(i) The Commonwealth shall credit to each State the revenues c
lected therein by the Commonwealth.

(ii) The Commonwealth shall debit to each State—
(a) The expenditure in the Commonwealth incurred sole
for the maintenan balance, as at the time of transfe
of any department, transferred from the State to the Commo
wealth;

(iii) The Commonwealth shall pay to each State month by month th
balance (if a

90. On the imposition of uniform duties of customs the power of th
Parliament to grant bounti
on the production or export of goods, shall become exclusive.

On the imposition of uniform duties of customs all laws of the sever
States imposing duties of customs or of excise, or offering bounties on th
production or export of goods, shall cease to have effect, but any grant
or agreement for any such bounty lawfully made by or under the authori
of the Government of any State shall be taken to be good if made before th
thirtieth day of June, one thousand eight hundred and ninety-eight, an
not otherwise.

91. Nothing in this Constitution prohibits a State from granting any ai
to or bounty on mining for gold, silver, or other metals, nor from grantin
with the consent of both Houses of the Parliament of the Commonwealt
expressed by resolution, any aid to or bounty on the production or export
goods.

92. On the imposition of uniform duties of customs, trade, commerce, an
intercourse among the States, whether by means of internal carriage or ocea
navigation, shall be absolutely free.

But notwithstanding anything in this Constitution, goods imported befo
the imposition of uniform duties of customs into any State, or into an
Colony which whilst the goods remain therein, becomes a State, shall,
thence passing into another State within two years after the imposition
such duties, be liable to any duty chargeable on the importation of suc
goods into the Commonwealth, less any duty paid in respect of the goods
their importation.

93. During the first five years after the imposition of uniform duties
customs, and thereafter until the Parliament otherwise provides—

(i) The duties of customs chargeable on goods imported into a State an
afterwards passing into another State for consumption, and th
Sta
and after
sumption, shall
Stat

(ii) Subject to the last subsection, the Commonwealth shall cred
prescribed for the period preceding the imposition of uniform duti
of customs.

THE CONSTITUTIONAL CHALLENGE

Essays on the Australian Constitution, constitutionalism and parliamentary practice

Michael James (ed.) • G. S. Reid • James S. Buchanan
Anthony Rutherford • John Hyde
G. de Q. Walker • D. J. Hamer • Campbell Sharman

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THE CENTRE FOR INDEPENDENT STUDIES
1982

First published July 1982 by

The Centre for Independent Studies

National Library of Australia

Cataloguing-in-Publication Data

The constitutional challenge.

Includes index.
ISBN 0 949769 01 0.

1. Australia - Parliament - Rules and practice.
I. James, M.H. (Michael Henry), 1943- .
II. Centre for Independent Studies (Australia).
(Series: CIS readings; 4).

342.94'02

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Editor's Note

This collection was inspired by a CIS conference on 'Constitutional Theory and Australian Practice', which took place at the University of Sydney Law School in November 1979. Three of the essays in the collection (those by Michael James, G.S. Reid and G. de Q. Walker) are revised versions of papers delivered at that conference. James M. Buchanan's essay 'The Limits of Taxation' was originally presented to a conference organised by the Fraser Institute of Vancouver, Canada. The Centre for Independent Studies is grateful to the Fraser Institute for permission to use Professor Buchanan's paper in this collection.

In planning and preparing this collection I have benefited enormously from the assistance and guidance of Dr Knud Haakonssen, the organiser of the 1979 conference. Without his help the collection would never have got off the ground. Greg Lindsay cheerfully made available all the resources of the CIS, and offered innumerable helpful comments and suggestions as the collection progressed. Responsibility for all the shortcomings, however, must be taken by me alone.

Michael James
April 1982.

Preface

The Readings series of the Centre for Independent Studies was established to analyse certain issues from a number of viewpoints. This book, the fourth in the series, surveys the Australian Constitution and constitutionalism in the light of ideas about what the functions of government should be and how its activities are carried out (at least in the Australian context) through the practices of Parliament. It adopts a multidisciplinary approach to the subjects under investigation, bringing together the skills of the political scientist, the lawyer, the practising politician and the economist. The book further underpins the primary object of the Centre, namely, to study the principles which enhance the many aspects of a free and open Australian society.

History has invariably shown that the state has been the greatest threat to the freedom of the people it governs. Constitutions have been one of the more satisfactory ways of delineating the bounds of responsible government activity, though the existence of a constitution is not a sufficient condition for good government as Milton Friedman pointed out to a CIS seminar in 1981. He noted that many South American countries had copied word for word the constitution of the United States and few could be described as desirable examples of democracy and freedom. It might be added that the written constitution of the Soviet Union is not short on fine sentiments guaranteeing freedom and fundamental individual rights. There is obviously much more.

In Australia today, the Constitution is no doubt under more informed discussion than for decades. It is seen by some as a restriction on the ability to achieve quickly certain political and social ends. This is undeniable, but in designing the Constitution, its framers did provide for change which would allow for the evolving perceptions of the population. Such changes have occured in the past both smoothly and democratically. There may be, of course, shortcomings in the Australian Constitution, though in the end it is a matter of opinion as to what these deficiencies might be. It is to be hoped that as discussion about the Constitution and Austr-

alia's political institutions and practices continues, the clearest motive should be that the freedoms and rights of the citizenry are enhanced within a framework of the rule of law rather than, as so often is the case with proposed legislative and constitutional changes, one or other group is served at the expense of all. To achieve this aim would seem to require a more widespread understanding of our political institutions, especially the very real role that constitutions play in modern government. The greater the understanding of the consequences of various governmental practices, the better able will the public be to make informed decisions about crucial issues that affect them. This is one of the challenges that this book responds to.

In publishing this volume, the Centre for Independent Studies feels a significant contribution has been made to the discussion of important issues. Nevertheless, the views expressed by the various authors are theirs and are not necessarily shared by the Centre's staff, Advisers, Trustees, or Directors.

Greg Lindsay

Introduction

Michael James

The constitutional crisis of late 1975 raised issues which are fundamental to Australia's Constitution and the operation of her political system. As a result of that crisis, the true nature and extent of the powers of the Governor-General are uncertain, as is the status of the convention (if such it is) that the Senate does not exercise its legal right to defer or reject supply bills passed by the House of Representatives. Yet the ensuing debate about the Constitution has been limited to a small number of politicians, lawyers and other academic specialists. Neither among politicians as a body nor among the general public is there evidence of any strong desire to have these constitutional issues resolved, even though it is quite possible that they will eventually reappear in a form at least as acute as that which they assumed in 1975.

The absence of a truly popular debate about the Constitution is scarcely surprising. To the public at large, the Constitution seems as remote and inaccessible as any other branch of the law. In any case, the essential legal forms of the political system survived the crisis intact, and the general election of 1975 did provide a speedy and legitimate means of resolving the immediate deadlock. As for the politicians, the system provides them with incentives to concentrate on everyday political and electoral issues, and to avoid campaigns for constitutional amendments which are necessarily difficult to effect and whose consequences are likely to be relatively uncertain. Even the Australian Labor Party, which of all the parties is most interested in constitutional reform, continues to adapt itself to everyday constitutional reality and, in practice, treats the Constitution as workable in its present form. Perhaps it is this lack of urgency about the matter which causes much of the constitutional argument which does take place to be conducted in broad and idealistic terms (e.g., whether the Constitution should be 'monarchic' or 'democratic'): a tendency which is unfortunate, since it further politicises the Constitution and diverts attention from potential piecemeal reforms which might command wide support.

In these circumstances, any serious discussion about the Constitution and the desirable direction of its future evolution would do well to begin by emphasising how important constitutions really are. It is not difficult to do this. In the first place, politics can be a peaceful and stable activity only if it takes place within a framework of constitutional rules. A constitution (here we use the term in a broad sense, to include informal practices and conventions as well as laws) establishes the procedures to be followed in the formation of policy and the rules whereby political conflict is to be authoritatively settled. Unless it takes place within secure constitutional boundaries, political disagreement can degenerate into violent conflict. Secondly, constitutions often contain legal guarantees of the basic freedoms of citizens and protect them from coercion at the hands of the state. This is the central concern of the doctrine of liberal constitutionalism which was first formulated in England in the seventeenth century. In the liberal legal traditions of Australia and many other Western countries, the idea of a constitution is closely associated with the principles of the rule of law and natural justice, which convey the notion that there are crucial **limitations** to the lawful exercise of political power.

In the USA, the understanding of constitutional limits on the state is deeply embedded in the public mind; this is no doubt an aspect of the central role which the constitution plays in that country's civic religion. But in many other countries, Australia included, there is far less comprehension of this idea, despite the fact that our constitutional traditions originated in the belief that the best defence against tyranny was to surround the state with legal barriers. If there is one reason in particular why constitutional matters evoke little interest or understanding in Western countries (the USA excepted), it is the triumph during the twentieth century of the democratic ideal. It is hard to exaggerate the hold which democracy exercises on the political imagination of the West. The original appeal of democracy was that it enabled the people as a whole to pass judgment on, and even to eject from office, the government of the day. And as democracy has become the only legitimate form of government, it has replaced the older notion of constitutional limitation with that of the popular will. From a purely democratic point of view, constitutional limitations are at best redundant, since the people's real protection lies in their ability to throw out governments which offend them; and they are at worst pernicious, since they might place legal obstacles in the path of a government devoted to carrying out the will of the people.

Democrats thus tend to favour simple constitutions which leave governments unlimited in their legal powers but which subject them to the checks provided by the electoral process.

Most modern democracies are characterised by the features of what has come to be called the 'adversary system' of politics. The granting of universal suffrage facilitated the rise of the mass political party; and the strict internal discipline of such parties has in many cases resulted in the executive branch of the state exercising overwhelming influence over the legislature. Under the adversary system,[1] government is monopolised by the political party (or party alliance) which wins the most seats in parliament (typically, the governing party controls a majority of parliamentary seats, but this is not a necessary aspect of the adversary system). The largest of the remaining parties becomes the official 'Opposition', which creates what amounts to an alternative government of 'shadow ministers', ready to take over should the existing government fall from office. Democrats tend to favour the adversary system for three main reasons. First, it gives quick effect to the predominant viewpoint among the voters. Secondly, it provides for a standing alternative which is supported by a large proportion of the voters. Thirdly, it preserves the right of the voters to exercise their ultimate sanction via the ballot-box: they are given the opportunity, at regular intervals, to evict the Government and install the Opposition. This system is held by its supporters to embody the spirit of democracy more fully than its most obvious alternative, the permanent grand coalition. For if government offices were held by all main parties in proportion to their parliamentary strength, with the result that there existed no institutionalised confrontation between government and opposition parties, then the link between the popular will and the formation of policy would be weakened by the process of bargaining among the parties, thus gravely diminishing the importance of the voters within the system.

But, for all its popularity, the adversary system is vulnerable to a number of objections which cast doubt on the claims of its advocates. For example, there is no obvious reason why the viewpoints on a given issue should be only two in number; yet the system naturally tends to produce only two from which the voters can make a choice. This enables the Opposition, in particular, to manipulate the system to its own advantage. Rather than trying to discover the alternative to existing government policy which most voters favour, the Opposition need do no more than select the alternative which most suits itself, so long as this is appreciably less unpopular

than prevailing policy. There is thus no reason why the Opposition should be the sensitive barometer of public opinion that democratic theory requires it should be. Individual voters frequently recognise this when they complain that all they can do at elections is to choose 'the lesser of two evils'.

The artificiality of the two-party monopoly of policy which the adversary system leads to is even more tellingly revealed when issues of public concern are systematically excluded from political debate. Oppositions like to stress that their job is to oppose; yet there is nothing to stop them colluding with the government, when it suits them. In the UK, for instance, all main parties are committed to maintaining an army presence in Northern Ireland, against the known wishes of a majority of British voters. In Australia, both Government and Opposition favour the maintenance of import controls, since each is supported by a special interest which benefits from this policy. But the consequence is that the Australian public as a whole, which is harmed by the policy, cannot register its views through the electoral process.

Perhaps the most harmful effect of the adversary system, and the one which most clearly questions its constitutional credentials, is its tendency to politicise areas of social life in which no issues have emerged spontaneously. As noted above, the central feature of the system is that it grants a monopoly of official power to the strongest political party. As a result, each party has a powerful incentive to maximise its electoral support in order to win this substantial prize. One of the most effective means of doing this is to identify social and economic groups whose interests can be promoted by state action, and to offer such groups special treatment in exchange for their votes. This process is today perhaps the most important single cause of high government taxing, borrowing and spending. After several decades of this competitive bidding for group support, the typical democratic state finds itself burdened with a public sector whose size and cost mount steadily and is becoming increasingly difficult to finance.

This tendency of democratic politics to spawn large and expanding executive empires raises, in a new form, classic constitutional issues, and prompts the need to return to the idea of constitutional limitation as an ingredient of good government. In the first place, there is the threat to the rule of law. The multifarious activities of the modern welfare state require a vast amount of detailed legislation, whose effects are often quite unpredictable and which can be administered only through bureaucratic discretion. Secondly,

the taxation required to finance these activities exceeds the level which public opinion finds tolerable. Democracy by itself, however provides no real guide to the solution to these difficulties, since the electoral mechanism registers **both** the aggregate demands of the voters for state subsidies **and** their reluctance to finance those subsidies through taxation. The weakness of democratic ideology is that it provides an answer to only one question: who should rule? But equally important is the question: what should be the limits of government? The answer to the first question clearly does not provide an answer to the second. Yet the person who thinks that 'the people' should rule is not necessarily committed to the view that anything that the people approve of should be done. Nearly every democrat accepts that there are some policies which it would be wrong to pursue, however popular they might be: the persecution of minority races is an obvious example. The intriguing question is whether, underlying the continuous generation of, and conflict among, political opinions, there is a 'tacit constitution', a set of mutually consistent general rules which, if formulated openly, would command near-unanimous support and entrench clear limits to government. (Thus, while we would be unlikely to agree on any particular pattern of state spending, so many and varied are the individual decisions that go to make up any such pattern, we might well agree that, as a matter of constitutional principle, no government should be able to raise more than a particular percentage of anyone's income in the form of taxation). And despite the polarised style of politics that the adversary system encourages, there is evidence that the voters in countries ruled by this system are in agreement on certain fundamental issues. In the UK, the home of the adversary system, the recent spectacular success of the central alliance between the Liberal Party and the Social Democratic Party has revealed how remote the previous two-party system had become from public opinion.

Although much of Australia's political life takes places under the aegis of the conventions of the adversary system, Australia is fortunate in having a written constitution which embodies such classical liberal principles as federalism and the separation of powers, which help to mitigate the harmful effects of unlimited party competition. And the contributors to this collection of essays are concerned at least as much with explaining the rationale of these principles, and with suggesting the means of reviving them in practice, as they are with promoting specific legal reforms whose implementation would require amendment of the Constitution. The

first essay (James) identifies the essential elements of liberal constitutionalism and establishes, in broad terms, their role within the Australian Constitution. The central group of essays (Reid, Hamer, Rutherford and Hyde, and Sharman) focuses on our central political institution - Parliament - and discusses ways in which that institution might assert its independence against both the Executive and the party machines and thus begin to realise its full constitutional potential. The final group (Buchanan and Walker) draws upon certain recent developments in political economy and suggests how our liberal constitutionalist traditions might be strengthened by entrenching limits on public spending and by incorporating a better understanding of the operation of property rights. (Professor Buchanan's paper, though universal in its implications, was composed with specific reference to the USA. An Appendix by Philip Clark briefly describes the operation of the powers of taxation and borrowing contained in the Australian Constitution.)

It would of course be absurd to pretend that all our current constitutional issues can be settled by appeal to some underlying consensus which has only to be appropriately formulated for it to be unanimously espoused. For example, on the issue of the legitimate role of the Senate in the formation and dissolution of governments, there is deep and genuine disagreement. But it is a major contention of this collection that constitutional issues are qualitatively different from routine political issues, and that constitutions are so basic to the survival of political systems that disputes concerning them need to be resolved by something more durable than the often transient simple majorities that serve to settle everyday political conflict. From this standpoint, that Section of the Constitution which requires that amendments must be supported not only by a majority of voters but also by a majority of States should be viewed, not as an irrational prohibition on the popular will, but rather as a valuable constraint which helps to ensure that the Constitution remains a source of social consensus.

Note

1. This account of the adversary system is drawn from its manifestations in countries which, like Australia, enjoy the Westminster system of parliamentary government. But it is important to note that adversarial characteristics, and their attendant effects, appear also in democracies with different types of constitution, whether these tend towards two-party systems (as in West Germany) or even to multiparty systems (as in The Netherlands), where the opportunities for coalitionist politics are at their greatest.

1

The Constitution in Australian Political Thought

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The Constitution in Australian Political Thought

Michael James

I. INTRODUCTION

It has often been pointed out that the Australian Constitution embodies two principles which are logically distinct and of diverse historical origin. First, a combination of constitutional law and convention gives Australia the Westminster system of responsible government. The members of the Executive are drawn mainly from, and are collectively responsible to, the democratically elected House of Representatives. Secondly, the Constitution explicitly prescribes a form of legislative bicameralism based on American rather than British experience. While the Australian Senate has less constitutional power than its American counterpart, it enjoys virtually equal power with the Australian House of Representatives, and has the right to reject finance bills passed by the lower house. On the one hand, then, the Constitution tends to **combine** executive and legislative power by ensuring that government derives its legitimacy from the confidence of the House of Representatives. On the other hand, it tends to **separate** executive and legislative power by giving the Senate powers which are, strictly speaking, independent of the mechanisms of responsible government. In practice, however, responsible government and legislative bicameralism have been able to coexist peacefully over long periods of time. But they are also capable of coming into direct conflict with one another, as they did in October-November 1975.

The crisis of 1975 was more, however, than a technical conflict between two constitutional principles. It was also a confrontation between two constitutional ideologies. Each constitutional principle is, broadly speaking, associated with a distinct idea about the nature and the purpose of constitutions. Thus, the principle of responsible government flows from a conception of the constitution in which parliament is regarded as sovereign, and the limitations which the constitution imposes on parliament are, correspondingly, devalued and challenged. According to this view, the function of the

constitution is to give legal effect to the will of the people; and for this popular will to be supreme, it must have access to a constitutional instrument which is free from all legal restraints. The principle of legislative bicameralism, meanwhile, to the extent that it implies an equality of power between the two legislative bodies, is derived from a liberal conception of the constitution (which we may refer to simply as 'constitutionalism'). In this case, great importance is attached to those aspects of the constitution which limit the powers of the state, the assumption being that the state poses a permanent threat to individual liberty, and is compatible with that liberty only so long as it operates within a framework of fixed and impartial rules which are not of its own making.

This essay seeks to elaborate and to contrast these two conceptions of the constitution, by way of three distinct exercises. First, I argue that, although Australia has had a written constitution for eighty years, constitutionalism has put down remarkably shallow roots; and that Australian political practice is dominated by procedures and conventions which, being British in origin, tend to impart an aura of sovereignty to Parliament and to mask the significance of those aspects of the Constitution which are foreign to British practice. Second, I offer some counter-arguments to the criticisms which, following the constitutional crisis of October-November 1975, have been levelled against the Constitution by some of its more radical opponents: in particular, the complaint that the Constitution as it stands entrenches a conservative and irrational order of things. Finally, I attempt to construct a case for constitutionalism, based mainly upon the arguments that the concept of the popular will provides no coherent foundation for a constitutional system, and that, under modern conditions, a democratically elected sovereign parliament will tend actually to violate, rather than reflect, public opinion.

II. THE ORIGINS OF AUSTRALIAN CONSTITUTIONALISM

The Constitution is accorded remarkably little significance in the Australian approach to politics. Although, as one would expect, it has come to be better known since the events of 1975, it remains, among politicians and public alike, very much on the fringes of political awareness, and is widely viewed as an obstacle and an irrelevance to the real business of politics. The extent of the Australian tendency towards constitutional blindness can be gauged from a brief compa-

rison with corresponding attitudes in the United States of America. In that country, the constitution is not only widely understood; it is also respected and celebrated to the point of forming the symbolic heart of the regime itself. It is viewed not merely as a body of rules prescribing the form which the American political system takes, but also as an expression of the moral consensus which underlies those rules. Americans understand, for instance, that the separation of powers is designed to protect individual liberty. Above all, there is in America a general appreciation that the constitution prescribes limits to the powers exercised by the various branches of the state, and thereby provides criteria whereby the unlawful and arbitrary exercise of power may be recognised and appealed against. In Australia, by way of contrast, the Constitution provides little more than a description of the polity in legal terms, and makes no reference to any general principles which might provide a rationale for its fundamental structure. There is a strange gulf between constitutional theory and political practice in Australia which results in the issue of constitutional reform being accorded very low priority, even though it is quite possible that the parliamentary deadlock that occurred in 1975 will soon be repeated.

This contrast between the triumph of constitutionalism in America and its near-invisibility in Australia is all the more remarkable in view of the fact that each country was constructed out of British colonies (though in very different circumstances), and each derived its basic understanding of politics from British experience. But it is in this common British link, I believe, that the clue to the difference between the two cases is nevertheless to be found. British constitutional theory and practice underwent a profound revolution between, on the one hand, the seventeenth and eighteenth centuries, when Britain was colonising America, and, on the other hand, the nineteenth century, when the Australian colonies were being formed. Both America and Australia continue to live by the British constitutional wisdom that prevailed at the time of their respective foundations.

When, in 1787, the Americans set about drawing up a constitution, they intended to frame it around the principle of liberty, which, they believed, had inspired the English Revolution of 1688. This principle was to be embodied in the institutions of the rule of law and the separation of powers. The connection between these two crucial elements of constitutionalism had already been articulated in the following passage from the *Declaration of Parliament*

Assembled at Westminster, issued in 1660:

> There being nothing more essential to the freedom of a state, than that the people should be governed by the laws, and that justice be administered by such only as are accountable for mal-administration, it is hereby further declared that all proceedings touching the lives, liberties and estates of all the free people of this commonwealth, shall be according to the laws of the land, and that the Parliament will not meddle with ordinary administration, or the executive part of the law: it being the principle [sic] part of this, as it hath been of all former Parliaments, to provide for the freedom of the people against arbitrariness in government.[1]

What makes this passage so interesting is that it demonstrates how well the distinction between law and government was understood in seventeenth-century England. Government consisted of executive orders issued to particular classes of subjects for the achievement of particular purposes; law consisted of fixed, universally known, and universally applicable rules of conduct which, to the extent that they were observed, enabled individuals to pursue their private goals without fear of coercion. An individual who became subject to an administrative order was guaranteed against coercion to the extent that the order was made within the terms prescribed by law. The maintenance of the rule of law required the separation of legislative and executive powers, since a government which had the right, not only to exercise the powers attached to its office, but also to amend the law prescribing those powers, would sooner or later legislate its way into a position of absolute power and bring liberty to an end. Similarly, a legislative body which had the right, not only to frame the law but also to apply it in particular cases, would eventually succumb to the temptation to legislate for the purpose, not of maintaining liberty, but of promoting its private goals. Nowadays, this careful distinction between law and government has virtually disappeared from general political understanding, and survives mainly in ceremonial language. Even in America, it is probably true to say that the public understanding of limited government involves more a sense of the distinct **sources** of law, and of the limitations imposed on each source, than of the distinct **functions** of law and government. Nevertheless, the widespread attachment to the civic virtue of 'respect for the law' is probably a throwback to the days when 'the law' was

conceived in terms of general rules of conduct. Respect is hardly an appropriate response to the stream of legalised orders which issue from modern governments.

By committing themselves to a written document, the Americans, quite deliberately, imposed severe limits on the extent to which their constitution could evolve. They thereby succeeded in preserving constitutionalism as their basic mode of political understanding. The British, however, had begun to drift away from constitutionalism long before the American revolution. By the middle of the nineteenth century, it was clear that sovereignty - which, from a constitutionalist standpoint, represented the principle of absolute and arbitrary government - had reappeared in the British constitution, not, this time, in the office of the monarch, but in the parliament. The intellectual origins of this change are to be found in two doctrines which gained currency in the eighteenth century and which, despite the considerable area of conflict between them, were crucial to the emergence of modern British constitutional theory. The first of these doctrines held that the House of Commons, the House of Lords, and the Crown, though formally separate, were, collectively, sovereign. This view of the constitution did not, however, entail that government was under no obligation to observe the rule of law. Rather, the guarantee of individual liberty was thought to lie, partly in the 'balance' between the three institutions of parliament, and partly in the established conventions and precedents observed by the English people, wherein the spirit of the Revolution of 1688 lived on. The law of the land embraced these conventions as well as the formal statutes enacted by the King in parliament; the idea that the sovereign body might abuse its power by issuing statutes that overrode the liberties embodied in the common law was not taken seriously in the politically tranquil atmosphere of eighteenth century Britain. The second doctrine was based on Jeremy Bentham's revival of Hobbes's command theory of law, according to which laws were to be understood solely as expressions of the will of the sovereign. Bentham found himself, consequently, in agreement with those who argued that the constitution did not prescribe the separation of powers; the whole idea of such a separation was nonsense, since there must ultimately exist a unitary source of law which was itself above the law. But the command theory necessarily entailed obliterating the distinction between law and government. If every law was an expression of the will of the sovereign, there existed no criterion for distinguishing a rule of conduct from an execu-

tive order. It followed that individual liberty could not be protected through legislation designed to establish rules of conduct. Rather, liberty consisted only of the gaps, so to speak, between the laws; gaps which the sovereign could fill in at any time.

When Bentham was converted to the cause of radical parliamentary reform, then, it was not out of any concern for individual liberty. Rather, his aim was to ensure that the unlimited powers of the sovereign would be used to promote the welfare of the community as a whole rather than the 'sinister interests' of the ruling elites. This required, he argued, the transfer of sovereignty to the House of Commons alone, and an extension of the suffrage to a point not far short of universality; only if the members of the sovereign body were made fully dependent upon the people for their tenure of office could they be trusted to govern in the public interest. Yet the sovereignty of the House of Commons seemed to one commentator to have become established, without any such major reforms having been enacted, by the mid-nineteenth century. In *The English Constitution*, first published in 1867, Walter Bagehot not only argued that 'The ultimate sovereignty in the English Constitution is a newly-elected House of Commons'[2] but regarded the Hobbesian theory of sovereignty as incontrovertible ('Hobbes told us long ago, and everybody now understands, that there must be a supreme authority, a conclusive power, in every State on every point somewhere'[3]). What is remarkable about Bagehot's essay is the evidence it provides of the extent to which the theory of sovereignty had quietly triumphed over constitutionalism. Bagehot not only treated Hobbes's theory as beyond debate; he appeared to have no understanding of the constitutionalist outlook of the American founding fathers. 'The Americans of 1787', he wrote, 'thought they were copying the English Constitution, but they were contriving a contrast to it'.[4] The 'contrast' lay in the fact that, whereas the English constitution was of the 'simple' type, in which 'ultimate power upon all questions is in the hands of the same persons', the Americans created a 'composite' constitution, in which 'the supreme power is divided between many bodies and functionaries'.[5] He seemed unaware that the Americans were trying to institutionalise the rule of law rather than the rule of men, or that, in so doing, they were drawing on an interpretation of the constitution which had been elaborated by the English themselves.

It was A.V. Dicey who drew together these various threads of constitutional analysis and wove them into what

became (and still is) the received interpretation of the British constitution. In *An Introduction to the Study of the Law of the Constitution*, first published in 1885, Dicey put forward three basic propositions. First, the British constitution embodied two principles: parliamentary sovereignty and the rule of law. Second, these principles were not in mutual conflict, but actually supported one another. Although parliament was subject to no limitation of its legal competence, it was bound, in its legislative activities, to observe certain fixed procedures and was to this extent subject to judicial scrutiny. It was the discipline of legalism which these procedures imposed that protected the rule of law against the arbitrary exercise of parliamentary sovereignty. Third, the constitution consisted to a large extent of conventions. These conventions served the purpose of providing practical solutions to the technical gaps and inconsistencies which had, inevitably, crept into and grown up with the slowly evolving law of the constitution. Dicey regarded the conventions of the constitution as being so important that they enjoyed, for him, virtually an equal status to that of constitutional law proper. It is not difficult to see why Dicey's work became so influential. By drawing attention to the crucial roles played by legalism and conventions, Dicey enabled the British to combine their intellectual preference for the command theory of law with their conviction that their traditional liberties were secure. The appeal and logic of the emphasis on conventions in particular have been aptly described in a recent work on British politics by Nevil Johnson:

> The attractiveness and perhaps the strength of an unwritten or unformalised constitution depends upon the continuing awareness of a particular insight which that kind of tradition reveals. This is that all formalised constitutional ideas can be realised in practice only if supported by appropriate conventions and understandings; in other words a large part of the reality of any constitutional order must consist in the traditions of behaviour which sustain it . . . The uniqueness of the British constitution is to be found in the fact that it has erected that very insight into a dominant feature of the Constitution itself. It appears to eschew rules and principles as far as possible, proclaiming instead that the rights and procedures which it claims to protect have their security and continuance in particular habits and understandings, and only there.[6]

Johnson goes on to argue that this complacent reliance on convention has helped to dissipate in Britain any understanding of the distinction between constitutional and political matters. The truth of this insight is, I hope, brought out in the third section of this essay.

The Australian statesmen involved in drafting the Australian Constitution shared the British assumption that good constitutions were grounded at least as much in practical conventions as in theoretical perfection. The logical inconsistencies between the British principle of responsible government and the bicameralism which their prior commitment to federalism required did not unduly worry them, since they were convinced that any future clash between the two would be resolved in the British spirit of good will and compromise.[7] And it is this confidence on the part of the founding fathers in their own and their successors' ability to find practical solutions to constitutional problems which gives us the clue to the meaning and the import of the crisis of 1975. It takes us beyond the formal conflict between responsible government and bicameralism contained within the Constitution, and illuminates a basic approach to constitutional matters which Australians have shared since federation. In internalising the principle of responsible government, founded as it was on a set of conventions which evolved out of British experience, Australians thereby internalised the notion that conflicts between written and unwritten aspects of the Constitution could **also** be resolved by convention. The debate on the true nature of the Constitution was delayed for so long because it had been so widely assumed that its written aspects had been absorbed into conventional understandings and its legalistic complexities thereby resolved. So, when the written word of the Constitution validated the Senate's decision to deny finance to the government - in other words, when it failed to uphold the principle of responsible government - the public reaction was one of surprise. Many Australians realised for the first time that their Constitution embodied a principle of which they had no practical experience. This principle was, of course, that of the separation of powers, which had never been at home in a political culture so dominated by a British, convention-based approach to constitutional theory.

In the light of the analysis offered here, the claim made earlier that Australia's Constitution is located on 'the fringes of political awareness' needs qualification. It would be nearer the truth to say that Australia's actual Constitution consists primarily of a set of conventions and assumptions

which have become fully internalised in political practice and that the written word of the Constitution is only partially assimilated into the constitutional consensus. This may help explain why the damage done by the crisis of 1975 was relatively limited. While the **written** Constitution has become politicised, the day-to-day practices and conventions on which government is based remain predictable and reliable. But this fact is itself additional evidence of the weakness of constitutionalism in Australia. The revival of the liberal aspects of the Constitution during the crisis of 1975 has done little to create a greater awareness of their rationale; on the contrary, the thrust of new thinking on the Constitution is, on balance, towards strengthening still further the presumption that Parliament is sovereign.

III. THE RADICAL CRITIQUE OF THE CONSTITUTION

On the face of it, it is ironic that the advocates of radical constitutional reform should promote a view of the Constitution which is sanctioned by convention and tradition; a Burkean conservative would have little difficulty in supporting reform whose effect would be to enhance the historical continuity between the mother parliament at Westminister and her Australian offspring. But the conscious aim of the radicals is not, of course, to bring the appearance of the Constitution into greater harmony with its essence, but to give the Constitution an unambiguously democratic character. The unchallenged sovereignty of parliament is, they assert, a necessary condition for the realisation of the will of the people.

On what grounds do the radical critics argue that constitutional reform is desirable? The following two passages from the collection of articles entitled *Change the Rules! Towards a Democratic Constitution*,[8] which is one of the nearest things to a constitutional reform manifesto to have appeared since the events of 1975, may be treated as representative of the radical position:

> The most important effect of the written constitution as a legal document is to inhibit political evolution . . . In its character as fundamental law the constitution entrenches an institutional structure of government that is both inflexible and complex. The effect is to distort the political process by compelling it to operate within a framework that is almost entirely unresponsive to the needs of a socially and technologically advanced democracy.[9]

> It is . . . clear that the Australian constitution is an ace up the conservatives' sleeve and that a social-democratic party which aims for real political power, as distinct from mere office, must squarely face the need for fundamental constitutional reform and gear its propaganda to this need.[10]

The unreformed Constitution, so the argument goes, perpetuates a particular state of affairs which promotes certain conservative interests, and which is also inefficient and irrational. Democratic reform, however, by giving Parliament unlimited powers and allowing a radical party to run its full term without fear of dismissal, would facilitate the construction of a new state of affairs, more efficient and rational than the old one.

There is, of course, an obvious sense in which an entrenched constitution which separates the branches of the state and prescribes limits of their powers favours 'conservative' interests, in that those who do not favour radical constitutional change are more likely to be satisfied than those who do. (A constitution which was easy to amend would eventually cease to function as a constitution in the sense of providing a stable and predictable framework of rules.) There is also evidence that entrenched constitutions do not prevent social and economic change. No one would argue that Australia has stood still since federation, or deny that America has been transformed during its two hundred years of independence under a written constitution. What the radicals believe, however, is that the Constitution in its present form serves certain interests which are bound up in the existing socio-economic structure of Australia; and, whatever other changes the Constitution has allowed, it has effectively beaten off any political challenge to that structure. The constitutional limits on the powers of Parliament are designed, not to protect civil liberty, but to deny the people their right to bring about, through their elected representatives, social change of a truly radical nature. It is this injustice which the radicals propose to remedy through their reform proposals.

This argument derives much of its plausibility from a set of beliefs, the truth of which is nowadays so widely taken for granted that it is rarely explicitly defended. These are the Marxist beliefs that the basic source of power and influence lies in the ownership and control of the means of production, and that the function of the political system is to entrench and legitimate that power. The radical reformers do not go

along with these propositions in their entirety; to the extent that they assume that constitutional reform can be achieved, and is worth achieving, under the existing regime, they accept that the political system is, potentially at least, a source of power in its own right. They are thus to be distinguished from those radicals who argue that political change can come about only as part of a general social revolution. But they do go along with the general belief that there is a systematic connection between a constitution and the specific state of affairs over which it presides. Just as the existing Constitution is related to the existing order of things, so the new order which the radicals wish to see instituted will require its own constitutional face.

There is, however, another way of seeing this connection. Constitutions need not **prescribe** particular states of affairs, but only **prohibit** them. Thus, a particular social pattern may be related to the constitution under which it emerges only in the sense that it falls within the range of logically possible social patterns which the constitution does not rule out. This is not a matter of establishing the correct direction of causation between a constitution and an order of things, but of seeing that there may be no direct causal connection at all. This is the case where the constitution does no more than maintain the rule of law. Such a constitution imposes no particular pattern upon its citizens; rather, by securing their basic liberties, it permits a state of affairs to emerge which reflects the manner in which those liberties are exercised. To the extent that the rule of law is maintained in Australia, the existing social pattern is 'capitalist', not in the sense that it has been so designed, but only in the sense that it has emerged spontaneously from the free actions of millions of individuals, whose fundamental liberties include, as they must, the right to acquire, possess and exchange property.

The proposition that capitalism can be a state of affairs which emerges spontaneously when individuals are secure against coercion from any quarter would be rejected by Marxists on metaphysical grounds, despite the considerable evidence in its favour (of which all Communist governments are well aware). But it would be resisted by many radicals, whether Marxist or not, since it suggests the fact that the particular order of things to which they are committed - socialism - manifestly does **not** emerge spontaneously. Those who are keen to reconstruct society according to an intellectual blueprint naturally tend to see any given state of affairs as the embodiment of **someone's** blueprint and frame their

arguments accordingly. Politics becomes a struggle between rival groups of social draftsmen, each trying to demonstrate the superiority of its plans. Socialism and capitalism can then be neatly contrasted as alternative orders of things, and the choice between them presented as a moral one. What cannot be admitted is that society need not be so conceived at all; for the socialist in particular, such an admission would confront him with the awkward puzzle of how socialism is to be reconciled with liberty.

The belief that society should be a consciously designed order, embodying the intentions of its rulers, also lies behind the radicals' claim that the Constitution as it stands is inefficient and irrational: that it is, as the first of the two passages quoted above puts it, 'almost entirely unresponsive to the needs of a socially and technologically advanced democracy'. Once again, this appears to be a metaphysical claim, since the evidence overwhelmingly suggests that economies operating under liberal constitutions have achieved much higher levels of development, and much higher living standards for their working populations, than those which are planned and directed. America and West Germany are the outstanding examples of countries which have been economically transformed under constitutions which were designed to give their citizens maximum freedom to promote their own welfare in self-chosen ways; and Australia has developed greatly under a constitution which is largely liberal in result if not in design. Meanwhile, in Communist countries economic planning consistently fails to deliver the goods. Yet the belief persists that a social order can be rational only if all its parts are co-ordinated under the control of a single mind. From this point of view, the limitations on the powers of Parliament naturally look like obstacles in the path of the rational reconstruction of society, and fetters on the forces of production.

At this point, we may note the continuing relevance of the command theory of law which, as we have seen, triumphed in British jurisprudence during the nineteenth century over the liberal theory of law. The idea that society is the embodiment of an intellectual design is perfectly compatible with, and is strengthened by, the idea that laws are commands issued by sovereign authorities. In the union of the two ideas, laws become the instruments whereby the blueprint conceived by the sovereign is converted into reality. But the radicals' implicit acceptance of the theory of sovereignty also imparts to their reform proposals a sense of historical continuity. As Gough Whitlam put it:

> Australia can still have vigorous, reforming government, but our constitutional traditions will need to be strengthened and defined, and much vigilance exercised by democrats of all kinds, and not least by lawyers, if such a government is to have a chance of surviving and putting its objectives into practice.[11]

For those who wish to conserve and strengthen the liberal aspects of the Constitution, the task is not only one of reviving the almost forgotten idea that the function of a constitution is not to legalise whatever governments want to do, but to subject governments to the rule of law and thereby protect individual liberty. It is also one of resisting the weight of constitutional conservatism in Australia, from which the radicals derive so much inspiration and which lends their proposals so much plausibility and legitimacy.

There is, however, one radical proposal which, if adopted, might strengthen the liberal aspect of the Constitution. This is the proposal for a Bill of Rights. There is no doubt that the supporters of this measure accept that it would impose limits on the powers of government.[12] But it remains unclear where this proposal stands in relation to the set of radical reform proposals as a whole, which aim, of course, to increase rather than reduce the powers of government. Another problem is that the language of rights has become debased in recent years to the point where a demand that a right be upheld often amounts to no more than a demand for the satisfaction of a want or a need. If rights are so understood, they require an extension, rather than a diminution, of government powers. One commentator has analysed such a shift of meaning in the case of the right to work:

> The right to work traditionally meant that no artificial, coercive powers be placed in the way of a man freely selling his labour, by trade unions or any other combinations. On this reasoning a genuine Bill of Rights would outlaw the closed shop, even if it were sanctioned by Parliament. But now the right to work has come to mean that the government should create full employment by law. This can only mean, in the long run, the direction of labour, and the transformation of the right to work into the duty to work imposed by legislative command.[13]

The proposal for a Bill of Rights would be worth considering from a liberal point of view so long as it treated

rights in the original, negative sense of specific and important areas of liberty which need to be explicitly protected by law. It would also have to take the form of a Section of the Constitution and thus be secure from arbitrary amendment by parliament. Otherwise, a Bill of Rights could swiftly degenerate into a device for legalising a massive extension of state powers and thus result in individual rights being less secure than ever.

IV. PARLIAMENTARY SOVEREIGNTY AND THE LOGIC OF DEMOCRACY

In an age when the principle of democracy is universally legitimate, those who favour constitutional reform on democratic lines enjoy a great advantage over their opponents in that they need not argue above a technical level. They can assume that their audience is already in favour of democracy; all that has to be done is to demonstrate how the unreformed Constitution falls short of democratic standards, and the necessary reforms become immediately obvious. Those who wish to defend the liberal aspects of the Constitution, however, are obliged to argue at the level of the actual principles involved, which is always a more difficult task. Liberals can nevertheless draw some inspiration from the fact that the steady ascent of democracy since the French Revolution has been accompanied by a slight but persistent tradition of analysis - by no means all of it crudely 'undemocratic' - warning that the concept of the will of the people was hollow, and that the attempt to embody it in political institutions could have disastrous consequences for individual liberty.

The will of the people

The traditional liberal argument against democracy has been that it may lead to a 'tyranny of the majority'. Jean-Jacques Rousseau, the political philosopher with whose thought the concept of the popular will is most closely associated, seemed to give the game away when he stated, in ominous anticipation of twentieth-century doublethink, that the minority, in being made to conform to the will of the majority, was being 'forced to be free'. In Britain, Jeremy Bentham's *Plan of Parliamentary Reform* was strongly attacked by Sir James Mackintosh, who feared that the poor, who were to be enfranchised under Bentham's proposals, would use their political power to impose an egalitarian

order, under which, not only would the owners of property be dispossessed, but property itself, the mainspring of wealth, destroyed.[14] By the mid-nineteenth century, when it was clear that democratic revolution was inevitable, liberals like John Stuart Mill could do little more than propose constitutional defences for the educated elite, whose liberal values would otherwise, they feared, be smothered under a blanket of mass conformism and inertia. In the second edition of *The English Constitution*, published in 1872 - five years after the second Reform Act - Walter Bagehot warned that the supremacy of the working man in the political arena would be disastrous, since it would entail 'the supremacy of ignorance over instruction and of numbers over knowledge'.[15] He also warned that the proletarian revolution he so feared would be brought about by the simple logic of party competition:

> In plain English, what I fear is that both our political parties will bid for the support of the working man; that both of them will promise to do as he likes if he will only tell them what it is; that, as he now holds the casting vote in our affairs, both parties will beg and pray him to give that vote to them.[16]

The liberal critics did not doubt the existence of a 'will of the people'. What was important was to prevent that newly enfranchised will from imposing a new, illiberal order through the sovereign institution of parliament.

In the event, these fears turned out to be greatly exaggerated. Democratic reform did not lead to the immediate formation of a populist political movement, intent on aggregating all power in its hands. Around the turn of the century, some observers argued that the concept of the popular will was suspect and misleading, but was given a bogus currency by the process of party competition - rather in the manner foreseen by Bagehot. Sir Henry Maine, for instance, argued that the notion of a popular will was a fiction which politicians found useful in their efforts to legitimate their policies. 'The truth is', he wrote, 'that the modern enthusiasts for Democracy make one fundamental confusion. They mix up the theory, that the Demos is capable of volition, with the fact, that it is capable of adopting the opinions of one man or of a limited number of men, and of founding directions to its instruments upon them . . . what is called the will of the people really consists in their adopting the opinion of one person or a few persons'.[17] It was essentially the same line of reasoning which,

several decades later, led Joseph Schumpeter to recommend that the concept of democracy be released from its damaging association with the concept of a 'general will' and should henceforth be taken to refer to a particular method of decision-making 'in which individuals acquire the power to decide by means of a competitive struggle for the people's vote'.[18]

The strength of the analyses advanced by Maine and Schumpeter lies in their exposure of the speciousness of the symmetry between the concepts of monarchy, oligarchy, and democracy, which suggests that 'the people' can formulate a will just as a monarch or a small elite can. What is overlooked in this assumption is that the popular will can consist of no more than the wills of the many individuals who constitute the people, and that, the more wills there are to be aggregated, the fewer are the issues on which agreement among them is possible. In modern democracies, with their many millions of citizens, there are very few issues on which a spontaneous majority point of view exists. Rousseau himself, though the main source of 'the classical doctrine of democracy' which came in for such a mauling from Schumpeter, was well aware of the limits of consensus. Popular sovereignty was possible, so he argued in his *Social Contract*, only in small communities, where the common environment elicited a spontaneous conception of the common good and a corresponding determination to realise that good. In large communities, however, the diversity of interests and points of view encouraged citizens to promote their interests through political factions, which dominated the political arena for their own sectional ends. Rousseau had few illusions about the stringency of the conditions necessary for rule by popular will; history has by and large borne out his pessimism.

More recently, certain advances in the field of welfare economics have tended to confirm the view that the concept of a popular will is, if not quite meaningless, very difficult, even impossible, to realise in practice. Kenneth Arrow, for instance, has demonstrated that, under conditions which democrats would find reasonable, there is no formula for aggregating individual preferences which is guaranteed to produce an unambiguous collective preference - even when we are prepared to treat a 'collective' preference as amounting to a majority, rather than a unanimous, preference. The problem is not so much the familiar one where opinion is so diverse that none of the available options receives an absolute majority of votes. Even where voters

may list the options in order of preference, it can happen that every option is defeated by another option which a majority of voters prefers to it - thus leading to the paradox of 'circular majorities'.[19] Every electoral system must, therefore, contain a rule (such as limiting the relevant options to two) which avoids the paradox and allows a definitive result to emerge. But however justifiable such rules might be on other grounds, none of them can be said truly to give effect to the 'will of the people'.

Yet, despite the many conceptual problems surrounding the idea of the popular will, and Schumpeter's suggestion of a definition of democracy which avoids those problems, the concept of democracy has not lost its historical and ideological association with the concept of the popular will, which modern radicals find no less inspiring than did Rousseau himself. In recent years, there have been some serious attempts to work out institutions which might to some extent reproduce the conditions which Rousseau regarded as necessary for the emergence of an authentic popular will. The idea of 'participatory democracy' has been promoted as an alternative to the democratic elitism of Schumpeter and his pluralist successors, who believe that political initiatives must inevitably be taken by politicians, and that citizens can do no more than provide a passive endorsement of some of them. But many radicals insist that Parliament is the true embodiment of the will of the people, and that the party which dominates Parliament is 'mandated' by 'the people' to implement its election manifesto. These are the radicals who are concerned to promote the cause of democratic constitutional reform.

Coalitions of minorities

A useful way of beginning a systematic criticism of this position would be to refer to an influential work on democratic theory which gives *prima facie* support to the populist democrats. In his book, *An Economic Theory of Democracy*,[20] Anthony Downs attempts to show that a political system in which citizens have no political role other than to vote for the political party of their choice might yet (in the manner anticipated by Bagehot) produce something which could be fairly described as the will of the people. If voters and parties are both motivated by self-interest, then a democratic system facilitates a sort of market transaction between the two groups of actors: political parties offer to satisfy the wishes of the voters in order to obtain power, and

voters give their votes to the parties which offer the most desirable policies. The successful party (or, in the case of a multiparty system, the successful coalition), can, therefore, be presumed to give effect to the wishes of the voters. The institutionalised division between elite and mass can be shown to be consistent with the aspirations of the classical theory of democracy. A sovereign parliament elected under universal suffrage may well produce government by the will of the people; and a desire to continue winning elections constitutes a check on the powers of government sufficient to compensate for the absence of constitutional limits to them.

This is not the place to explore the details of Downs's model or the many criticisms which have been levelled against it. But what is of great importance for present purposes is Downs's demonstration that, under certain conditions, a majority viewpoint can be defeated by a party which wins an election by constructing **a coalition of minorities.** This can happen if a majority of voters are in the minority on some electoral issues, and feel more strongly about those issues than about those on which they share the majority point of view. Such voters would be prepared to trade off the chance of having their less intense but widely shared preferences acted upon, in exchange for having their more intense, but narrowly shared preferences satisfied. But if this were to happen the result would clearly not represent the 'will of the people'. On the contrary, the majority preference would have been systematically overridden by the combined promises to minorities, each one of which, taken alone, was opposed by a majority. Downs goes on, however, to argue that, although this outcome is theoretically possible, it is very unlikely in practice, since voters know too little about the effects of parties' actions, and parties know too little about voters' preferences, for the necessary bargaining process to get under way. Parties consequently try to find majority viewpoints to support, and voters promote preferences which they believe to be common ones, since these stand the greatest chance of being taken up by the parties. What I want to argue, however, is that the minority coalition is much more likely to emerge than Downs believes; and that the absence of constitutional limits on the powers of democratically elected governments greatly encourages such an outcome.

An important implication of Downs's analysis of the conditions which produce minority coalitions is that a body of electors cannot be simply divided into a 'majority' and a 'minority', at least where the range of politically relevant

issues is varied and indeterminate. (Where there is only one relevant issue, as for instance in Northern Ireland, it makes sense to talk, as the people of that country in fact do, of **the** majority and **the** minority.) Each individual has a range of preferences, some of which he shares with many of his fellow-citizens, some of which he shares with only a few. Downs also implies that minority preferences are typically more intensely felt than majority preferences. This tendency has been explained by Mancur Olson who, in *The Logic of Collective Action*,[21] shows that is rational to concentrate on minority issues and to neglect majority issues, not because the latter are necessarily of less ultimate significance than the former, but because there is so much less that one individual can do to promote general interests than small group interests. Another reason is that, although the promotion of a group interest imposes costs on the public at large, the individual will gain more as a member of a group than he loses as a member of the public. A familiar example of this is the widespread promotion of producer interests and the correspondingly weak promotion of consumer interests. Samuel Brittan has explained the logic of this imbalance thus: 'The beneficial impact of any one protectionist or restrictionist measure on an individual via his professional or geographical interests is far greater than any loss he may bear along with 50 or 60 million other consumers. Thus he is entirely rational to take the producer's view'.[22]

The role of pressure groups

But what of Downs's argument that an all-round lack of information will prevent the mobilisation of minority interests and ensure the promotion of majority interests? The crucial factor here which Downs overlooks is **organisation.** By becoming organised into a pressure group, a minority communicates its existence to the political parties and indicates that it is in the political market, as it were, ready to exchange votes for the promise of favourable consideration. Where a great number of voters are organised into pressure groups, there is a good chance that a political party may win an election by constructing a coalition of minorities. The political significance of organisation was perfectly understood by Bentham, who was acutely aware of the tendency of organised minorities to subvert the political system and prevent the promotion of the public interest. It was, he argued, the immense influence of a few entrenched 'sinister interests', such as the landed aristocracy and the

legal profession, which necessitated a reform programme designed to transfer political power to the people at large, who would suppress the sectional interests which had hitherto preyed upon them by asserting the public interest. A crucial assumption in this argument was that the general public were in no position to organise their group interests in the manner of the aristocracy. Not that they lacked the motivation to do so; rather, the geographical dispersal of the various producer groups and their relative poverty made it impossible for them to organise. The masses could therefore be relied upon to use their votes to promote the only interest open to promotion thereby: the public interest. What Bentham did not guard against was the possibility that the means of interest-group organisation might become generally available, as they are today. The moment that possibility is realised, there is nothing in Bentham's democratic system (as there is nothing in Downs's) to prevent the parliament being dominated by a coalition of representatives committed to the granting of favours to the minorities which sponsored them.

One might at this point appeal to the pluralist argument that politics is, in any case, a matter of promoting group interests; and a system which facilitates peaceful bargaining between groups must produce outcomes which are acceptable by virtue of being fair. There are two weaknesses in this argument. First, such a process might still leave individual members of the various groups worse off than if such groups did not exist, and government was free to promote the interests which everyone shared regardless of minority interests. Brittan again neatly sums up this argument: 'Political theorists often make the mistake of assuming that if there is a fair balance of policies or bargains between all producers, all is well. But this is simply untrue . . . For although (the producer) gains far more than he loses from restrictionist measures in his own small sphere, he will often lose out on balance, especially in the long run, from the sum total of restrictive measures encompassing the whole field of political activity'.[23] The second weakness of the pluralist position lies in the fact that many people belong primarily to groups which cannot organise, whether because, like the aged and the poor, they lack the means, or because, like the consumers, their very large membership reduces virtually to zero the effects of the efforts of any one member. If we had to construct a political system from scratch, ignorant of the groups to which we would eventually belong, it is by no means obvious that we would opt for a system which guaranteed fairness between groups. It is more likely that we would opt

for a system which prevented groups from influencing policy and promoted the interests of each individual as an equal member of the public.

A solution that might suggest itself at this point is to fall back on a strong, centralised, sovereign parliament as the only instrument with sufficient power to enforce the promotion of the public interest and the suppression of the excessive influence of pressure groups. If the public is threatened by the organised power of minorities, then surely the only way to protect it is by the exercise of a power greater than that of all the minority groups combined: the unlimited power of the state itself. This argument might be sound, but only if the sovereign institution is not democratically elected. The entire case against radical constitutional reform could be summarised in F.A. Hayek's acute observation that 'democratic government, if nominally omnipotent, becomes as a result of unlimited powers exceedingly weak, the playball of all the separate interests it has to satisfy to secure majority support'.[24] The weakness to which Hayek refers arises **both** from a democratic government's need to gain electoral support **and** from the absence of constitutional limits to its powers. In the first place, electoral competition between political parties is, as Downs stresses, full of uncertainty, with the result that, in a homogeneous society with a two-party system, the parties end up looking much the same. But if a party can overcome some of that uncertainty by securing the support of minority groups, it will be tempted to make overtures to such groups and thus begin the process of coalition-formation. The other party, however, is under a similar temptation; hence the process of competitive bidding for group support which is so characteristic of democratic politics. (The policy of multiculturalism which the major Australian parties now espouse is, however desirable in itself, rather the outcome of party competition for the ethnic vote than an indication of changed attitudes among the host community, which according to recent opinion polls on the subject, remains largely hostile towards migrants.) In these circumstances, the absence of constitutional limits on state power not only allows government unlimited scope for offering concessions to minority groups; it also greatly encourages such groups to keep up the pressure for concessions. For if there is nothing that a government cannot legally do, then it cannot definitively reject demands for concessions which it would rather not make. A government whose powers are limited by law, on the other hand, is thereby limited in the extent to which it

can grant concessions, and is to the same extent free from group pressures. A government promise which would require a constitutional amendment before it could be fulfilled would not be worth having, and for that reason would not be sought.

The British experience

The post-war history of Britain provides substantial evidence in support of Hayek's claim that democratic governments operating without the benefit of constitutional limits become helplessly besieged by pressure groups demanding special treatment. The causes of Britain's economic decline are no doubt many and complex; and place must be given to historical and sociological factors, such as the persistence of class attitudes generated before and during the industrial revolution. But what gives the country its characteristic atmosphere of chronic economic crisis, is, I believe, precisely the absence of a written constitution. This has allowed the two main political parties, in their search for secure electoral coalitions, to extend the sphere of state activity to the point where, in the mid-1970s, public spending went out of control and had to be curbed by outside intervention in the form of the International Monetary Fund. Two areas of government power are particularly important here, and both arise from the lack of legal limits on the state: first, the right of parliament to exempt classes of citizens from common law liability for damages; second, the concentration of all macroeconomic decision-making power in the hands of the executive.

The former of these powers is largely responsible for the rise of trade unions to positions of great influence in the British political system. The crucial event in this ascent took place in 1906, when Westminster granted trade unions the legal right to undertake industrial action free from liability for damages arising from such action. This event also had a wider, more symbolic, significance: it revealed, just twenty years after Dicey had proclaimed it could not happen, and to Dicey's own dismay, that parliamentary sovereignty could sanction the violation of the rule of law. It also represented a victory for the Benthamite view that rights were created by sovereign authorities over the Burkean view that they were prescribed by custom, and was a portent of the steady decline of the common law during the present century and the corresponding rise of statute law.

The exemption of trade unions from the rule of law has been greatly enhanced in recent years; unions can now obtain

legal status for closed shop agreements, and are secure against lawsuits brought by individual workers who lose their jobs as a result of not joining a union. The power which these legal immunities confer on trade unions is manifested in several ways; unions have become the *de facto* employers throughout whole sectors of the British economy, and they regularly use this power to insist on the overmanning which is a major cause of Britain's low level of productivity. But the most spectacular example of union power is their ability to secure large wage rises wholly unconnected with increases in productivity.

On the face of it, the laws of economics should operate where the law of the land is silent and check trade union power over wages. Since the price at which a commodity is sold can be raised by human intervention only by limiting its supply, wage rises secured by union action can be paid for only by a reduction in the number of workers employed. Trade unions, knowing this, should temper their demands accordingly in the interest of preserving their members' jobs. But it is at this point that the other government power becomes relevant. Since the government has sole control over the macroeconomy, it can decide to increase the level of demand throughout the economy by spending more than it receives in revenue, i.e., by running a budget deficit, and thereby maintain full employment. And so long as governments believe that full employment helps them win elections, they will act accordingly, thus encouraging the unions to press ahead with their demands. But, as we now know, this Keynesian pattern of economic management cannot be sustained in the long run except at the cost of ever-accelerating inflation; and voters have consistently indicated that they regard inflation as a greater evil than unemployment. The closed shop, meanwhile, effectively prevents unemployment from correcting itself through the erosion of the bargaining power of the unions. But trade union power is now so entrenched that any attempt to bring about a serious reduction of it would lead to industrial confrontation and, possibly, the collapse of the government. Although the present government has indicated its intention of diminishing the power of the unions, it is likely that both major parties have tacitly abandoned full employment as a serious goal of policy.

But trade unions are not the only kind of pressure group which have benefitted from the unlimited power of the state to spend money. The poorer regions of the country have received huge sums in industrial assistance, much of it for the purpose of keeping declining industries in business. The

underlying political function of this kind of spending was revealed during the first few months of 1979, when the Labour government was attempting to maintain its majority in parliament though a series of overt offers of electoral bribes to the outer regions, many of whose members of parliament belonged to small parties free from alliance with the major parties. The attempt failed, however; and, in the ensuing general election, voters in the more prosperous regions of the country revolted against the high levels of taxation that were required to finance the high levels of state spending, which included the servicing of the huge public debt accumulated over years of budget deficits. The present Conservative government, meanwhile, claims that it has a 'mandate' to reduce the role of the state in the nation's affairs. But the political system itself remains unreformed; and there is no guarantee that the logic of the system will not once again prevail, and draw government back on to the path of high spending in an effort to construct a secure electoral consensus. There is no real reason to suppose that the continuing absence of constitutional control over government will not eventually lead again to the sacrifice of genuinely public interests, such as a reduction in taxation, to the combined interests of pressure groups, whose promotion requires high levels of state spending and therefore of taxation. (There are signs that this is already happening.)

It is remarkable how little constitutional debate has been generated in Britain by the country's rapid economic and political decline. Some commentators have taken this as evidence of the underlying strength and stability of the British constitution. The more likely explanation is that the British people, for the reasons suggested in the first part of this paper, have little sense of what the idea of a constitution involves. By and large, they see little direct connection between the poor performance of politicians and the established practices under which they operate; and political improvement is widely seen as a matter of getting people with the right ideas into power. There is welcome evidence, however, that the adversary system, with its institutionalised perpetual conflict between government and opposition, is unpopular; and there is growing support for electoral reform along the lines of proportional representation. A few eminent lawyers have suggested a Bill of Rights. But the first step in any serious attempt to promote a movement for constitutional reform in Britain would have to be the rejection of the popular idea that every constitutional system must somewhere contain an ultimate authority which is itself

above the law. The renowned flexibility of the British constitution would have to be shown to be a legal trap which made it impossible to entrench any worthwhile reform so as to render it secure against the wishes of succeeding parliaments. In short, the sovereign powers enjoyed by democratic government in Britain would need to be exposed as a source of constitutional weakness rather than strength, on the grounds that such powers are incompatible with the primary aim of constitutionalism, i.e., the maintenance of the rule of law.

If Britain appears to provide evidence that supports the conclusions which Downs and Hayek have drawn from their models of democratic systems operating without constitutional limits, Australia should, correspondingly, supply evidence supporting the virtues of the written constitution. Yet, in making comparisons between the two cases, one is struck, at least at first, by the similarities rather than the differences between them. Like Britain, Australia suffers from high rates of inflation and unemployment; and politics by organised pressure group is scarcely less in evidence. Are the structure and performance of economies not, then, even partially explicable by reference to the constitutions under which they operate? On the contrary, I would argue that the similarities that do exist between the British and Australian cases draw attention to the limits of liberalism within the Australian Constitution. The Federal Executive can, within the terms of the Constitution, exercise discretionary powers over large areas of social and economic life, and pressure groups have arisen in response to the opportunities provided by those powers. Immigration and international trade are but two areas of activity whose terms are being constantly altered by arbitrary government decree, usually out of the need to satisfy sectional interests. And while the Constitution does prohibit the outright nationalisation of industry, it has failed, as became clear in the 1970s, to prevent governments acquiring a large measure of indirect control over economic decisions through the expansion of the public sector by means of budget deficits. The Constitution has been shown to contain no safeguard against the abuse of the Executive's monopoly powers in the field of monetary control.

But these similarities between Australia and Britain, though real and significant, should be seen in context. Australia shows few signs of the political and economic decay which now grip Britain. The federal structure of the Australian Constitution helps protect a spontaneously exuberant economy from the centralising ambitions of Canberra,

and encourages its regional diversification. And despite the continuing tensions between its written and its unwritten aspects, the Constitution provides a framework which is found acceptable not only by the general public - hence their reluctance to countenance radical constitutional reform - but also by politicians. It was Gough Whitlam himself who wrote: 'the basic aims of the social democrat in Australia can be achieved under the present Constitution'.[25] This was **after** the crisis of 1975.

V. CONCLUSION

What then are the prospects for constitutional improvement in Australia? In the first place, much can be done simply by drawing attention to, and explaining the rationale of, the underlying liberal structure of the Constitution. In its purely written form, the Constitution provides for a measure of separation between Parliament, Executive and Judicature, and between State and Federal government. Although the tight bonds of party discipline have obscured and weakened these areas of separation, the Constitution contains the potential, as the events of 1975 revealed, for evolution away from the Westminster model of responsible government and towards a looser, more creative relationship both between the two houses of Parliament and between Parliament and Executive. In short, the imbalance between the laws and the conventions of the Constitution could be resolved in favour of the former, with the result that the Constitution becomes a better-known and more independent element in Australian public life. In the second place, there may be some scope for constitutional amendment of a non-radical kind. Frequent reference to the constitutional conservatism of Australians has tended to hide the fact that Australians have, in recent years, been prepared to sanction at least some amendment proposals designed to enhance the rule of law. The Constitution now applies equally to aborigines, and the procedures for filling casual Senate vacancies have been fully incorporated into constitutional law. The one recent amendment proposal designed to increase the discretion of politicians - involving the automatic double dissolution of Parliament at election time - was, significantly, rejected. This suggests, not a fearful and stubborn conservatism, but a confidence, however inarticulate, in the basic principles of the Constitution and a willingness, when asked, to strengthen and extend those principles. This in turn encourages the possibility of fruitful speculation on amendments designed,

for instance, to entrench fair electoral procedures and even to limit government discretion in fiscal and monetary policy. But what should be avoided at all costs is a major constitutional upheaval of the kind which would make the Constitution the subject of polarised political argument and could result in the rule of law being totally expelled from it.

Notes

1. Quoted in F.A. Hayek, *The Constitution of Liberty*, Routledge & Kegan Paul, London, 1960, pp. 169-70.
2. Fontana Edition, 1963, p. 219.
3. *Ibid.*, p. 214.
4. *Ibid.*, p. 219.
5. *Ibid.*
6. Nevil Johnson, *In Search of the Constitution: Reflections on State and Society in Britain*, Pergamon Press, Oxford, 1977, pp. 31-2.
7. See Brian Galligan, 'The Founders' Design and Intentions regarding Responsible Government' in Patrick Weller and Dean Jaensch (eds.), *Responsible Government in Australia*, Drummond, Melbourne, 1980, pp. 1-10.
8. Sol Encel, Donald Horne and Elaine Thompson (eds.), *Change the Rules!*, Penguin Books, Melbourne, 1977.
9. Colin Howard, 'The Constitution as a Legal Document', in *Change the Rules!*, pp. 21-42 at p. 21.
10. James McClelland, 'How Safe is Australian Democracy?' in *Change the Rules!* pp. 190-203 at p. 193.
11. E.G. Whitlam, 'The Labor Government and the Constitution', in Gareth Evans (ed.), *Labor and the Constitution 1972-1975*, Heinemann, Melbourne, 1977, pp. 305-30 at p. 330.
12. See, for instance, Elaine Thompson, 'A Bit of Paper Called a Bill of Rights', in *Change the Rules!* pp. 84-102.
13. Norman P. Barry, 'Labour and the Constitution', *Contemporary Review*, vol. 232, January 1978, pp. 7-11 at p. 10.
14. *The Edinburgh Review*, vol. 31 (1818), pp. 165-203.
15. Fontana edition, p. 277.
16. *Ibid.*
17. Sir Henry Maine, *Popular Government*, John Murray, London, 1909, p. 89.
18. Joseph Schumpeter, *Capitalism Socialism and Democracy*, Fourth edition, Unwin University Books, London, 1954, p. 269.
19. Kenneth J. Arrow, 'Values and Collective Decision-Making', in Peter Laslett and W.G. Runciman (eds.), *Philosophy Politics and Society*, Third Series, Blackwell, Oxford, 1969, pp. 215-32.
20. Harper and Row, New York, 1957.
21. Harvard University Press, Cambridge, Mass., 1965.
22. Samuel Brittan, *Capitalism and the Permissive Society*, Macmillan, London, 1973, p. 115.
23. *Ibid.*
24. F.A. Hayek, *Law Legislation and Liberty. Volume 3: The Political Order of a Free People*, Routledge & Kegan Paul, London, 1979, p. 99.
25. Evans, *op. cit.*, p. 329.

2

The Parliament in Theory and Practice

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The Parliament in Theory and Practice

G. S. Reid

I. INTRODUCTION

This essay examines Parliament from the two perspectives of 'theory' and 'practice'. My intention is to consider whether or not the practices of the national Parliament at Canberra are congruent with the basic theoretical premises about Parliament that underpin the constitutional system. I expect that many people who listen to Parliamentary broadcasts will already have some preconceptions in that direction.

Yet these two chosen perspectives provide a blurred view of government. The problem lies mainly in using the notion of 'theory' in a discussion about government. It is difficult, for example, to find a complete specification of a theory of government in the Australian Constitution, and it is equally difficult to find a theory of Parliament. The written Constitution appears to contain only a portion of a theory of Parliament; and what theory it does contain is disputable. And if we turn to scholarly works for the necessary complement - say, to the works of Lord Bryce, Professor Dicey, Quick and Garran, Sir Thomas Erskine May, Professor Geoffrey Sawer *et al* - we find differing interpretations. Thus, there is no escape from the question - whose theory of the Constitution, or of the Parliament, do we choose? Moreover, once a constitutional theory is chosen there remains the difficulty of spelling out the precise prescription expected to be followed in the relevant constitutional practice. Hence, the problem is, on what grounds do we declare what should, or should not, be practised in and by Parliament?

Such is the difficulty over the notion of 'theory' in government, that Aldous Huxley declared:

> Most theories of state are merely intellectual devices invented by philosophers for the purpose of proving that the people who actually wield power are precisely the people who ought to wield it.[1]

So, was that the intention of this collection? Is our

discussion on constitutional theory meant to buttress the balance of power that we already have in Australia? Or was Huxley wrong?

I believe that Huxley was on the right track - although he did exaggerate to make his point. At any particular time, established theorists about government and politics tend to be pillars of the Establishment. It is recognisable in Australia, as in all countries, that authors who advocate a theory of government antagonistic to 'the people who actually wield power' get a rough ride. You will recall how the events of November 1975 provoked, in an unusual way, many useful but differing prescriptions as 'theories of state' for Australia; but they received a mixed reception. Our problem, then and now - whether we speak of constitutional theory or of parliamentary theory - is, whose theory do we accept? Which theory is right?

It was in the face of the obvious subjectivity of alleged political theory in specific governmental situations that Professor Michael Oakeshott warned his students to steer clear of those shifting sands. He said it was the role of the practising politician, not the role of the academic scholar, to articulate in prescriptive terms political theories such as 'natural law', 'freedom', 'the rule of law'. For Oakeshott, the academic scholar was not concerned with 'the condition of things' but only with 'a manner of explanation'. In his view a philosophic argument was to be respected for its coherence, its intelligibility, its power to illuminate, and its intellectual fertility. The conversion of the role of explanation into the role of prescription in government was to go beyond the responsibility of a scholar.[2]

This is an old issue. I reject Oakeshott's argument, for not only is his case prescriptive in itself, I believe that the social implications of government are too important to be isolated from academic prescriptions. An academic person ought to state unequivocally what should and should not be done in government. So I intend to proceed in this paper under two headings - first, 'Parliament in Theory' and secondly, 'Parliament in Practice' - and to be prescriptive.

II. PARLIAMENT IN THEORY

A reading of the Australian Constitution indicates that the politicians who framed it held assumptions and values about how the new system of government should work. An examination of the written Constitution, so far as it provides for the Parliament, reveals their assumptions. They are:

First it is based on a federal theory, which necessitates

(i) a bicameral Parliament with both of its Houses organised in keeping with the philosophy of federalism;

(ii) a division of the powers of government in Australia between Federal and State Parliaments; and

(iii) the overriding authority of a supreme court - the High Court of Australia - to adjudicate in disputes arising over that division of power.

Secondly, it is based on the theory of representative government by which both Houses of Parliament are comprised of members about whom the electorate is given a recurring opportunity to make a choice.

Thirdly, it is based on one of the principal theories of the Westminster style of mixed government, whereby all of the Queen's Executive Ministers of State must be drawn from, or become, members of one or other of the elected Houses of Parliament (that is, the Crown in Parliament assembled).

And **fourthly,** it is based upon theories of 'constitutionalism' and the 'law of legislation' which require:

(i) the subordination of both citizen and government to the higher law of government - the Constitution - entrenching both the institutions and the manner and form of governing; and

(ii) the creation of the Parliament as the nation's legislature; requiring the law of the land to be made in accordance with the decisions of an elected Parliament.

There would be general agreement that some of these theories of Parliament have greater importance than others. However, I doubt whether there would be general agreement on their order of importance. In the practice of government there is considerable disputation about the relative priorities of the respective theories. Increasingly, particularly in the State of New South Wales, the federal theory is said to have diminished in its significance. But that is not the claim in my State of Western Australia. And in some parts of Australia it is held, increasingly, that the Parliament should surrender its responsibility for making legislation. Yet there are some people left, including myself, who will argue otherwise.

However, we cannot say that the theory of Parliament ends with the written document. As you know, constitutions, and the political institutions they prescribe, are mere pieces of paper until such time as human beings breathe life into them. As John Stuart Mill wrote

> . . . political institutions . . . are the work of men; owe their origin and their whole existence to human will. Men did not wake on a summer morning and find them sprung up. Neither do they resemble trees, which, once planted, 'are ay [ever] growing' while men 'are sleeping'. In every stage of their existence they are made what they are by human voluntary agency.[3]

'Human voluntary agency', I suggest, has created the Australian Parliament; and in doing so it has established parliamentary practices which are not provided for in the written document. Such is the disparity between the constitutional word and the day-to-day political practices of government that a body of literature has developed which brands those people who interpret the Constitution by its literal provisions as being blinkered 'literalists'. Mark Cooray's thoughtful work on *Conventions: The Australian Constitution and the Future* adopts this approach. 'To insist on literalism in all situations is to put the Constitution into a straitjacket'.[4] Hence Cooray, and others, specialise in examining practices in government called constitutional conventions, maxims, usages, doctrine, customs, principles, and procedures. They claim that all of such practices have developed prescriptive force in one way or another, even though they are not prescribed by the written document.

If we wish to rescue the Australian Constitution from a literalist 'straitjacket' the problems are even greater than that created by the written Constitution; for example, who is to say what are the unwritten theories of the Constitution; or, for our purposes here, what are the unwritten theories of Parliament?

It is in making judgments about unwritten theories of the Constitution - that is, conventions, maxims, usages etc. - that academic analysts and practising politicians frequently join hands. This is one of the areas of government Aldous Huxley referred to. In parliamentary affairs injunctions about the 'Westminster Model', 'Responsible Government', 'Parliamentary Control' or 'Crown Privilege', are used to direct behaviour, sometimes even contrary to the provisions of the written Constitution itself, or sometimes to bolster the strength of one written theory over another written theory. There are people who, intentionally or unintentionally, articulate political theories in the name of conventions and maxims of the Constitution in the way that a dominant political group may prefer, or in a way helpful to a subordinate political group.

You will recall some of the emotional judgments made in Australian politics late in 1975 over whether or not it was a convention of the Constitution that the Australian Senate could, or could not, block supply. We saw some academic people, and some politicians, arguing that 'it could', others that 'it could not', and others changed their argument in the course of a day, a week or a month. There was also the argument about whether the Governor-General may, or may not, dismiss his Prime Minister when the latter held the support of the majority of the House of Representatives. There was disputation at the time of the Loans Affair about whether or not senior officials of state should be obliged as witnesses to answer questions of Senators before the Bar of the Senate. And there were many more similar issues.[5] It was in the wake of that disputation that Mr Justice Sir Ninian Stephen referred to 'this great penumbral area of the Constitution'.[6] He suggested that the precedents, practices, principles, conventions etc should be codified, but he did not answer the obvious questions - 'by whom?' and 'in what way?'

For this explanation of 'Parliament in Theory', I nominate only two unwritten theories; there are others but I nominate two as being of major significance in Australian government, notwithstanding their omission from the written Constitution. It is difficult to envisage anyone omitting them from a list of the theoretical premisses of Parliament in Australian government.

The first is the theory of responsible government - sometimes expressed as 'ministerial responsibility'. It means many things to many people, but the common denominator in all the explanations of it is that Ministers of State are 'responsible' for their actions; and more specifically, they are 'responsible' to the elected Parliament; and in this way the government is 'responsible' to the governed.

And the second is the theory of parliamentary control of the Executive Government - sometimes expressed as 'Parliamentary control of the Executive', sometimes 'Parliamentary control of expenditure', sometimes 'Parliamentary control of the budget', sometimes 'Parliamentary control of the Government', and so on. I shall call it 'Parliamentary Control'.

Thus, overall, my Theory of Parliament is comprised of six component theories - four find expression in the written Constitution, and two form part of what is known as the unwritten Constitution. They are:

Written Theories

1. A Federal Parliament
2. A Representative Parliament
3. A Parliamentary Executive
4. A Legislative Parliament

Unwritten Theories

5. Ministerial Responsibility to Parliament
6. Control of the Executive by Parliament

It takes only a brief reflection to recognise that if the Australian Parliament is based on these six theories, then that institution is by no means a mirror-image of the Parliament at Westminster; the differences are caused by the first of the written theories. Yet it is frequently claimed, prescriptively, that the Parliament is modelled on Westminster. It is my thesis that such claims are usually politically motivated; they are often made to overcome the obstacles to political goals that the first theory creates; or sometimes to facilitate the application of the other theories. Public statements by theorists of the the 'Westminster Model', along with theorists of 'Responsible Government' and of 'Federalism', frequently confirm Huxley's thesis that philosophers of government set out to prove that 'the people who actually wield power are precisely the people who ought to wield it'. True, much has been achieved in Australian government in the name of Westminster, but if our concern is 'Parliament in Theory', it is clear that the Australian Parliament is based as much on theories of Washington as it is on those of Westminster. Constitutionally speaking, the theoretical composition of the Australian Parliament is hybrid.

It is useful to emphasise the extent to which the first theory of the national Parliament qualifies the presumptions of the Westminster Model. True 'the Crown in Parliament assembled' has been copied, as has the adherence to one of Westminster's unwritten theories, 'Ministerial responsibility to Parliament'; but federal theory pervades the written constitution and profoundly modifies its Westminster pretentions. It is difficult to ignore the federal quality of the entrenched High Court, the federal division of parliamentary powers; and the special and powerful position of the Senate. Yet many practitioners in central government, and some academic analysts, have ignored the philosophical

origins of these facets of Australian government.

Given its federal qualities, it is reasonable to ask why Australians should tie themselves only to Westminster- and Washington-style preconceptions about theories and practices in government. A broader view becomes clear if the Australian Constitution is examined against the wider background of the government of nation-states. This would demonstrate that the Australian system of government is based on a number of ideals which were actively advocated in various parts of Europe and North America during the 18th and 19th centuries. The Australian Constitution embraces ideals for government such as constitutionalism, the specification of parliamentary powers, judicial oversight, an acknowledgment of 'the separation of powers', the vesting of legislative powers in an elected Parliament, a constitutional sharing of legislative powers between two elected Houses, the ideals of representation such as universal suffrage and recurrent elections, notions of popular control of Executive Government and popular control of the structure of government itself. All of these provisions owe their modern existence to human aspirations beyond Westminster and Washington. In this light the Australian Constitution can be seen to provide a particular style of self-government; in this it presumes limited government; it provides a variety of checks and balances upon executive government - in particular the limited life of Parliament, bicameralism, appropriation made by law, no taxation without representation, rules about Offices of Profit, and declarations of parliamentary privilege. Notions of ties to Westminster or to Washington give only a partial picture; it is helpful to look beyond the preconceptions of these so-called 'models'.

Implicit in all six of my theories of Parliament - whether or not they have emerged from Westminster or Washington - is that they are all linked by a common spiritual quality. No doubt J.S. Mill would see all of them as an expression of 'human will'. Each is an expression of a desire on the part of the constitution-makers for the new nation to be self-governing in a particular way; to be governed by parliamentary law enacted by procedures which provide for the governed, through elected representatives in the Parliament, to maintain a constant influence upon the course of government. The six theories I have listed demonstrate the intentions expressed at the Constitutional Conventions during the 1890s to establish institutional safeguards both for the maintenance of a new Australian nation and for the protection of individual liberty in the context of collective action.

Each is a worthy theory. But what name could be given to their common spiritual quality - 'Parliamentary Democracy'? 'Social Democracy'? 'Parliamentary Liberalism'? 'Responsible Parliamentary Government'? 'Representative Government'? All of these have some relevance, but they do not emphasise the common quality I wish to explain. In my opinion all of the six theories of Parliament express a basic social aspiration which is of broadly European and North American origin, and which had an influence in no small measure at the beginning of responsible self-government in New South Wales in 1856; this aspiration was influential too when the other Australian colonies followed suit; and it existed upon the creation of the new national government in 1901. Although it may now sound trite, the six theories all embody the popular aspiration of 'government of the people, by the people, for the people'. That is to say they are foundation theories for a system of government which was expected to accommodate popular will. The six theories embody a populist ideal. Yet this ideal is implicit rather than explicit; it does not gain a mention in the prose of the written Constitution because that document, unlike most other national constitutions, did not spring from a popularly inspired revolution or a civil war. The Australian Constitution does not express the overthrow of an old regime; it is the result of evolution rather than revolt. Australians chose to retain elements of monarchy in their Constitution, and to mix those elements with elements of popular self-determination. In the mixture, the essence of the populist ideal was diluted, although it was by no means dissolved. It still pervades all six of the original theories of Parliament. Our task now is to demonstrate what has happened to it in the subsequent years of political practice.

III. PARLIAMENT IN PRACTICE

My thesis about Parliament in Practice is that the populist ideal I have just explained has been, and is being, sapped of its vitality, deprived of its dynamism, and subordinated to the monarchical components of earlier autocratic regimes which lingered in the constitutional mix of 1901. Today these older components manifest themselves in a vastly expanded executive government both numerically and in coercive power.

I do not have time here to explain all of the practices of Parliament which are eroding the populist ideal within the respective theories. It would be logical to examine each separately. All that I can attempt here is to concentrate

upon one of the six parliamentary theories as an illustration of what is happening.

The theory I choose is the most important of the six. It is the theory of Parliament as the nation's legislature. There can be no gainsaying its existence as a theoretical premiss - Section 1 of the Constitution makes it clear: 'the legislative power of the Commonwealth shall be vested in a Federal Parliament . . . '.

The power to legislate is indeed the basic power given to the Federal Parliament. Section 1 of the Constitution provides for the populist influence in Australian government to penetrate into the law of the nation-state via the elected components of government. The theory ties the exercise of the power of the State, whether benign or coercive, to the will of those over whom it is exercised. The reality is, that if that power to legislate is allowed to weaken through disuse or through neglect, or by submission to Executive strategies designed to negate its intent, all other populist aspirations implicit in responsibility, control, representation, and financial scrutiny will atrophy with it. The power to legislate provides the elected Parliament with its sole legal sanction over a recalcitrant Executive Government. Parliament neglects that sanction at its peril. It is no accident in history that the legislative power of Parliament is expressed at the start of the written Constitution. It is the basic presumption upon which all else in the Constitution develops. If the Government needs new legislative powers - or wishes to change the powers it already possesses - it must come to the representative Parliament to seek those powers in legislation. The decisions of Parliament taken by a legislative process are the only decisions of Parliament that the Executive Government will recognise as binding. Non-legislative resolutions of either or both Houses are persuasive only; and, as a result of the decline of legislative power, they are not particularly persuasive at that.

Parliament today remains formally the nation's legislature, but its actual role is vastly different. In eighty years of federation, matters of initiative in legislation have been virtually surrendered by members of Parliament to the Executive Government. Over 99 per cent of proposed laws are initiated by Ministers of State. Of the 5,000 or more Bills which have been enacted since 1901, only 8 were initiated by Private Members. At present there is little expectation and little opportunity provided for non-Ministerial members of Parliament to initiate legislation or to have such proposals considered. The virtual surrender by elected MPs of their

rights to initiate legislation to the advantage of Ministers of State and department officials is the greatest debilitating influence that we have in Australian government. It spreads a pall of futility over the Australian Parliament and a pall of passivity across Australian politics - and we the governed are the losers. How has this come about?

To illustrate what has happened, and is happening, in the legislation processes of Parliament, I have examined the parliamentary record for the years 1924, 1933, 1974 and 1978.

From the evidence, a number of points emerge.

(i) In 54 years the annual volume of legislation has grown almost fourfold from 65 proposed laws (Bills) in the year 1924; 74 in 1933; 226 in 1974; to 240 Bills in the year 1978.

(ii) In spite of the increased volume of legislation, the vast expansion in the scale of governmental initiative, and the increasing complexity of law-making, each House of Parliament has given detailed committee attention to about the same number of bills each year - averaging about 50 Bills per year - through the only device that each House has possessed (until 1978) - the Committee of the Whole House. (In 1978 the House of Representatives delegated the scrutiny of seven of its bills to two small and new legislative committees. This new procedure, which is in its infancy, has yet to be evaluated - see below.) This means that in 1924 21% of proposed laws were not examined in detail. This proportion has risen to 76% in 1974 and 78% in 1978.

(iii) In 1924, debates on Bills in the Committee of the Whole House (in both Houses) were characterised by considerable interest from backbench members on both sides. 255 amendments were moved by Ministers, all but 18 of them were accepted; 142 amendments were moved by Opposition back-benchers, and 14 were accepted; 120 amendments were moved by Government backbenchers and 59 were accepted.

(iv) The pattern was much the same in 1933:

115 amendments were moved by Ministers, and all but one were accepted; 55 amendments were moved

by Opposition backbenchers, and 2 were accepted; 115 amendments were moved by Government backbenchers, and 28 were accepted.

(v) Some interesting comparisons can be drawn with the legislative activity in the Parliament in the two years 1974 and 1978. In looking for a point of contrast with 1924 and 1933, the outstanding feature is the decline in the legislative initiative taken by Government backbenchers.

(vi) In spite of the dramatic change of government between 1974 and 1978, in both years there was a lively initiation of proposals from Ministers and Opposition members to amend the bills under scrutiny, but Government backbenchers virtually withdrew themselves from the legislative picture.

In 1974, in the midst of the intense legislative struggle of that period, Ministers moved 243 amendments, the Opposition moved 256 amendments, but Government backbenchers moved only 7 amendments (one amendment in the House of Representatives, six in the Senate).

In 1978, Ministers in both Houses moved 191 amendments, all of which were carried. The Opposition moved 233 amendments all but one of which were lost. Government backbenchers moved only 9 amendments, all of which were defeated.

So, in general, the reluctance in both Houses, until 1978, to decentralise any part of the legislative process to smaller committees, and with Parliament meeting on average only 65 days a year over the last 20 years, an apparent congestion and rush of legislative business has developed in both Houses. A superficial scrutiny has been given to an increasing number of Bills; and there has been a withdrawal of Government back-bench members from the formal legislative process. The impression created has led to the assertion that the scrutiny of proposed laws is too time-consuming, too complex, and too difficult for lay parliamentarians to manage.

It was in August 1978, after a great deal of adverse publicity about the neglect by the House of Representatives of its legislative responsibilities, that that House agreed to establish small committees of 14 to 20 members each for the detailed scrutiny of proposed laws. The House agreed to establish as many committees as it required. In 1978 two such committees were set up and seven Bills were presented

to one or other of them for their committee stage - this was the first occasion in 78 years that a proposed law received a committee-stage scrutiny away from the floor of the House in plenary session. The official record of that innovation demonstrates that, as an application of the parliamentary theory of legislation, it was a signal success. Both committees demonstrated rationality, flexibility and relaxed formality; they proceeded systematically and constructive debate prevailed. In examining the seven Bills, Ministers moved 34 amendments, successfully; government backbench members moved 10 amendments, 9 of which were carried; and Opposition members moved 19 amendments, 6 of which were carried. In the light of that record in 1978, it is curious that only two Bills were referred to similar committees in 1979. Perhaps the innovation in 1978 appeared as a threat to the authority of the respective party leadership or to the departmental officials. Whatever the reason, the innovation languishes at the present time.

It is in the wake of the Parliament's dismal record in examining proposed laws that other interests have moved to fill the consequent void in the power structure of government.

The Executive Government, and its official advisers, have been the principal beneficiaries, and sometimes the architects, of the Parliament's weaknesses in passing legislation - particularly the weaknesses of the House of Representatives. They have helped to introduce the 'Gag' and 'Guillotine' procedures to forestall debate; they have utilised the 'floodgate technique' to encourage 'legislation by exhaustion'; they have engaged in a form of legislative abortion by insisting in the House of Representatives on a misinterpretation of Section 56 of the Constitution whereby the words 'shall not be passed' in that Section are applied as if they meant 'shall not be introduced', with a subsequent and serious constraint upon Private-Member initiatives in the process for making the law.

In addition, Executive Ministers and their officials have benefited from the Standing Orders and Speaker's ruling providing that only Ministers of State may propose taxation measures; from procedures whereby it is sufficient, without authority, for any Minister to declare that his taxing proposal is applicable from the moment he moves the relevant motion in the House - notwithstanding that the House has not debated it, nor come to a decision on it; and from the practice whereby the House is encouraged to desist from amending the Executive's Estimates of Expenditure under

threat of the Government's resignation should they succeed. In 1979 the House of Representatives set up two new Estimates Committees for the decentralisation of its scrutiny of the Executive's annual Estimates of Expenditure. Those committees, however, were born with the constraint that they '. . . shall not vary the amount of a proposed expenditure'.

Furthermore, it is not generally realised that the so-called Keynesian Revolution has also contributed to the suppression of the populist ideals implicit in Section 1 of the nation's Constitution. Not only was the Keynesian philosophy grasped thankfully by Executive Governments in Canberra as a means of weakening the federal influences which pervade the Constitution, but it brought to Australia Cambridge-based preconceptions that the science of economics was far too complex and important for elected politicians to worry about. The Keynesian Revolution in Australia was cleverly orchestrated midst the economic uncertainties of 1944-45 with the help of that influential official publication *Full Employment in Australia* which seems now to have run its full lap of honour.[7] Moreover, in this repressive climate, the nation's monetary policy has been consistently kept at arm's length from parliamentary interference.

And midst the growth of these restraints upon parliamentary development we have witnessed the multiplication of the size and complexity of the statute book; a widening delegation of legislative power into the hands of appointed officials; a widening interpretation of 'the official secret'; and the vesting of unprecedented, unscrutinised executive powers in the hands of the Australian Security and Intelligence forces. It is of concern, at least to me, that out of all of these trends there is an apparent and growing demand that, as a consequence of the Parliament's alleged 'failure' to meet its responsibilities in legislation, we should now consider transferring the task of making the law away from the elected Parliament and placing it in the hands of a small number of more knowledgeable experts.

You may recall that in the days of the Whitlam Government in 1975, Sir Anthony Mason (a former Solicitor-General of the Commonwealth, now Justice Sir Anthony Mason of the High Court) claimed that:

> Perhaps the time has come for a delegation of legislative authority to Law Commissioners and to other agencies outside Parliament, the delegation to be subject to disallowance by either House. Short of this

> solution it is difficult to see how the law can be consistently and promptly updated. Increasingly it seems that Parliaments are concerned with the politics of survival, and . . . regular reform is not likely to receive its due measure of attention.[8]

And surprisingly, if not alarmingly, the renowned libertarian of the twentieth century, Professor F.A. Hayek appears to have succumbed to that thesis in 1978, with

> If the Parliament [he was speaking of the United Kingdom] has failed to meet its legislative responsibilities an organisation of qualified experts should fill the constitutional void in its place.[9]

So in place of that populist spirit which infused formal parliamentary theory in Australia, we are increasingly adopting, or advocating, practices which will subordinate elected parliamentarians to the decisions of appointed experts in the making of the nation's laws.

In this vein, the Federal Government and the Governments of all Australian States have now established their respective Law Reform Commissions comprised of appointed personnel - usually legally qualified - all of whom are appointed for a specific, but short, term by the Executive Ministers of State. Law Reform Commissioners receive their references of work from the same Executive Minister who appoints them, and they report first to that Minister before their report flows through to Parliament. The populist ideal in the face of this development looks weak indeed.

Perhaps it is to be expected that enthusiasm for the reform of legislation as advocated by the appointed and expert Law Reform Commissions will not always be matched by subsequent and comparable enthusiasm from the elected parliamentarians. Parliamentarians, with their electorates to worry about, might understandably be troubled when pressed to enact proposals which, although characterised by expert zeal, may also invite political suicide, or fail to spark any electorate interest at all. However justifiable the Parliament's prevarication in this respect may be, it has prompted the national Law Reform Commission to report to its Minister that 'the history of [parliamentary] consideration of law reform proposals is not entirely a satisfactory one'; 'there is no doubt that inaction by parliament upon law reform proposals causes despondency and diminishes the

incentive to advance proposals'.[10]

It seems, therefore, that despite Section 1 of the Constitution, the question of who should wield power *de facto* in making legislation is a matter which requires early determination in Australia. Executive officials believe that they should be so entrusted; Law Reform Commissioners believe that their turn has come; whereas elected politicians such as Senator Cavanagh assert 'we are the law-makers and we should ensure that we maintain our position'.[11] Or as Senator (now Mr Justice) Lionel Murphy once claimed 'members of Parliament are determined to exercise their legislative functions. Under the Constitution, and by direction of the people, we are elected to make laws. That is our function - each of us has a legislative responsibility'.[12]

But Parliament, in its practices, has gone a long way towards satisfying the values of Justice Sir Anthony Mason and Professor Hayek, rather than supporting the ideals of Senators Cavanagh and Murphy. Law-making in the 1980s is seen to be a matter for experts. Does it matter?

IV. CONCLUSION

My thesis is that if the Parliament, in practice, suppresses, or condones the suppression of, the populist ideal implicit in Section 1 of the Constitution, then it will, indirectly, suppress the populist element in every other theory of Parliament. If the legislative powers of elected parliamentarians are suppressed, or are allowed to atrophy, then what defence will parliamentarians have against destructive attacks upon the theory of parliamentary representation, the theory of Executive-parliamentary balance, the theory of ministerial responsibility to Parliament, or the theory of parliamentary control of Executive officials, and even a theory of federal Parliament?

So, in summary, I believe that we should articulate theories of Parliament; and that the six theories listed earlier in this paper are of first importance for Australians. Whereas those theories might, or might not, support the people who actually wield the power of government, all six of them embrace a populist ideal which is an essential quality of civilised life. In the circumstances of a modern industrial society requiring government initiatives on a large scale, the populist ideal frequently looks to be a vague and misplaced impediment to direct and rapid social action; it is so easily subordinated to the will of Executive government by instruments of patronage or coercion, in the name of positive

government. It is being so subordinated as the Australian nation traverses the 1980s. Thus I believe we will ultimately pay a high price for our present intolerance of theories of Parliament.

Notes

1. Aldous Huxley, *Ends & Means: an Enquiry into the Nature of Ideals and into the Methods employed for the Realization*, Chatto and Windus, London, 1940, p. 58.
2. Michael Oakeshott, 'The Study of "Politics" in a University', in *Rationalism in Politics and Other Essays*, Methuen, London, 1962, pp. 301-333, at p. 331.
3. J.S. Mill, *Considerations on Representative Government*, Basil Blackwell, Oxford, 1948, p. 111.
4. L.J.M. Cooray, *Conventions, the Australian Constitution and the Future*, Legal Books, Sydney, 1979, p. 16.
5. On the question of Executive Privilege as claimed in the 'Loans Affair', see Geoffrey Sawer, 'The Petro-Dollar Loan', chapter 5 of *Federation Under Strain*, University of Melbourne Press, Melbourne, 1977, pp. 65-90. See also Gareth Evans, (ed), *Labor and the Constitution 1972-1975*, Heinemann, Melbourne, 1977, pp. 147-156.
6. Justice Sir Ninian Stephen, 'The Labor Government and the Constitution 1972-1975', Address to the Federal Anniversary Seminar (unpublished), p. 5.
7. *Full Employment in Australia*, Commonwealth Parliamentary Paper No. 11, 1945
8. A.F. Mason, 'Where Now?', *Australian Law Journal*, 49, 1975, 570 at pp. 572-73. (Quoted in the Australian Law Reform Commission, *Second Annual Report*, 1976, pp. 11-12.
9. Hayek, F.A., 'The Miscarriage of the Democratic Ideal', *Encounter*, March 1978, pp. 14-17.
10. The Australian Law Reform Commission, *Third Annual Report*, 1977, pp. 3-4 (paras. 8 and 10).
11. Senator the Hon J.L. Cavanagh, (Senator for South Australia), *Parliamentary Debates (House of Representatives)*, 1 March 1979, p. 472.
12. Senator the Hon. L.K. Murphy, (Senator for New South Wales), *Parliamentary Debates (Senate)*, 23 October 1973, p. 1345. (Senator Murphy subsequently became His Honour Mr Justice Murphy, High Court of Australia.)

3

Towards a Valuable Senate

D. J. Hamer

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Towards a Valuable Senate

D. J. Hamer

I. A STATES HOUSE?

There was never any real doubt that Australia would have a bicameral Federal Parliament, with an Upper House in which all the existing Australian colonies would have equal representation. Not only is it difficult to see how the smaller colonies could otherwise have been induced to federate, but both of the most familiar examples of federal constitutions - the Canadian and the USA - as well as Britain and all the self-governing Australian colonies had two legislative chambers.

The delegates to the federation conventions were quite clear as to the role they wished the Senate to perform. 'Not only by its express powers,' said Barton, 'but by the equality of its representation of the States, the Senate was intended to be able to protect the States from aggression.'[1]

This defensive role for an Upper House was not unusual. In all federations there is a constant fear, said Professor Wheare, that 'the general executive and legislature depending primarily on numbers, may adopt policies in foreign and . . . in domestic affairs, which might be opposed but ineffectually opposed by the less populous states which are less strongly represented in the lower house.'[2] This has been a common worry in federations both old (such as the USA) and new (such as Australia and West Germany).

In the eighteenth and nineteenth centuries an Upper House was seen as a check on change and the onward march of democracy, and Upper Houses usually had appropriate membership restrictions. 'All second chambers,' said Finer, 'have been instituted . . . not from disinterested love of mature deliberation, but because there is something their makers wished to defend against the rest of the community, especially inherited possessions and status.'[3] Madison campaigned for a strong American Senate as a 'check on the democracy - it cannot therefore be made too strong.'[4] The Australian colonial Upper Houses were undoubtedly constituted on this basis. It was this anti-democratic role of Upper

Houses which led Abbé Sieyès to claim 'If the Upper House agrees with the Lower it is superfluous; if it disagrees it ought to be abolished.'

Not all the delegates to the federation conventions were convinced that the Senate could or would operate as a States' house. Macrossan in 1891 had raised doubts whether the Senate would in fact function in the way other delegates imagined. In the Conventions of 1897/98, only Deakin and Isaacs echoed these doubts. As Deakin said in Adelaide, 'From the first day that Federation is consummated . . . the people will divide themselves into two parties . . . The instant Federation is accomplished the two Houses will be elected on that basis. State rights and State interests . . . will never be mentioned.'[5] Isaacs had earlier asked: 'How do the interests . . . of what are called the larger States conflict with similar interests in other States? . . . How is it probable . . . that there should be any combination of States, large or small, against other smaller or larger?'[6] But he received no answer. The great majority of delegates obviously believed that the Senate would represent the interests of the States; as Barton said: 'The contingent of a State to the Senate should be able to speak for that State as a whole, representing its citizens as a collective body.'[7]

Of course Barton's vision has been proved to be quite false. Contingents from States have never effectively spoken for their States. By any measure of public performance - amendments to Government bills, initiation of private members' bills, motions, questions to Ministers - there is no evidence that Senators have been any more diligent in protecting State interests (real or supposed) than have the Representatives: if anything, they have been slightly less diligent. In fact, the Senate, far from protecting the interests of the States, has sometimes taken action that seriously damaged them. 'In 1970, indeed' wrote Professor La Nauze, 'a small group which held the balance of power in the Senate[8] combined with the Opposition to defeat a Government Bill[9] which proposed measures to **compensate** the States for loss of revenue from a type of tax which had been held by the High Court to be an excise duty, and therefore beyond their powers to impose. The ironies of the Senate as a States House could go no further.'[10]

Faced with the conclusive public record, some have attempted to argue that the Senate is effective as a States' House in non-public ways. A recently retired Clerk of the Senate put it thus:

> Senators are constantly forming deputations to Ministers to safeguard and promote the interests of their States - a development project, a rail link, an airport, water conservation . . .[11]

Twenty four Ministers (twelve from each of the Whitlam and Fraser Governments) were asked their opinions of the Clerk's statement. None felt that the statement that Senators were 'constantly' forming deputations was reasonable: five found it 'exaggerated' and nineteen found it 'absurd'. On the question of the source of most parliamentary pressure on issues which safeguard and promote State interests, no Minister felt it came mainly from Senators. Five thought it came about equally from Representatives and Senators, eleven felt it came mainly from Representatives, and eight said that they never had experienced any such pressures.[12]

Parliamentary Party meetings provide another possible forum for the pressing of States' interests. The minutes of the Labor caucus have been published,[13] and they reveal (at least for the period 1901-49) absolutely no special pressure from Senators on States' matters. The joint Liberal Country Party meetings are less structured, but it can be said that at these meetings Senators are certainly no more vociferous than their Representatives colleagues in putting forward pro-State arguments.

In fairness, though, it must be admitted that the **existence** of the Senate changes the internal balance of the political parties in Canberra in favour of the less populous States, and (since proportional representation voting was introduced for Senate elections in 1949) ensures that each of the two major parties will have **some** members from each State.

But the Senate itself has no past, and no future, as a States House.

II. A HOUSE OF REVIEW

The former Chief Justice, in his famous advice to the Governor-General during the 1975 constitutional crisis,[14] implied that the Government is responsible to both Houses of Parliament. This seems a very idiosyncratic view, and it is difficult to see how it would work in practice or that it has ever worked that way. Everyone accepts that a House of Representatives election determines the Government, regardless of the result in the Senate. And when, for instance, the

Senate in 1973 passed a motion of no confidence in the Attorney-General (Senator Murphy),[15] no one called for the Government to resign, and no one seriously expected Senator Murphy to resign.

The authors of the Constitution undoubtedly left us with an awkward structure, though the responsibility suggested by Sir Garfield Barwick was never seriously considered by them. What they did was to combine the British concept of responsible government with the American concept of a strong Senate, and to hope for the best. I believe the present Senate has a duty to turn away from the role of a rival Lower House, with all the enormously disruptive political consequences, and to look for more useful and rewarding complementary roles.

At the federation conventions the question of the Senate acting as a House of Review was raised, though it was not seriously debated. It was, however, the justification for its continuous nature, achieved by the rotation of Senators. Many political systems include a review body. 'The ancient Goths of Germany,' wrote Laurence Sterne, 'had all of them a wise custom of debating everything of importance to their state, twice; that is, once drunk, and once sober; drunk - that their councils might not want vigour; and sober - that they might not want discretion.'[16]

In more serious justification of a House of Review, it is customary to argue that two sieves are better than one; by this analogy, three are presumably better than two, and four than three. Of course it all depends on what the sieves are intended to achieve, how fine a product is desired, how much delay in flow is acceptable, and whether the same result could be achieved by more efficient means.

As the role of Upper Houses as protectors of special interests became less acceptable, this alternative role as a House of Review came into prominence. Walter Bagehot was tepid about the concept. 'With a perfect Lower House', he wrote more than a century ago, 'it is certain that an Upper House would be scarcely of any value . . . But, . . . beside the actual House a revising and leisured legislature is extremely useful, if not quite necessary.'[17] This concept also fitted Montesquieu's theory of the state as an equilibrium of forces through the separation of powers. The Bryce Report of 1918, for instance, held that a main function of second chambers was 'the interposition of so much delay (and no more) in the passing of a Bill into law as may be needed to enable the opinion of the nation to be adequately expressed upon it.'[18] But who was to decide when the will of the nation had been

adequately expressed, and what it was? And how was the second chamber to be limited to imposing 'no more' delay than was necessary? These were - and are - the unsolved questions.

The Senate has done some modestly useful work in the review role, providing a convenient way of tidying up defective legislation. Its effectiveness in the more serious examination of Bills has been severely limited by the rigidity of party divisions. The procedure for considering Bills which are being 'reviewed' (having already been passed by the Lower House) is normally identical with that used when a Bill is initiated in the Senate. Very few Bills indeed have been referred to Senate committees for public examination and report; even this has usually been done from a desire to shelve or emasculate a Bill rather than a genuine wish to improve its effectiveness.

A curious feature of the review role is that the Lower House is sometimes the reviewer. Senate Ministers naturally like to introduce their own legislation in the Senate, which gives the Representatives the task of reviewing - a task for which they seem very ill-prepared. They certainly have devised no special procedures.

But, in any case, this role of the Senate in reviewing the work of the Lower House has been overtaken by events. In all Westminster-style parliaments, the last century has seen, through the strength of party discipline and the development of party machinery, the domination of the Lower House by the Cabinet. This has been reflected in a dramatic growth in departmental bureaucracy and an extraordinary growth in administrative law and subordinate legislation. The power of the courts to constrain the Executive has been reduced; the Lower House has almost none. The restraining role, if it is to be performed at all, must fall largely on the Upper House. 'The House of Lords, which once stood guard over the actions of a too powerful House of Commons,' wrote Professor McKechnie, 'now stands guard over a too powerful Cabinet.'[19] The Government deserves great praise for the appeals system it has set up to review administrative decisions; and the Senate has its own Regulations and Ordinances Committee. Both these bodies are very valuable, but they look only at the legality and propriety of ministerial and bureacratic decisions. The desirability of the legislation itself is not really looked at by anyone.

Such control of the Executive cannot be carried out by the House of Representatives, because any government whose measures are consistently altered in the Lower House must be

assumed to be in the last stages of impotence or dissolution. Party committees are a frail reed, and in any case, they meet in secret. It is very unlikely that the option of the American system of a rigid separation of powers would be an acceptable alternative here. In the post-Nixon era the American system of checks and balances seems more check than balance. But in Australia the Parliament is neither. A good example is the way in which the major decision to raise oil prices immediately to world parity went through Parliament with almost no serious discussion, despite the enormous environmental, economic and oil exploration implications and the dramatic effects on the car industry and energy consumption. Certainly, Parliament heard no evidence from experts on the consequences of this decision - a decision for which Parliament, not the Executive, must ultimately take responsibility. It is not being argued that the decision is wrong; it is just that most Members of Parliament did not know whether it was right or wrong and made no collective efforts to find out.

As Parliament is operating at the moment it is accepting responsibility without power. What we are becoming is not a democracy but, to use Lord Hailsham's expression, an 'elective dictatorship', and the public service bureaucracy is the dominant force in this dictatorship. Certainly the Cabinet sets broad objectives but within these objectives the options presented to Cabinet and the details of any plan come from the public service. It is a brave Minister who goes counter to his departmental advice for, the public service being what it is, one will find that key Cabinet Ministers have been carefully briefed on what he is proposing to do and why he should not do it. Government by the public service is actually moderately good government but has little to do with democracy and nothing to do with the parliamentary system. It also assumes that the public service holds all the wisdom. On the contrary, there is a vast store of wisdom and knowledge in the community which we should tap. This is particularly important in this country, for our public service, centred in Canberra, is peculiarly isolated from the mainstream of community life. A possible answer to this problem lies in the gradual development of the Westminster system to a point somewhat closer to the American system, with a strong questioning Senate balancing the Executive. In this process the Senate, unlike any other chamber in the Westminster system, is uniquely placed to play a key role, since it cannot effectively be whipped into line by the threat of an election or of abolition.

For this role an effective committee system is essential. Remarkable advances have been made in the Senate's committee system in the last decade. These perhaps have been more noticeable in the field of inquiry than in legislative review, although even in the inquiry role the response by the Executive has been patchy. It does not seem possible that the Senate could ever function effectively as a House of Review of the proposals of the Executive while there are Ministers there. The six Ministers are, in effect, six Trojan horses in the Senate on behalf of the Executive. Of course the Ministers are charming people, but the Trojans thought their horse was charming too - and look what happened to them. It is inconceivable that the Senate could act as an effective House of Review while six of its most distinguished members are devoted to getting Government legislation through with a minimum of fuss, a minimum of alteration and a minimum of delay. There is an inherent and insoluble conflict of interest in this. Even more damaging to the proper performance of the Senate as a House of Review are those who are not Ministers but would like to be. The fact is that the whole aspiration pyramid in the Senate is skewed in the wrong direction. It is quite proper and natural under the present system for Senators to wish to join the Executive. But this utterly incompatible with a role as a House of Review, a check and balance on that same Executive. An effective House of Review must distance itself from the Executive it is supposed to be reviewing.

The aim of having a proper House of Review will not be achieved until all Bills automatically go to the appropriate committees. Of course, some will be dealt with very quickly but the appropriate committees must have the right and the duty to deal with the Bills. What Bills go to the committees must certainly not be decided by the Executive. In fact, *prima facie*, any Bill the Executive does not want reviewed should be one which should be given the most searching examination to find out why the Executive does not want it reviewed. The aim must be that all legislation that comes to the Senate is seen by the community to be reviewed. When considering Bills, evidence must be called from expert groups and, where appropriate, from the general public. Only by doing this can the general alienation of the community from the parliamentary process be removed. The average voter does not feel that voting for a kind of shopping list of proposals at a general election, some of which he probably does not agree with anyway, gives him any significant influence on the machinery of government. If we wish the

democratic system of government to thrive we must involve the community more in its processes.

It is not enough, incidentally, to allow a Bill to lie on the table of the Senate, for the public comments then go, not to Senators, but to the relevant Minister and through him to the public servants who are in fact the authors of the Bill. That is not legislative review at all. There must be legislative review in the Senate and we should not be satisfied with review by the bureaucracy. It is perhaps symptomatic of the problem that lobbyists do not really bother to go to much more than token efforts to influence members of Parliament. Lobbyists fulfil a valuable role, **provided** they are forced to give their evidence in public. At the moment the wise lobbyists concentrate on public servants in secret. What we have in this country to a very considerable extent is not only government by the public service and ministry: this is proper - someone must govern and Parliament certainly cannot do it. But we also have legislation by the public service and Cabinet rather than by Parliament; this must change.

Two things would flow from what is proposed. First, there would be substantially less legislation passed. Secondly, it would be necessary for the Government to be prepared to compromise much more in order to get its legislation through. Legislation could nearly always be improved by thorough public examination by a Senate committee. And there need not be too much concern about the sort of stalemates which develop in America between the Executive and Congress. Australia, unlike America, has a procedure for resolving deadlocks, a procedure[20] that prevents any Australian Senate pressing too hard when out of tune with public opinion on a major issue.

III. EFFECTS ON THE SENATE

The first proposal is that Ministers with Departmental responsibilities should no longer be appointed from the Senate. There would however be a need for the Leader of the Government in the Senate to be a member of the Cabinet (without real departmental responsibilities), possibly as Vice-President of the Executive Council, so that the priorities of government legislation could be properly represented to the Senate. The Senate might not agree with or might not accept these priorities, but at least it should know of them.

The absence of Ministers would necessarily change the nature of Question Time. The Senate is not very usefully

employed in probing day-to-day political events and in trying to score political points. Political point scoring can safely be left to the House of Representatives. What is needed from the Senate is more serious questioning on longer term issues. The Question Time procedure used by the British House of Commons would seem to be admirable for this purpose. If the House of Commons procedure were used the result would be this: Ministers would appear in the Senate on a roster basis to answer questions of which they would be given notice, and supplementary questions would be admitted not only from the questioner but also from other Senators. This would be an interesting experience for Ministers from the House of Representatives who would be unable to get away with their usual habit of answering a different question if they do not like the look of a question they are asked. This system, as used in the British House of Commons, would provide a very valuable and proper question time for the Senate. It might, however, be the most difficult reform for the Senate to achieve. The other reforms suggested could, if necessary, be imposed by the Senate. But the new-style question time would require the co-operation of the Executive.

The second proposal is that government Bills received from the House of Representatives should be formally introduced by the Leader of the Government, and immediately referred to one of the Standing Committees for examination and report. There would be no point in having a second reading debate on the broad principles of the Bill. That seems to be quite pointless. Anyway no one seems to listen now while the Senate does it. If a Bill passes the House of Representatives it can be taken that it is what the Government wants. The Senate should take the government Bill and examine it critically in a Standing Committee, hearing public evidence on it to see whether it does in the most efficient way what the Government says it wants done.

There is a great deal of expert opinion available in the community, an expertise which is often not available in the Commonwealth public service. These committee hearings must be in public and must involve the community to the greatest possible extent, in order to mitigate general alienation of the community from the parliamentary processes. Responsible Ministers would also frequently be required to give evidence on their Bills to the committees. There is nothing in the present Standing Orders to prevent such appearances and certainly wise Ministers would welcome the chance to improve the prospects of their Bills emerging unscathed.

Some may ask whether a committee is an appropriate instrument for such a vital review role. Many barbed shafts are thrown at committees, e.g. 'a camel is a horse designed by a committee'. A better description of a committee is that it is like a baby - a loud voice at one end and no sense of responsibility at the other. But these are criticisms of committees as executive bodies, in which role they clearly have many defects. But they are excellent for an inquiry role. An all-party Senate committee is a sound instrument to hold public hearings on proposed government legislation. When such a committee is gathered round a table hearing public evidence (rather than in the confrontational atmosphere of the Senate chamber) rigid party attitudes tend to melt away and there is a very general desire on the part of the committee to get the best answers to the particular problems before it. It would be inevitable that the conclusions of this type of committee examination in detail of government Bills would result in substantial amendments. This is a highly desirable prospect, for the idea that legislation, as produced by public servants and accepted or modified by the Cabinet, should be sacrosanct is utter nonsense.

Public hearings would also push lobby groups into the open. Lobbying is a legitimate part of the democratic process. As a major influence in the framing of legislation and government decision making it too should be subject to public scrutiny. At the moment pressure groups chiefly operate on public servants in secret. They should be forced into the open, which committee hearings would do.

Another advantage of referring Bills to committees is that they could be dealt with at leisure between sessions, as in fact was done with the Freedom of Information Bill. It would be of great advantage if this procedure extended more widely. Of course, some Bills are urgent and cannot be delayed, but these are much fewer than most people think and could be even fewer with proper forward planning by the public service. Some permanent heads have the reputation for bringing their legislation in at the last possible moment so as to limit the time for irritating parliamentary scrutiny. The Senate most certainly should not put up with this practice if it ever occurs.

As mentioned above, an inevitable effect of having proper committee examination of Bills would be that fewer Bills would be passed. This would be an unmitigated blessing. For the last ten years we have averaged 168 Acts a year with the record of 221 Acts in 1973 when the Senate was

supposed to be obstructive. Over the same period the British Parliament averaged 74 Acts and the Canadian Parliament 48 Acts. Admittedly we have special constitutional requirements that force us to bring in two Bills on certain money matters which in other parliaments would be covered in a single Bill; but such Bills have a minor effect on the total and in no way explain why we pass three times as many Acts as Canada and twice as many as Britain, particularly as the British Parliament combines the functions of our Federal and State parliaments. Worse still, typically more than 20 Bills are introduced into the Senate in the last week of a session and passed in the same week. The scant review they receive needs no emphasising.

IV. OBJECTIONS

What about objections to the reform of the Senate on the lines suggested? These fall under two headings. First it is suggested that it is unrealistic to expect Senators to give up the prospect of the power and prestige of ministerial office. And secondly, it would in the view of some, make the Senate too weak and irrelevant; in the view of others, too powerful.

On the first point, it is proposed that the chairman of the eight Legislative and General Purpose Standing Committees should receive the pay, entitlements and personal staff of non-Cabinet Ministers. If these Senate committees develop as they should, as public scrutineers of proposed government legislation and as watchdogs on the proper decentralisation of Executive power, their chairmen will be at least as powerful and important as any Ministers, and it is just that they should be appropriately recognised and rewarded. Compare, for instance, the power of a Chairman of a major committee in the United States Senate with the power of a Cabinet Minister. Incidentally, in case anyone thinks that eight chairmen is a rather excessive number to be recognised, it should be pointed out that they represent one-eighth of the strength of the Senate. The twenty Ministers in the House of Representatives are one-sixth of the strength of that chamber.

The purpose and desirability of the increased staff are obvious, although it should be emphasised that the increased staff would be for committee work and not for the chairmen personally. Senate Committees have always been ludicrously understaffed. The level of funding for Senate committee staffs is at present decided by the Executive, not the Senate.

Some may complain that removing extra pay and entitlements from six Ministers and giving them to eight chairmen would be a substantial additional expense. This is not so. The pay and entitlements of a Minister are only, to use a currently overworked expression, the tip of the iceberg. Each Minister has to have a department; each department has to have premises and a secretary and deputy secretaries and first assistant secretaries and all the rest of the infrastructure. The cost of running a separate department as opposed to the same function being carried out by a division of a larger department could not be less than several hundred thousand dollars a year and is probably, under Parkinson's law, much more. There would, therefore, be great economies in reducing the Ministry by six and giving the equivalent entitlements to eight chairmen.

While on the subject of Ministers, it will no doubt be said that it is unrealistic to assume that the elimination of Senate Ministers would not result in an immediate increase in the number of Ministers in the House of Representatives. This may happen but it certainly should not. There are at present 20 Ministers in the House of Representatives. On any reasonable administrative structure there should not be more than 20 Government departments. The factors pressing a Prime Minister to have more Ministers - State balance, the need to recognise ability, to reward supporters and to foster talent - would not be increased by the elimination of Senate Ministers.

If additional political supervision of the bureaucracy is required - and it clearly is - the response should not be the weirdly extravagant and inefficient one of creating new Ministers and new departments, usually without a proper chain of responsibility to existing departments. It would surely be preferable to extend political control by appointing parliamentary secretaries to Ministers. Such parliamentary secretaries have the advantage of being unpaid and of not needing a departmental structure of their own. It is also a very convenient way of trying out the administrative ability of promising back-benchers. The Prime Minister has recently appointed two such parliamentary secretaries, one to himself and the other (curiously) to the Minister for Primary Industry. This type of appointment should be widely extended.

But what about the change in the power of the Senate? The Senate would not acquire any new power, it would just use beneficially the power it has already. And the Senate would be giving up some powers it has used in the past. But

it is not really a question of adding up and subtracting the various shifts in the use of power. The only question is whether it would make our parliamentary system more efficient and more respected by the governed.

This leads to the final doubt.

Why so radical a change, why not continue with gradual development? The answer is that we have gone about as far as we can by gradualism. The committee system is now firmly established. But it cannot be used effectively for searching review of the legislative proposals of the Executive while there are Ministers in the Senate.

V. IMPLEMENTATION

How can such a reform be brought about? If it is to last it will be essential that it have all-party support, and it must be accepted that it will be fiercely opposed by the Executive. That happened with a much less radical reform, when the Senate established its present committee system; that change was resisted step by step by the Executive, but it was achieved by the determination of an all-party coalition.

Such a coalition could be put together on this issue. Three Liberal senators[21] have publicly expressed their support, and several others are sympathetic. The Australian Democrats are committed to the reform. The Australian Labor Party is committed by its Platform to the removal of Ministers from the Senate,[22] though its position is complicated because elsewhere in the Platform there is reference to the removal from the Senate of power to reject, defer or otherwise block money Bills, and the placing of a time limit on the Senate's power to delay legislation.[23] The last two would of course necessitate amendments to the Constitution, and the Labor Party must be aware that there is no prospect of these being passed in the foreseeable future.

It would certainly be possible, in the present Senate, to pass a motion stating the view that there should not be any Senate ministers with Departmental responsibilities. But this would not achieve any result; it would simply be ignored by the Executive. To make the Senate's will effective, a series of actions would have to follow. Standing orders would have to be amended:

> To provide that Government legislation could not be originated in the Senate.
>
> To direct each Government Bill received from the

Representatives to a Senate Standing Committee for public examination and report.

To eliminate Second Reading debates on Government Bills.

To set up a 'Rules' Committee to decide which Government Bill went to which Senate Committee, and by when the committee should report to the Senate.

To remove any procedural privileges for Ministers, and to give comparable privileges to the Chairmen of Standing Committees.

To modify Question Time on the lines suggested above.

If these were implemented, the reform would be in place. It would remain only to arrange through the Remuneration Tribunal, fortified if necessary by a requested amendment to the Remuneration and Allowances Act, for the appropriate payments to be made to the Chairmen of Standing Committees, and for the cessation of payments to Senate Ministers.

The passage of such a reform, in the face of determined Executive resistance, would require sustained determination by the reform coalition. The Executive has some very strong weapons, of promised rewards or threatened retribution. But it is to be hoped that principle will prevail over possible preferment, for the Senate must turn away from the role of trying to compete with the House of Representatives on its level, for the end product of that will be destruction of responsible government. The Senate is desperately needed in roles which it alone can perform, as a watchdog on the proper decentralisation of Executive power and as a public chamber of review of the implementation of the policy decisions of the Executive. There is the chance over the next few years to make the most important and dramatic advances in the system of parliamentary government to occur this century. I hope we will seize our chance.

Notes

1. Quoted in the foreword to J.R. Odgers, *Australian Senate Practice*, Canberra, 1976.
2. K.C. Wheare, *Federal Government*, OUP, Oxford, 1953, p. 189.
3. Quoted in F.A. Kunz, *The Modern Senate of Canada 1925-1963: a Re-appraisal*, University of Toronto, 1965, p. 6.
4. Quoted in Max Ferrand, *Records of the Federal Convention*, New Haven, 1911, vol 1, p. 222.
5. National Australasian Convention, *Official Record of the Debates, Adelaide, 22nd to 30th March, 1897*, p. 297.
6. *Ibid.*, p. 174
7. Australasian Federal Convention, *Official Record of the Debates, Melbourne, 20th January to 17th March, 1898*, p. 1924.
8. The DLP Senators.
9. *States Receipts Duties (Administration) Bill*, 1970.
10. J.A. La Nauze, *The Making of the Australian Constitution*, Melbourne, 1974 p. 148.
11. Odgers, *op. cit.*, p. 13.
12. Results of questionnaire to Ministers and Ex-Ministers in 1976. Table taken from D.J. Hamer, 'The Australian Senate 1901-1919: an Appraisal', M.A. thesis, Monash University, 1977, p. 427.

		Whitlam Government		Fraser Government	
Q1.	From your experience as a Minister is the use of the word 'constantly' in the above quotation:	Sen	Rep	Sen	Rep
	Reasonable	-	-	-	-
	Exaggerated	1	1	1	2
	Absurd	2	8	2	7
Q2.	From your experience as a Minister, does parliamentary pressure on interests which 'safeguard and promote the interests of their States' come:				
	Mainly from Senators	-	-	-	-
	About equally from Senators and Representatives	1	-	2	2
	Mainly from Representatives	1	5	1	4
	Never had any	1	4	-	3

13. Patrick Weller, ed., *Caucus Minutes 1901-1949*, Melbourne University Press, Melbourne, 1975.
14. Letter from Sir Garfield Barwick to Sir John Kerr, dated 10th November, 1975. The complete text of this letter, among other references, can be found in Odgers, op. cit., pp. 67-68.
15. Australia, Senate, *Debates*, 5 April 1973, p. 928
16. Quoted in S.D. Bailey, ed, *The Future of the House of Lords*, London, 1954, p. 7.
17. Walter Bagehot, *The English Constitution*, Fontana, London, 1963, pp. 133-34

18. *Conference on the Reform of the Second Chamber (Cd. 9038)*, London, 1918, p. 4.
19. Quoted in G. Ross, *The Senate of Canada*, Toronto, 1914, p. 84.
20. S.57 of the Constitution provides that if the Senate twice (with an interval of three months) rejects, fails to pass, or unacceptably amends a Bill passed by the Representatives, there may be a double dissolution. If the stalemate continues after the election, the matter may be resolved at a joint sitting of both Houses.
21. Senators Rae (Tasmania), Thomas (Western Australia) and Hamer (Victoria).
22. Australian Labor Party, *Platform, Constitution and Rules as approved by the 33rd National Conference, Adelaide 1979*, Canberra, 1979, p. 20.
23 *ibid.*, p. 19.

4

Choosing the Lesser Evil

Anthony Rutherford and John Hyde

'I only wish to insist that we must expect every elimination of an evil to create, as its unwanted repercussion, a host of new though possibly very much lesser evils, which may be on an altogether different plane of urgency. Thus the second principle of sane politics would be: **all politics consists in choosing the lesser evil** (as the Viennese poet and critic K. Kraus put it). And politicians should be zealous in research for the evils their actions must necessarily produce instead of concealing them, since a proper evaluation of competing evils must otherwise become impossible.'[1]

Anthony Rutherford has been research assistant to John Hyde MP, for six years. He was before that a tutor in the Department of History at the University of Western Australia. He took his first degree in mediaeval history at that University and his second in Celtic languages at the University of Edinburgh. Dark-age British history still occupies much of his spare time, and he has published articles on aspects of the period in the *Bulletin of the Board of Celtic Studies* and *Proceedings of the Society of Antiquaries of Scotland.*

John Hyde has been Liberal Member for the Federal seat of Moore since 1974. In his eight years on the back bench he has been a consistent advocate of the liberal point of view, particularly on trade and other economic matters. Mr Hyde has taken an active interest in parliamentary reform during his career as an MP, and was one of the principal architects of the new Legislation and Estimates Committees of the House. Before entering Parliament he was a wheat and sheep farmer in Dalwallinu, Western Australia, active in local government and in the State Liberal Party. He has recently published a manifesto, *The Year 2000: A Radical Liberal Alternative*, which has been widely discussed both as a critique of present policies and a starting point for future strategies for Liberal governments.

Choosing the Lesser Evil

Anthony Rutherford and John Hyde

I. THE FUNCTIONS OF THE HOUSE

The elective function

There is such widespread agreement that the Parliament, and in particular the House of Representatives, is unsatisfactory that it is worth considering at the outset what things it does well and only then how well it does those things we expect of it.

Bagehot, writing one hundred and fifteen years ago, had fewer illusions than most of us today. 'The House of Commons', he wrote, 'is an electoral chamber; it is the assembly which chooses our president.'[2] The firmness with which Bagehot stated the view that the electoral was the most important function of the House is not amiss even now. From an understanding of that essential point stems an understanding of much of the rest, as well as a certain forgiveness of apparent failures.

The most common complaint among the greater electorate concerning the House in Australia is that its standards of conduct are in many respects unseemly. The House is often both noisy and indecorous; but to condemn it on those grounds is both to forget the nature of the prize for which the players in the game are contending and to fail to consider the alternatives for the gaining and transmitting of power, from settled monarchy to bloody anarchy. Even the most flagrant abuse of parliamentary privilege (which ought never be a licence to slander), the least attractive incivility of the House, is in the end preferable to a succession determined by privilege or violence.

When considered on this ground alone, the House is more than satisfactory. If it did nothing less, the Prime Minister of the day could still at the end of a session claim with Bagehot's Minister, 'Parliament has maintained ME, and that was its greatest duty; Parliament has carried on what, in the language of traditional respect, we call the Queen's Government; it has maintained what wisely or unwisely it deemed

the best executive of the . . . nation.'[3] It has above all conferred upon the Executive the authority which enables it to govern for the most part without violence to the citizen.

This is a virtue, and a very considerable one. It is also the root of many, probably most, of the vices of the House, insofar as it influences the behaviour of Government to Opposition, Opposition to Government, front bench to back bench, back bench to front, not to mention government to governed. Most importantly, perhaps, the Executive survives the continual electoral process by the skill of its day-to-day performance; it is the quality of the performance that counts, rather than the worth of the script being played, and it matters little that the script may be worthless - low farce rather than high drama. That means in practice that good government, however defined, is not necessarily part of skilful government. No suggestion for reform which fails to take into account these factors will prove acceptable, let alone efficacious.

When we turn from this essential matter to look at those other functions traditionally ascribed to the House, it can be seen that all are performed in such small measure that they can best be regarded as token.

Review of legislation

In the parliamentary sittings of 1980, the House sat for 51 days. In that time 152 Bills were originated in the House; 87 of those Bills passed all stages in four sitting days or less, and the average time taken for passage was 5.13 sitting days. Only 9 bills were amended during passage; no successful substantive amendment was moved by either the Opposition or by the Government's own back bench. Of course some legislation - a notable example being the two-airline Bills - is extensively altered in draft before it reaches the House. This is, however, fairly rare: backbench party committees are usually able to make only peripheral change to draft legislation, even when the Minister is cooperative and the committee competent. It is scarcely reasonable to assume that this Executive dominance is a sign of inherent perfection in the legislation in question. The role of the backbench, again, in introducing legislation has always been small in Australia, certainly smaller than at Westminster. This is not, probably, a serious loss: many of the areas covered by such Bills in the Commons are in Australia the responsibility of the States; and in many other cases a simple notice of motion (whether debated or not), question or speech will

serve the same purpose, which is not usually to effect a situation by law but to contribute to the argument in the hope of changing the opinion of either the Executive or the electorate.

Review of revenue and expenditure

Differences between methods of presentation perhaps make it less easy for the Representatives than for the Commons to review the whole fiscal process. For the past three years, the expenditures for each Department of State have been referred to budget estimates committees. These have not been operating long enough to be properly assessed, but they are unlikely to be effective while they operate at the whim of the executive and within their present narrow limits. Debate on income tax and other tax legislation is routine; debate on customs tariff proposals negligible to the point of absurdity. The three standing committees of the House - the Expenditure Committee, the Public Works Committee and the Public Accounts Committee - do as good a job as can be expected, but their findings - and the increasingly important reports of the Auditor-General - are treated too lightly, while the consequent parliamentary debates tend to add weight to the belief that the principles of ministerial responsibility are moribund. Although the Auditor-General's reports allow for a measure of efficiency audit, and the standing committees are able to look at forward fiscal planning, neither procedure is adequately institutionalised in the forms of the House, nor do Members have the resources (such as the Congressional Budget Office of the USA) to enable them adequately to view the whole.

Review of administration and delegated legislation

In an everyday, and largely unrecognised, way, administrative review forms most of a Member's electorate work, and most Members are substantially electorate politicians. But in a less empirical way, such review, not only of administration but more importantly of the legislative instruments of administration, is negligible. Even a persistent fault found in electorate work, as in social security, taxation or immigration regulations, is only rarely corrected either by representations to the Minister responsible or by public (e.g. adjournment or grievance) debate. In the House of Representatives, prospective consideration of regulation is virtually unknown; both the method of legislation and the

overwhelming volume of regulation consistently work against it. More and more review is being undertaken by Ombudsmen, and by such bodies as the Social Security Appeals Tribunal and the Administrative Appeals Review Tribunal: their theoretical basis can be considered as dubious, and their success in reviewing the policy, rather than the administration, of regulation is necessarily slight.

The educational functions

Bagehot saw the 'expressive' and the 'teaching' roles of the Commons as of some importance.[4] The second of these is now (in Australia) almost obsolete, due partly to the rise of public relations machines, partly to an increasing desire on the part of back bench politicians to dissociate themselves from an unpopular government in their electorates, but most of all because both Ministers and back bench convey misinformation in attempting to create an impression favourable to their party. An associated factor must also be the increasing difficulty of explaining publicly the relationship between a government's political acts and its avowed political philosophy. Statements of those philosophies are, more and more, merely ritualised parts of the electoral process, intended to demonstrate poles of political ideology which are otherwise too often undetectable from political practice. The expressive function - the name applied by Bagehot to the process whereby the Members collectively expressed the mind of the electorate on matters of consequence - is less moribund, but increasingly seems to take place in private or outside the House. Well-made representations to the Minister would seem to be more influential than any debate in the House, a well-placed press release more influential than that, but the work of a lobby, with or without the involvement of a private Member, enormously more influential than any. We have in the last three or four years seen a number of major matters - such as the decision in 1978 not to introduce a broad-based sales tax, or the decisions to continue protection for the footwear, clothing, textile and motor vehicle industries - decided largely by the direct action of pressure groups on the Government without the back bench's playing any necessary part at all. The success of any such large-scale pressure group seems often to be in indirect proportion to the logical strength of its argument and in direct proportion to the vigour with which the argument - or threat - is put.

II. CONSTITUTIONAL PRINCIPLES AND THE HOUSE

Besides these, and other, easily recognisable functions, traditional constitutional theory lays upon the House the duty to uphold certain abstract principles. The principle of the separation of powers, for instance, should be seen to be a concern of the Legislature. It is a notion which has from the time of the making of the Constitution been more implicit than explicit in parliamentary thought. (The Founding Fathers in the 1890s were, with characteristic prescience, more concerned with the cost of the High Court). But recently it has emerged publicly again: new legislation (in the schedule to the Statute Law Revision Act, 1981) requires the courts to take into account the stated intention of legislation. This may be construed by some as prejudicing notional separation. To discuss it more fully here - to discuss, in particular, the central notion of where legal creativity properly lies - would not be possible. It is, however, disappointing that the Parliament has collectively failed to see that the doctrine has wider and now perhaps more serious relevance to, for instance, the Government's relationship to the Industries Assistance Commission, many of whose recommendations are of far more moment than the decisions of the High Court.

More seriously still, the same traditional theory imputes to the Legislature a duty to have concern for the rule of law. It cannot be said that the House - or for that matter any Australian Legislature - has demonstrated much conscience in this regard. The rise of the powerful lobby and the need to fund increasingly expensive election campaigns have meant that governments of all political colours have increasingly found it difficult if not impossible to refuse protection to vested interests of all kinds: monopoly industry, monopoly labour, and not least of all their own public service. To these must be added the growing demands on Government (and on Treasury) arising from the continuing creation of large groups of recipients of personal transfer benefits - in pensions and other income security payments, allowances and tax deductions - for the most part granted irrespective of any adequate measure of need and which are the by-products of election by auction. The maintenance of tariffs and quotas for car manufacturers, of award wages, of financial assistance for impecunious mining ventures, of benefits for those to whom it is an unnecessary perquisite - these practices, recalling and exceeding the worst kind of eighteenth-century grace and favour government, inculcate a

widespread cynicism towards the Legislature and the law, a contempt which may in the end be more damaging to democracy than the purely economic consequences. Nor can the economic consequences be separated from the ethical. In order to finance the sale of favours, increasingly high and complex exactions of taxation are necessary; this in turn has created an industry of tax evasion and avoidance whose existence may well turn out to be the single greatest immediate threat to the rule of law. It should be conceded that the phenomenon is scarcely new: those with a liking for gloomy historical parallel may find it an interesting reflection that Saint Patrick's father, the last Roman Briton of whom we know anything at all, was a tax evader.

The need to speak in broad generalities has perhaps darkened this picture too much in some areas. It needs to be said that within any Executive there are Ministers who not only take their duties seriously (that indeed is the rule rather than the exception) but who also have a serious regard for their relationship with the Parliament. That relationship is often characterised, however, by fear rather than reason and respect; its end result is all too often expressed in temporising and expedient makeshift.

For the institution of Parliament to function well, it is entirely necessary that all its participants should take its various roles seriously (and, paradoxically, themselves perhaps a little less so). The electoral college role of Parliament so dominates all others that its legislative, administrative review, financial control and educational functions are lost amid the inter-party games and one-upmanship of daily politics.

This has been only a partial catalogue of disorders: no doubt others could add to it or would give more weight to some particulars. The diagnosis, however it varies, is simply made; the remedies, and their application, are rather less so.

III. REMEDIES

There is no certain or quick remedy to be found in constitutional change. Good government and the means by which it is achieved are not necessarily susceptible to such codification, which in the end describes only forms and intentions. It may be remarked, conversely, that none of the current schemes for rewriting the Constitution will in the end have very much to do with the quality of government: issues such as the power of the Senate to block supply are in this context peripheral. Nor is there any special virtue in a

wholesale rearrangement of functions as between House and Senate. None of the functions we have identified should ever be performed only by the Senate: to subtract any of the Houses's roles (let alone the entire process of review) would be in effect to increase and magnify the failings which already have their cause therein. Nor should the Senate be reduced only to the reviewing function. Ultimately that idea seems to rest on Bagehot's observation that the House of Lords, '. . . as a body, is accessible to no social bribe';[5] it sets too low a value on the virtues of both party and ambition.

The remedies, such as they are (and they may well prove inadequate to the disorders) are rather to be found in considering piecemeal and incrementally, small and particular ways of improving on the performance of each function. In many cases, legislative change or change to Standing Orders may be necessary, requiring, for instance, certain kinds of scrutiny to be gone through before decisions may be properly made. It is necessary to enter a preliminary caveat: these procedures are open, to a lesser extent perhaps, to the same kind of objections as were applied above to constitutional change, in that no amount of optimistic institution of new forms can be made to work well if the intention to make them work is absent. What follows is, again, a partial catalogue; it could only be complete at the risk of departing altogether from the realms of the possible.

The Committee system

Since Members generally conduct themselves with greater civility, more carefully weigh the merits of an argument and are more inclined to place the interests of nation above party when in closer contact across a committee table, away from the theatre of the chamber, attempts have been made to remove some of the potentially more detailed debate to legislation and estimates committees. These two fledgling reforms of the House must be firmly established, and consolidated by constant use.

Legislation committees have a number of uses and amiable characteristics already obvious. A good deal of legislation is so minor, so technical or so politically uncontentious that it is pointlessly time-consuming to have it debated through all stages in the House. At a conservative guess, at least one-third of all Bills could have their committee stages taken out of the Committee of the whole House and into a smaller body, where debate is at once more

rational and more constructive. The question then arises as to how much of the other stages could similarly be referred. Since the committee is an integral part of the House, there would seem to be no good reason why in many cases the whole second-reading debate should not be omitted or so transferred, so long as there remained proper reporting procedures and the right for any Member to speak should he feel the need when the Bill returned to the House for the third reading.

The principal virtue of estimates committees as demonstrated to date has been in allowing Members to submit Ministers to an inquisition, and Ministers for their part to make more detailed and sensible answers to questions than has hitherto been the case. Indeed, many estimates committees have been object lessons in what Question Time could become. But is that all they can do? As the sessional orders now stand, an estimates committee cannot, unlike a legislation committee, amend the Bill before it. That is probably right: such amendments are likely to be of such consequence, even directly affecting the stability of the government, that it should be moved in the whole House in the regular appropriation debates where tighter party discipline will prevail and where all Members may vote. In this sense, then, the estimates committees can be improved not by widening their powers but simply by practice. Since debate within them is better reasoned than the set-piece speeches they replace in the chamber, they contribute better to Parliament's educational role. As they do not amend the legislation they cannot be said to have direct control over expenditure. They do, however, possess at least the potential for influence. Properly used they can compel a Minister to think through and publicly express a justification for individual expenditures. There they contribute also to the 'expressive' role of Parliament in as much as the Minister is compelled to listen and respond to argument which will reflect popular aspirations. The committees hold the political sanction of exposure should a Minister be unable to justify his stewardship.

These thoughts lead to the consideration that estimates committees should have another function at another time in the parliamentary year. They should be able, in fact, to sit in consideration of forward estimates. That would, in Australian terms, mean a significant shift in the attitude of the Executive. But by the time the budget proper is brought down it cannot be tampered with. Consideration of forward estimates would allow Parliament and Executive publicly to

discuss the aggregates in a reasoned way. The advantages gained from that would not accrue entirely to the Parliament: the Executive would almost certainly gain from an annual explanation in public of the nature of its burden, less hindered by the factitious furore which usually greets the budget.

Close consideration should be given to extending the committee system (including, as always, a stage of reporting and debate on report in the full House) in other directions.

The present Prime Minister suggested some years ago that the House should establish a committee to examine the reports of the Industries Assistance Commission. That is a valuable suggestion but is perhaps too narrow in scope. A good deal of industries assistance goes through the House in the form of customs tariff proposals. Debate on these currently is minimal and unenlightened, and must improve.

A possible method of achieving some of the necessary scrutiny may lie in an adaptation and extension of the British theory of distinguishing 'private Bills' from others. A Bill which nominally benefited one person or company alone (such as recent legislation in favour of the Chrysotile Corporation and Mt Lyell Mining) or which had the same effect though anonymously (such as legislation affecting the steel industry, the sugar industry, and other such monopolies or near monopolies) should be referred to a Private Bills committee which would not only subject it to more than usually close scrutiny but also, as in Britain, be open to public submission.

The foregoing suggestions should have as their first two aims scrutiny and publicity, with the discipline that they bring. These two aims are already being pursued in the Senate with respect to another, until recently neglected, area of government activity, that of delegated legislation. It is open to reasonable question whether the House could and should emulate the Senate's example in this regard. Perhaps one chamber could assist the other by assuming responsibility for easily identifiable classes of regulations and ordinances, as for instance those relating to administration of the Australian Capital Territory or the defence forces. Certainly the question should publicly be asked, and the whole matter aired. In particular it must be asked whether governments should be permitted to legislate by announcing regulations and ordinances which may then be disallowed by the Parliament ('negative resolution') or whether positive approval must always be gained. Although it is probably true that the operations of the Senate committee have improved the drafting of delegated legislation, there is no sign that the flow of such

legislation has decreased, even though it is widely believed by those most closely affected by it that much of it is burdensome and unnecessary. If the House of Representatives were to force itself to consider all regulations as it does Bills, the monstrous nature of the task might of itself place a limit on the over-regulation of a long-suffering public.

Similar considerations apply to the oversight of the activities of government-owned business enterprises and other such statutory bodies. Although at various times in recent years various activities of the biggest half-dozen such enterprises have been called into question, there is no regular investigative machinery in the House which would enable a proper and continual review. It may perhaps be better, rather than carelessly suggesting yet one more committee, to see what further emerges from the deliberations of the Senate Committee on Finance and Government operations.

Working conditions and procedures

Of course, there can be no effective committee system in the House without an accompanying improvement in working conditions. These committees need to be able to meet outside the regular sitting hours of the House; their members need, for all but extraordinary circumstances, to be exempt from votes and quorums; some will need secretariat assistance; and so on. At the same time, some of the less pleasant and more time-consuming habits of the House need to be corrected.

It should be possible to arrange divisions at predetermined times, as is done at Westminster, so that Members are free to attend to committee work, research or electoral work, or more persuasive lobbying on behalf of their favoured causes, without the need to stay within earshot of the bells and without their interruption. The power to call quorums is a discipline used by oppositions on governments, usually after a disagreement about House procedure. Oppositions do need to have rights and they do need to be able to protect them; but there are many rights that they might be accorded - such as a better question time, more Private Member's time, privileges in relation to the order of business - which do not involve a mindless waste of time. Incidentally, if it were no longer possible to call divisions and quorums by ambush, Members could work in other buildings near Parliament House, and the present accommodation would be large enough to house Members and some much needed staff in Canberra.

There seems to be no good reason, further, why a suitable electronic voting system could not be introduced, to save not only time but tempers. The parties might themselves also consider whether a graduated method of whipping might not be introduced. The assumption behind that present method, that all votes and divisions are equally weighty, is not only patently untrue but also patently unhelpful in that it further persuades the Executive in its view that all dissent is equally intolerable.

In suggesting more and more devolution of work to committees there is an assumption that not only will that work be better done but the House will be better able to do other things. If question time is to be taken seriously, it should be better organised. The ability to ask supplementary questions is essential; partly for this reason, the House should consider rostering Ministers. It should also consider whether questions might be asked at other times, as for instance, after ministerial statements. Such statements should be subject to longer and closer debate than is presently the case. It goes without saying that the time presently used on debating, say, the Pig Meat Promotion Levy Bill through all its stages would be more profitably spent on debating the larger issues of foreign affairs, defence and the economy; it might also be used to discuss issues which are now virtually neglected, such as the reports of the Law Reform Commission. While a government must be able to stipulate that it will have its Bills by the date that they are needed, the program of the House otherwise could or should involve much more cooperation with the Opposition than it does now. It should be practice for the Leader of the House to advise the Opposition spokesman that a certain Bill is wanted by a certain day and then to divide up the debating time in a reasonable manner.

Above all things the House needs more time. Most legislation should take six months or more from the date of introduction to third reading, so that Members have time to come to grips with it and so the affected public can comment. The Parliament should sit for longer. This could be achieved with little inconvenience to any Member and advantage to some. It is interesting to reflect that in its first ten years, from 1901 to 1910, the House of Representatives sat for an average of 759 hours per year and passed in each of those years an average of 23 Bills; from 1971 to 1980 it sat for only 716 hours per year and passed an average of 173 Bills in each. At present Parliament sits on Tuesday, Wednesday and Thursday of each sitting week, so

that Members who travel long distances must spend a day-and-a-half travelling for each three days sitting. If Parliament sat for longer than three-day periods, some of the time now spent travelling might be used more profitably.

Ministers habitually travel in the 34 Squadron VIP fleet of aircraft; but such is their regard for the activities of Private Members (not to mention the taxpayer's dollars) that they will travel with empty seats and junior staff but enforce a rule that denies Members the convenience of a better flight time on a direct flight to Canberra. While this is not very important in itself it illustrates an attitude which is a major barrier to even minor reform of the Parliament.

IV. CONCLUSION

The reforms proposed are small in scope and unrevolutionary in method. In that they impinge for the most part on the relationship between House and Executive, however, they require a change of attitude which is nearly revolutionary.

There is a widespread assumption within all executives that Private Members lack the competence necessary properly to review or amend legislation or executive action of any other kind. The assumption is false on a number of grounds. It allocates an arbitrary importance to the status of Minister, insofar as it assumes that a backbencher may on one day be incompetent to review legislation but on the next, newly elevated, be competent to introduce and guide it through the House. (A truer assumption might relate to the information available to the backbencher, but that lack is to a certain extent remediable.) And although the House never represents the cream of Australia's most intelligent and able, it ignores the fund of skills invariably available in the House, the collective strength of which would usually exceed that of the Ministry.

But contemplation of the relationship between the House and the Executive raises other more important considerations. It is a serious enough matter that the House, or the whole Parliament, should have sufficient regard for the rule of law to ensure that the laws it makes are workable and intelligible to the governed; and to the extent that the laws proposed are said to be unintelligible to (or beyond the competence of) the representatives of the governed they are probably bad laws. In this context one should take as a serious warning the recent assertion by the Attorney-General that Parliament is being '. . . overwhelmed by legislation of enormous proportions and growing technicality, to an extent

that . . . it is beyond our capacity as parliamentarians to handle it.'[6] It is in the long run more serious that the increasingly unintelligible complexity of laws reflects an attempt to govern the ungovernable, or, more precisely, that which should not be governed. The nation, after all, in the sense of the sum total of all human transactions, represents a state of affairs in which the limits of government are determined by the limits of knowledge. To give only the most trite example: the making of a law forbidding murder does not depend on the same kind of knowledge of its operations as does, say, a law prescribing who shall or shall not own petrol service stations. The consequences of one are, for all ordinary circumstances, knowable, while the consequences of the other are not; one preserves the principle of equality before the law, while the other does not; and one would seem to be necessary for the peaceful and lawful conduct of society, while the other is not.

This is a matter with a more practical bearing on parliamentary reform than may at first sight be apparent. Historically, Parliament was, in form at least, an institution for the making of law, to preserve peace, justice or (often unwarranted) privilege. That function still exists. Surpassing it in volume, however, is a more modern function, that of regulating economic activity, which grew out of Parliament's other historic function, that of legitimising taxation. The House of Representatives could perform its law-making function quite adequately with the kind of minor procedural changes suggested. It is open to question, however, whether the second could ever be adequately performed either by this House or indeed by any representative democratic institution. For regulation of economic activity involves, willy-nilly, the redistribution of economic resources within the community of the governed, and there is no theoretical or practical basis for assuming that the task lies within the competence of the institution. Theory and practice suggest the reverse: that the task is best performed by the market. If that is the case, then procedural change is largely beside the point. It will serve some purpose only if by increasing public scrutiny and debate the limits of law and government can be more widely recognised. Hence the insistence on time and detail. While the overriding task of Parliament - or the House - is to maintain a government, it can only do that and all its other tasks better if it does less, more slowly.

Notes

1. Karl R. Popper, *The Open Society and Its Enemies*, Princeton University Press, Princeton N.J., 1971, p. 334.
2. Walter Bagehot, *The English Constitution*, Fontana, London, 1963, p. 150
3. *ibid.*, p. 152
4. *ibid.*,
5. *ibid.*, p. 137
6. Australia, Senate, *Debates*, 28 May 1981, p. 2314.

5

Diversity, Constitutionalism and Proportional Representation

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I. INTRODUCTION

The idea of representative government has within it two competing strands. One stresses the need for governmental institutions which respond to the diversity of opinion of preference that exist in the community, the other stresses the importance of coherent government action to implement the policies chosen by representative institutions. These strands conflict in that the more responsive governmental institutions are to the range of views in the community, the harder it is for governments to arrive at general solutions to policy problems. This tension is one manifestation of the trade-off between limited government and effective government long noted by writers on constitutionalism.[1]

In any given liberal democracy there will be a running compromise between these two themes and, in general terms, the style of constitutionalism will reflect the particular trade-off between them. This being said, it is clear that the British parliamentary tradition, in contrast to the tradition of the United States, has a strong propensity to compromise towards the end of the spectrum that favours coherent government action at the expense of the representation of diversity. A parliamentary system with its need for continuing majorities in the legislature to sustain the political life of the executive has the often observed effect of dichotomising parliamentary politics between the government of the day and the opposition, whatever the range of opinion in the community. As a corollory of this, parliament becomes more important as a prop for strong executive government than as a body representing diversity.

It might be argued, of course, that there is no inherent reason why parliamentary government should move in this direction, since the tendency towards executive dominance is dependent on another factor, that of party. The rise of the modern mass party has been linked with the ability of the executive to have reliable majorities in the parliament and a correspondingly disciplined body of voters in the electorate.

The mass party has brought with it what Beer has called the collectivisation of politics,[2] in which representative government is seen as a struggle for power between two major contestants, government and alternative government, each with a comprehensive plan for political action over the term of office. Such a view of politics is widespread in Australia and is often cited as a desirable mode of conducting the business of government. All those who favour strong government, deplore the uncertainties of coalitions, disapprove of the vagaries of hostile upper chambers, are suspicious of legislatively induced compromise, and argue that the Executive is in power to govern, are espousing a view of government that has little time for the representation of diversity.

It is this prevailing view of government which explains the suspicion and hostility with which proportional representation (PR) has often been treated. PR starts from the premiss that diversity should be accurately reflected in representative assemblies, and questions the need for and desirability of dichotomous electoral choice.[3] Moreover, the single transferable vote variant of PR goes further and rests on the assumption that the hold of parties over the selection of candidates should be loosened, striking at one of the major tenets of the mass party. For these reasons, even though PR raises technical questions of considerable interest to those concerned with the mechanics and theory of collective choice, much of the literature on the subject is cast in terms of strong advocacy or opposition precisely because of differing opinions about the nature and purpose of representation and rival claims about its effect on government.

Australia is in a good position to assess the effects of PR since it has tried a variety of electoral systems over its political history and is using PR to elect members to four of the thirteen legislative chambers in Australia's parliaments. It is the intention of this essay to look briefly at the various forms of PR and the Australian experience of PR in the context of its effect on the relationship between electoral systems, party systems and styles of representative government.

II. PROPORTIONAL REPRESENTATION AND THE NATURE OF ELECTORAL CHOICE

Proportional representation systems in general are geared to produce representative assemblies that closely mirror the pattern of electoral opinion in the community. Other electoral systems have this as one of their objectives but PR

puts relatively more stress on numerical fairness of representation in assemblies than such other competing goals as producing parliamentary parties with majorities from electoral parties with pluralities, or encouraging a strong geographical linkage between the electorate and its representatives. PR systems can, of course, be manipulated to accommodate considerations other than the accurate reflection of voting support - it is one of the aims of this paper to show how this has occurred in Australia - but PR systems have a prime concern with producing representative assemblies whose composition replicates the pattern of electoral support in the community.

This result is achieved by electing members from multi-member districts and allocating seats among the competing candidates in proportion to their electoral support. The mechanics of this process can be complicated but the principle is simple - if a quarter of the electorate supports candidates with a certain approach to political issues, then the electoral system should produce an assembly, a quarter of whose members share this approach - representation should be in proportion to electoral support.[4]

The development of PR has, however, been highly ambivalent towards what is to be represented in assemblies and, in particular, towards the role of parties in the political process. The two major variants of proportional representation - list systems and single transferable vote (STV) systems - are divided not only by major technical differences in their operation but in their intended effect on the extent of party control of the electoral and governmental process.

List systems of PR achieve proportionality by the relatively simple method of electors choosing between lists of candidates either with the whole electorate voting at large or in multi-member districts. Seats in the assembly are allocated in proportion to the electoral popularity of each list from the top of which the appropriate number of successful candidates is selected. In an assembly of two hundred, for example, a party winning 30% of the vote would be entitled to sixty members, those being the first sixty on that party's list. To the extent that party labels are attached to the lists and that the choice of candidates and their ranking on the ballot is a party function, party is entrenched as the basis of electoral choice, as the sole avenue for political recruitment, and as the agency for allocating political rewards. Such an electoral system has proved popular in several European countries since the early 1900s where it is consistent with the existence of three or more parties based on a mixture of

religious, ideological, ethnic and linguistic differences, and is compatible with entrenched, medium sized, regionally based parties. These general characteristics can be seen as expressing a resistance to the creation of simple dichotomies of party choice. Quite apart from the relationship between list systems of PR and the pattern of partisan representation over which there has been much discussion, it is clear that such systems recognise and incorporate the role of parties in the representative process in a way which gives party organisations close to a monopoly of power over the nature of electoral choice available to voters. Electoral choice is between party lists rather than between candidates.

The other strand of PR, that of STV, has its origin in mid-nineteenth century philosophies of liberal individualism as a device that would enable the establishment of a mass franchise without creating the unmoderated tyranny of the majority that was the bugbear of such political philosophers as J.S. Mill.[5] The swamping effect of universal franchise on the representation of informed opinion was to be avoided by encouraging the representation of a range of political views and interests. This was to be achieved by providing electors with a list of candidates whom the voters could rank in order of preference for the number of vacancies in the assembly. Proportionality is obtained by summing the preferences so that the pattern of successful candidates would mirror the pattern of electoral support. The arithmetical mechanics of this process are complex but the aim is straightforward - minorities can be sure of electing candidates to express their opinions in proportion to their voting power. If, as was originally proposed, elections are held with all the seats for a national assembly being elected at large, minorities with only a very small proportion of the national vote will be able to secure representation.[6]

The initial debate over this system in Britain was only indirectly concerned with party since it largely predated the emergence of mass parties in Britain as we now know them. Indeed, its discussion and advocacy were closely bound up with the anticipation of the power and ruthlessness of electoral majorities should universal franchise be introduced, an issue which did not prove to be of major importance in the event and which has long been submerged in other questions about the representative process. However, the focus of STV systems on the representation of diversity and the importance of electoral choice between candidates made it a device which could be used to counter the growing importance of party. Those who saw the development of mass parties,

particularly labour parties, as a sinister attempt to encourage the mindless voting for party nominees and the manipulation of assemblies by the discipline of party endorsement, seized on PR-STV as a way of minimising these undesirable effects. For this reason the debate over PR-STV reached its height around the turn of the century in Australia when the Australian Labor Party and other changes in political alignments were establishing the main characteristics of the present party system, just as, in Britain, there was a vigorous debate which corresponded with the emergence of the Labour Party as a major political power and the realignment of the party system between 1900 and 1920. Recent changes in patterns of partisan alignment in Britain seem to have had a similar effect.[7]

STV systems can be seen as anti-party to the extent that they reduce the ability of parties to regulate the nature of electoral choice. The voter's ability to vote for a number of candidates and to rank his or her preference for example, instead of exercising a single categorical choice between party candidates, weakens the importance of party endorsement. The increase in voter discretion is directly at the expense of party control.

In this respect PR systems in general present a paradox: list systems of PR reinforce the importance of party in the voter's exercise of electoral choice and give parties a strong vested interest in the preservation of such systems, while STV systems appear inconsistent with many of the aggregative roles of party, and STV has traditionally been championed by those who are hostile to party politics. Both streams of PR are linked only in their common avoidance of dichotomous choice for the electorate, proportionality being a device to express the variety of electoral opinion, although the variety is constrained by each system to affect the range and nature of the choice.

Some other differences between list and STV systems need to be mentioned. Australia, as Britain, has shown a marked reluctance until very recently to enshrine the power of political parties by statutory recognition[8] or even to formally recognise the importance of party in the political process. List systems require an unabashed acceptance of the role of parties that has not accorded with the style of Australian political rhetoric particularly on the conservative side. Coupled with this, Australia, together with the other Anglo-American democracies, has a tradition of representation being tied to single-member geographical constituencies.[9] Multi-member electorates, especially the large

ones necessary for achieving accurate proportionality, have been seen as weakening the bond between the voter and a particular representative. List systems are particular offenders in this respect because they tend to submerge personal and geographical considerations in those of party. STV systems are much more compatible with the notion of the voter having a particular representative, and do not deny geographically based minorities an opportunity for distinct representation. For these reasons PR systems in Australia have, until the last few years, been synonymous with STV. This has been reinforced by the fact that those authors advocating PR in Australia and Britain have traditionally been those hostile to the dominance of party and to whom list systems were little improvement on existing representative arrangements.

One other point should be made. The Australian Labor Party (ALP), as a party of the left, has an ideological predisposition against all PR systems because they tend to soften the divisions that flow from a class analysis of the political process. The ALP has a polarised view of politics and to the extent that PR works against dichotomous choices it is an electoral system that parties of the left will seek to avoid. The paradox in the Australian context is that it is the ALP that has been the initiator in all recently adopted PR systems.[10] Before an explanation for this can be offered, some implications of PR for party government need to be extended.

III. PR AND PARTY GOVERNMENT

The major opposition to PR has come from those who see it as a threat to a particular style of representative government. The arguments may be summed up by saying that PR is likely to reduce the dominance of the executive branch of government over the conduct of public affairs in systems with a parliamentary form of rule. Alternatively stated, the major advantage of simple plurality electoral systems based on simple member electorates is that such systems tend to turn electoral pluralities into parliamentary majorities by giving a substantial bonus to the winning party, and, in so doing, provide a stable, single-party-based legislative majority on which can rest a powerful parliamentary executive. The main characteristics of PR which counter this effect can be listed as follows (note that list and STV systems produce different patterns of characteristics):

A. PR-STV

A.1. PR-STV is likely to reflect close results in electoral contests, which will tend to produce parliamentary executives with small legislative majorities, minority governments, or coalition governments.

A.2. Characteristic A.1. can be stated alternatively in the form that PR-STV tends not to discriminate against minor parties (which have electoral support above a certain threshold) in their representation in assemblies, with the result that, in a party system with three or more components, coalition governments are likely.

A.3. PR-STV weakens party discipline in assemblies by complicating the nature of endorsement which, in a single-member electorate, is usually a necessary attribute of a successful candidate. The complications result from the necessity for the party to field more than one candidate, the fact that candidates of the same party may compete with one another as well as with rival candidates, and the likelihood that disaffected party members have a chance of electoral success if they run as independents.

B. PR-list

B.1. PR-list has the same tendency towards reducing parliamentary majorities as PR-STV (A.1. above).

B.2. Although PR-list does not intrinsically discriminate against the representation of minor parties any more than PR-STV (A.2. above), it provides more opportunities for the manipulation of quotas so that the threshold for the representation of minor parties may be high, and may preclude the election of independent candidates.

B.3. PR-list has precisely the opposite effect on party discipline to that of PR-STV (A.3.). It may give so much discretion to the party machine as to rival the influence of the executive of the parliamentary party.

As can be seen from A.1 to 3, all three characteristics of PR-STV are unsettling to the existing pattern of executive-dominated parliamentary assemblies such as the one existing

in Australia, Tasmania alone excepted. List systems fare better but are still a threat to the existence of the disproportionately large parliamentary majorities on which most Australian governments can rely.

The place of minor parties under PR is of special interest because their representation in assemblies is often claimed as one of the major threats to stable executive government and hence a major drawback to PR. Whether or not stability is a governmental virtue, it is not true that PR necessarily reduces the threshold for the representation of small parties. Indeed, for an assembly of given size, it must raise it.[11] The catch is that PR does not discriminate between those minor parties that are geographically based and those whose support is evenly distributed through the electorate. As the National Country Party (NCP) has shown, a regionally concentrated minor party can thrive under a single member electorial system, which has the advantage of actively discriminating against rival minor parties whose support is evenly spread; in other words, PR has a slight nationalising effect both because it removes any bias towards regional minorities and because it will reflect the existence of ideologically based minor parties. There is also the catch that adjustment of such technical features of PR as the size of the quota of first preference votes for candidates to have chance of election, and the number of seats per district can have a profound effect on the electoral success of minor parties. The systems of PR at present operating for elections to the Legislative Councils in New South Wales and South Australia both have features designed to reduce the representation of all but the two largest parties. In passing it might also be noted that attempts to link the existence of PR as an independent variable with governmental instability have not been particularly successful.[12] The Australian example, Tasmania, has, until recently, hardly been an example of either the insurgency of new parties or of governmental instability over the last fifty years.

To sum up, it is correct to say that the introduction of PR tends to weaken the extent of the dominance of parliamentary executives over assemblies. This effect will be especially strong if elections are customarily closely fought, if there are large minor parties denied representation because of the pattern of dispersal of their support, and if the existing electoral system is characterised by rules which encourage disproportionate representation of regionally based groups. The effect will tend to be stronger under STV systems than list systems. Given these characteristics, the executive

branch in parliamentary systems has little to gain and much to lose from PR. PR enhances the importance of legislative politics and to this extent weakens executive dominance.

The attractions of PR

When then should governments sponsor the adoption of PR, particularly in Australia where strongly disciplined parties and the executive dominance of legislatures are a distinctive feature of the system? With the exception of Tasmania, the answer relates to another characteristic of the Australian political process, that of bicameralism.

It is helpful to deal with Tasmania first because the state represents a major departure from the Australian tradition and because it provides a strong contrast to the subsequent adoption and modification of PR in Australia. Tasmania adopted the Hare-Clark variant of PR-STV for the lower house in 1907[13] before the full emergence of a strong, disciplined Labor Party, and the debate over PR was predominantly in terms of nineteenth century liberal individualism. In other words, PR in Tasmania was established before the present pattern of disciplined parties and executive dominance was fully entrenched. The ALP has had to accommodate PR and, although there have been periods of dissatisfaction, the party has operated with outstanding electoral success under the system. The reasons for this and for the persistence of PR raise broader issues but in general it can be argued that the ALP learned to live with PR early in its career and that PR-STV is congruent with Tasmanian political culture as a system that encourages the dispersal of political power, the seeking of wide consensus and a brokerage style of political activity.[14] Indeed, it can be argued that PR-STV has made the ALP in Tasmania a mass party only in name, its true nature being a collection of independents loosely aggregated under a party umbrella. The three other PR systems now in operation in Australia differ in every respect from the Tasmanian: they have all been adopted within the last thirty years; they all apply to upper houses and they all represent attempts by ALP governments to engineer electoral systems more amenable to ALP partisan success.

The existence of powerful upper houses dominated by conservative sections of the community has shaped the political process in all states since the arrival of responsible self-government in the 1800s. Only one state, Queensland, has managed to abolish its second chamber, and the tradition

of bicameralism in Australia has been reinforced by the existence of the Senate as a component of the national legislature designed to be sensitive to the demands of the state units in a federation. All these upper houses have been, at one time or another, a substantial thorn in the side of ALP governments. For this reason, PR has been considered by the ALP as a way of achieving a number of goals. In place of abolition, a strategy whose electoral unpopularity has been consistent and whose achievement involves special constitutional difficulties in several states, PR has been seen as an instrument for the reform of state upper houses by removing the anti-ALP bias that has been common to all of them. PR is not only manifestly fair but it has the added advantage of overcoming the problem of the wastage of ALP votes through concentration in single-member electorates. Secondly, if upper houses are to remain, it is prudent to elect them by some system of representation which is clearly differentiated from that used for the lower house. Thirdly, the special structural and constitutional role of the Senate as an upper house in a federation means that PR is attractive as a solution to a number of representational problems. PR is likely to have acceptance among non-ALP parties and, more particularly, among members of upper houses through which any legislation setting up PR must pass. This bipartisan attraction may be modified by designing a system of PR that is attractive to the large parties but discriminates against smaller ones. This may split the Liberal Party (LP) from the NCP in some states and ensure added political benefits for the ALP.

These benefits must be offset against the costs that PR creates as outlined above, together with the potential cost of further entrenching upper houses. The problem facing ALP governments has been to design PR systems which will ensure that the ALP has a reasonable chance of gaining control of an upper chamber, which minimise the inherent costs of PR to executive dominance and large party control, while maintaining enough bipartisan support to get the measure adopted. It is to the second of these issues, the minimisation of costs, that we now turn.

Modifying PR

The literature on European list systems of PR is full of examinations of the way in which PR can be modified to secure specific goals.[15] The most popular topic has been the study of the relationship between a variety of formulas for

the translation of votes into sets and the partisan advantage of large, small and medium sized parties. Another recent concern has involved an analysis of the threshold of exclusion, that is, the barrier which small parties must cross to secure representation. This often differs from the nominal proportion of votes that the PR formula suggests. Studies of the Irish system of PR-STV have investigated the relationship between the size of the electorate and the observed proportionality of the result. Irish governments have been aware for many years that proportionality can be modified to over-represent the larger parties by simply reducing the number of seats in each district. There has been no similar scholarly investigation of these questions published in Australia, although it is clear that the political parties and the various electoral offices have access to the relevant expertise when it is called for, as in the cases of South Australia and New South Wales. Australia has, however, taken a different tack in the modification of PR to suit the goals of sponsoring governments.

The ALP as the party which has sponsored all three PR systems recently adopted (the Senate, and the upper houses in New South Wales and South Australia), has had two aims in the adjustment of PR for upper houses. The first has been the reduction of proportionality to discriminate against small parties, the second has been the addition of provisions to maintain party discipline among candidates and among voters. The first of these goals is hard to achieve in an extensive way with PR-STV but, at the margin, the under-representation of small parties will occur where district magnitude, that is the number of seats in each district, is small and where, as in the system presently in use for the New South Wales Legislative Council, a minimum quota of votes is used to discriminate against small parties. The list system at present adopted for the South Australian Legislative Council, for example, has the same effect in a mild way, and the original proposal for the New South Wales Legislative Council discriminated against minor parties and independents in a drastic way.[16]

The unacceptability of list systems of PR (except very recently in South Australia for reasons peculiar to the party system and political context of that state and closely related to the long drawn out campaign for change in the method of election of members to the Legislative Council)[17] has meant that this way out of the dilemma of having PR without loosening party ties has not been available. This is not to deny that party machines have seriously considered PR-list as

a system that would greatly enhance their influence. N.S.W. Premier Neville Wran's original proposal for the New South Wales Legislative Council is a good example of both the party machine preference for a list system and the outcry that this system created. The achievement of the second goal, that of maintaining party discipline against the gradient of PR-STV has been reached in this country by adjusting the nature of the ballot paper and by related aspects of electoral law. This can be seen as a distinctively Australian contribution to the modification of PR-STV. The principle characteristics of this solution, taking the Senate as an example, can be listed as follows:

1. Grouping of the candidates by party on the ballot paper.
2. Giving the party machine the discretion of ordering the candidates in each group.
3. The absence of party labels on the ballot paper.
4. The use of 'how-to-vote' cards.

None of these characteristics is by itself specially important but, taken together, they operate to increase the influence of party and reduce the chance that voters will make full use of the potential of PR-STV for each voter to rank candidates in the voter's own order of preference. The first two characteristics clearly work in this direction. Instead of a single list of all candidates, party groupings are isolated on the ballot paper. The ability of parties to stipulate the order of their candidates within each group is a major opportunity for parties to indicate a party-preferred order of choice to their party faithful. These two characteristics are reinforced by the remaining three. The absence of party labels on the ballot and the requirement that all candidates be ranked in sequential order have the effect of denying information to the voter and simultaneously confronting him or her with the complicated task of ranking many candidates even though only the first dozen preferences are likely to be critical ones. The use of 'how-to-vote' cards by each party becomes a vehicle for simplifying the task of voting and at the same time enabling parties to achieve a disciplined exercise of their partisan vote.

That these characteristics have had an effect on the expression of voter preferences is easy to show. The success of candidates for Senate elections has always been in the order stipulated by the party, that is, there has been no case, for example, where a number two candidate for Senate elections has been displaced by their third candidate.

Partisan loyalty in terms of voting discipline has been maintained. This discipline has been the instrument for achieving another goal of the major parties, that of maintaining the critical nature of party endorsement for electoral success. If a party can determine the order of its candidates on the ballot paper and if it can achieve a high degree of partisan voter obedience to a 'how-to-vote' card, then the party machine can decide which of its candidates are likely to be elected. In the case of the Senate this means that, for a half Senate election, each of the major party groupings is sure of two seats from each five to be contested in each state. The third candidate on each party list has no more than a fighting chance of success. As a consequence, each major party machine in each state that can command a third [18] or more of the vote has four safe Senate seats to dispose of out of the state delegation of ten, a major price for which competition in the party hierarchy will be fierce. It also enables the party machine to discipline a rebellious Senator by moving him or her down the list and thus jeopardising the chances for the Senator's re-election. Such party control is a major modification of PR-STV. Indeed, the result is to turn what looks like a classical nineteenth century liberal individualist mechanism for protecting minority opinion into a device that works like a list system of PR to the advantage of party. The power of ancillary electoral laws relating to the shape of the ballot paper to achieve this transformation can be shown in two further ways.

The first relates to the position of the NCP as a regionally entrenched minor party gaining about 10 per cent of the popular vote at national elections for the lower house. As will be examined below, parties gaining such a proportion of the vote are likely to be substantially under-represented under the PR-STV formula operating for the Senate if they operate as a separate party with their own grouping on the ballot paper. Their best strategy is to combine with their usual government coalition partners to field a joint list, hopefully, with an NCP candidate in one of the safe positions. A less favourable alternative is for the NCP candidate to be relegated to third position on the joint party ticket with some understanding with the Liberty Party about the position of NCP Senators in subsequent elections. The critical factor becomes the nature of the deal between the party machines over the dispensing of patronage affecting the shape of the joint party ticket rather than the organisation of a minority in the community to vote for a particular candidate. This is precisely the cause of the fierce dispute

over joint Senate tickets between the Liberal Party and the National Party in Queensland, and the source of similar disputes in Victoria. Similar problems may emerge with the design of joint Liberal Party and National Country Party tickets for elections to the New South Wales Legislative Council. Although it may be doubted how consciously the ALP was aware of this consequence of the PR system used for the Senate, a major partisan benefit to the ALP seems to have been the intensification of intra-coalition disputes over candidate endorsement for joint tickets and the simultaneous creation of an ALP/non-ALP dichotomy between the parties represented in the House of Representatives which contest Senate elections.

The second way in which the powerful effect of the shape of the ballot paper and the use of 'how to vote' cards can be demonstrated, is by noting a near identical system of counting votes without the characteristic ballot paper modifications. This can be found in operation in Tasmania. In that state, although candidates are grouped by party on the ballot paper, none of the other Senate ballot rules applies. Candidate placement within each party group is by lot and not at the discretion of the party, party labels are shown on the ballot paper, a minimum number of preferences is stipulated which is equal only to the number of vacancies to be filled, and the handing out or display of 'how-to-vote' cards is prohibited.[19] The last aspect needs to be stressed since the 'how-to-vote' card is a ubiquitous accompaniment to all elections for all other Australians. In Tasmania the only form of election advertisement permitted for State lower house elections, whether poster or 'how-to-vote' card, is one which states either 'vote for the X party team', or 'vote for Bloggs first and other like party candidates in order of your choice'. This sets party candidates in direct competition with their fellows on the same party ticket and has several other interesting consequences for the style of electioneering. For the point of view of this essay, however, the most important effect of these rules is to change the pattern of voting and the expression of preferences on ballot papers in a radical way. The Tasmanian system encourages voters to chastise or reward particular party candidates by the voter's ranking within party groups while still being loyal to party, an opportunity which it is very clear that Tasmanians seize with gusto. The donkey vote down the ballot paper for Tasmanian House of Assembly elections is notable by its absence.[20] Nor is this the manifestation of special virtue on the part of Tasmanians - at Senate elections in that state, the

pattern of voting and preference distribution closely resembles the pattern in the rest of Australia.

Tasmania represents a compromise between what one author has labelled personal voting[21] and partisan attachment, a compromise that is within the tradition of PR-STV since it fosters a high level of voter participation in the choice of particular candidates. This is not the case in any of the systems of PR recently adopted for legislatures in Australia - they have been either listed systems or PR-STV systems so modified as to operate as list systems. The design of the ballot paper and the use of 'how-to-vote' cards are not incidental aspects of the electoral system but play a central part in the shaping of the expression of popular partisan choice, to the extent of submerging or even reversing tendencies encouraged by other aspects of electoral law.

IV. DESIGN AND PERFORMANCE: THE SENATE

In the light of these comments it is instructive to take a brief look at the Senate as a case study of electoral engineering using PR-STV. By 1948 there was broad agreement that there was a need for change in the electoral machinery to select Senators. Pressure for enlarging the House of Representatives meant that the size of the Senate had also to be enlarged to maintain the constitutionally required ratio of two-to-one between the size of the two Houses,[22] and this precipitated a general review of representation in the Senate. The principal goals of the then ALP national government can be summarised as being twofold: the first was to achieve a method of representation which avoided the violent windscreen wiper effect of violent changes in the composition of the Senate produced by the existing preferential system; the second was the partisan and short term goal of maintaining an ALP majority in the Senate in the face of possible defeat in the House of Representatives at the election due in 1949.

The mechanism to achieve these goals was PR-STV with statewide districts each with ten senators, five retiring every three years, and a ballot paper and electoral law designed to counter the anti-party aspects of PR-STV as discussed above. The debate in Parliament over these new measures stressed the bi-partisan support for the fairness of the proposed system, and the necessity to preserve a familiar ballot paper, PR-STV ballot papers being the same shape and format as the existing preferential ones, the difference between the systems being in the method of counting the

votes. The only areas in which there was some controversy concerned the random selection of ballot in the procedures for the allocation of preferences and the requirement that all candidates should be ranked by the voter rather than some lesser number. In general the debates indicated very little concern with the philosophy of proportional representation or with the variety of possible outcomes that the introduction of the new system might produce.

Experience since 1949 shows that the ALP achieved both its major goals: it maintained control of the Senate in spite of defeat in the lower house in 1949 (although it lost this control in the 1951 double dissolution), and it secured a pattern of partisan representation that is less erratic and numerically fairer than had been achieved by the previous system. Indeed, it can be argued that the ALP has achieved too fair a system for its own good. PR has denied to the ALP any logical argument for contending that the Senate is undemocratic in the sense that it distorts the pattern of partisan representation. There are arguments for the abolition of the Senate but one of them cannot be that the Senate is unrepresentative of partisan choice in the electorate. Another problem for the ALP has been the emergence of minor parties unknown in 1949 which have managed to secure representation in the Senate and on a number of occasions to hold the balance of power and thus reduce Executive dominance in Parliament. The ALP benefits from this while it has been in opposition but suffered from it during its term in office from 1972 to 1975. A further and more general point is that PR can be seen as one of the reasons why the Senate has become a much more important element in national politics than it was in 1949. PR has produced majorities in the Senate hostile to the government of the day; this has led to increased visibility and status of the Senate which in turn has altered recruitment patterns, the net result being a much more politically salient institution. These are clearly effects unintended by the government of 1948 and demonstrate the complexity of trying to forecast the precise changes that an alteration in electoral law will generate.

V. CONCLUSION

Tasmania stands alone as a system in which PR is used as an electoral system for a lower house which reflects and reinforces a style of politics that is compatible with the representation of diversity. As such, it is a major exception

to what follows. Elsewhere the Australian experience of PR leads to a paradox. Australian parliamentary politics is characterised both by strong party discipline and a marked division between the ALP on one side and a coalition of non-ALP parties on the other. In large part this polarisation is induced by the electoral popularity of the ALP in capturing the largest number of votes of any party at both State and Commonwealth levels for most electoral contests. These factors would suggest that the ALP would have a powerful interest in maintaining an electoral system that reflects and enhances a polarised pattern of political competition. Yet the ALP has presided over the adoption of all recent PR electoral systems and is advocating its adoption elsewhere.[23]

This apparent paradox can be resolved with reference to two factors, both of which have been examined earlier in this essay. The first is that several of the effects normally attributed to PR - those of weakening party voting and hence reducing Executive dominance in Parliament - can be moderated by other features of the electoral system or by abandoning PR-STV in favour of PR-list. The second factor, and much the more important of the two, is the bicameralism of all but one of Australia's parliaments and the resulting special problems of coping with powerful, unrepresentative and conservative upper houses.

The latter feature of the political system in turn presents a contradiction: the ALP is the party with least sympathy with bicameralism, yet it has initiated changes which have given life and legitimacy to moribund upper chambers. The Senate is an example of the evolution of a representative chamber from a minor appendage to a major participant in the legislative process, much of this change being traceable to the consequences of the adoption of PR. Similar effects are likely in New South Wales and South Australia as these political systems adapt to changes in the rules of the game.

The general effect of the adoption of PR for the election of members to upper houses has been to enhance a major element of Australian constitutionalism that is inconsistent with British style parliamentary government: this is, strong bicameralism. While Britain is nominally bicameral, since 1910, and certainly since 1945, the House of Lords has been a vestigial body of negligible political importance. Powerful upper houses with a representative base are much more compatible with the United States tradition and with such constitutional principles as the separation of powers and the legislature as an institution to represent diversity.

This is precisely that path down which the Senate and

similarly PR based upper houses are progressing, at the cost of Executive dominance and the modification of a simple dichotomy of parliamentary politics. While the direct route to a change in the style of constitutionalism in Australia may be barred in terms of major alterations to the electoral system and mode of politics in lower houses, the indirect route via growth in the autonomous role of upper houses remains open.

Notes

1. C.H. McIlwain, *Constitutionalism Ancient and Modern*, Revised edition, Cornell University Press, Ithaca, NY, 1947.
2. Samuel H. Beer, *British Politics in the Collectivist Age*, Vintage, New York, 1969.
3. On this area generally, note S.E. Finer, (ed.), *Adversary Politics and Electoral Reform*, Anthony Wigram, London, 1975.
4. For an examination of the various forms of PR and explanations of their technical details, note E. Lakeman, *How Democracies Vote: A Study of Electoral Systems*, 4th edition, Faber and Faber, London, 1974; W.J.M. Mackenzie, *Free Elections*, Allen & Unwin, London, 1958; and J.F.H. Wright, *Mirror of the Nation's Mind: Australia's Electoral Experiments*, Hale & Iremonger, Sydney, 1980.
5. J.S. Mill, *Considerations on Representative Government*, Oxford University Press, London, 1975 (first published 1861).
6. The minimum proportion of votes necessary to secure representation varies with the PR formula used. As an example and using the present Senate formula (see J.R. Odgers, *Australian Senate Practice*, 5th edition, AGPS, Canberra, 1976 pp. 94-107 with Australia as a single district (that is, not as 125 districts as is now the case), a minority would need to gain a quota of 0.8% of the national vote to secure one of the 125 representatives in the House of Representatives (this equals approximately 66,000 votes at the 1980 elections).
7. See Finer, *op. cit.*
8. The constitutional crisis of 1975 has, among other things, led to the power of political parties in the selection of Senators being formally recognised in the Commonwealth Constitution: see Section 15 (inserted in 1977).
9. Or, more accurately, electoral contests for one member per constituency at each election (in other words, where there are two members to an electorate, as in the upper houses of Victoria and Western Australia, each member's term of office expires at alternate elections).
10. The cases are the Senate in 1948, the South Australian Legislative Council in 1973, and the New South Wales Legislative Council in 1978. The New South Wales Legislative Council before 1978 was chosen by a PR-STV system of election but it was an indirect election: see K. Turner, *House of Review? The New South Wales Legislative Council, 1934-68*, University of Sydney Press, Sydney, 1969). Note that the lower house in New South Wales had a PR electoral system from 1919 to 1926 when it was abolished by the Lang ALP government.
11. For example, the quota of votes necessary for a candidate to be elected to the Senate is one sixth plus one of a statewide vote at a half-Senate election. If the State were divided into five equal districts, a tenth plus one of the statewide vote, if concentrated in one district, would secure election under a majority system.
12. See D.W. Rae, *The Political Consequences of Electoral Laws*, revised edition, Yale University Press, New Haven, 1971, pp. 148-171.
13. For details of the system operating in Tasmania, see the *Tasmanian Year Book* and Wright *op. cit.*
14. Note C. Sharman, 'Tasmania: the politics of brokerage' *Current Affairs Bulletin*, 53 (9), February 1977, pp. 15-23.
15. For example, Van den Bergh, *Unity in Diversity: A Systematic Critical Analysis of All Electoral Systems*, Batsford, London, 1955.

16. F. Hausfeld, 'New South Wales Legislative Council: Change or Reform?' *Australian Quarterly*, 49(4), December 1977, pp. 91-100; and New South Wales Parliament, Select Committee on the Constitution and Parliamentary Electorates and Elections (Amendment) Bill, *Report*, Parliamentary Paper No. 273 of 1976-77-78.
17. See N. Blewett, 'Dunstan, the Council and Electoral Innovation', *Australian Quarterly*, 48(3), September, 1976 pp. 83-97.
18. Two quotas at a half Senate election is 2 x 16.7 per cent = 33.4 per cent of the vote, hence 2 successive half Senate elections produce 4 safe Senate seats: at a double dissolution election four quotas equal 36.4 per cent of the vote.
19. On the way in which how-to-vote cards are banned, see the Tasmanian *Electoral Act*, 1907-1980, section 154, and in particular section 145(d)(iii). Since changes to electoral law adopted in 1980, it would be more appropriate to say that how-to-vote cards in the usual sense are impossible rather than prohibited. Candidates' names now appear in different orders on different ballot papers so that candidates have an equal share of favoured positions on the ballot: see the Tasmanian *Electoral Act*, Schedule 5 and Wright *op. cit.*, pp. 105-106.
20. See note 19, above: Even before the 1980 changes there was no discernible donkey vote according to officers of the Tasmanian Electoral Office, and the 1980 changes have removed the benefit that some candidates obtained by being immediately below a popular candidate on the ballot paper.
21. Van den Bergh, *op. cit.*
22. See Section 24 of the Commonwealth Constitution.
23. The Western Australian Branch of the ALP advocates its use for the Legislative Council in that state.

6

The Limits of Taxation

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The Limits of Taxation*

James M. Buchanan

I. INTRODUCTION

Constraints on government

This is one of the themes of this collection. Several contributions address the question: Can governments be controlled? In this essay, I restrict discussion to taxation, and by implication, to spending by governments. How high can taxes go? Are 'democratic' controls possible? Are there constitutional limits? How high should taxes be? How much should taxes be reduced? What new constitutional limits might work? How should these limits be designed and enforced?

Let us first recall the struggles between the English Crown and Parliament over the 'power to tax', and the general sentiment toward taxation that prevailed throughout pre-modern times. Taxes were levied on the people; exactions against persons for the benefit of Crown and clergy. As such, taxes were to be feared, opposed and minimised. This prevailing sentiment or attitude carried over well after the commencement of the period when 'the people', through the representative agencies of constitutional democracy, were considered and considered themselves to be ultimate masters of their own political fortunes. Power to topple governments was not equated with power of governments untoppled to do as they pleased. The American Founding Fathers considered themselves to be constructing a government from consent, but they also recognised that restrictions on the powers of governance were required. They sought to constrain government explicitly through a constitution that would act to ensure against the imposition of burdensome taxes. The United States was indeed born in a spirit of tax revolt.

What has happened in the relatively short span of two

* I am indebted to my colleague, H. Geoffrey Brennan, for helpful suggestions.

centuries? Where is the 18th and early 19th century wisdom?

We know very little about how ideas change, and about how public attitudes shift. But somewhere between then and now we lost our bearings. And by 'we' I refer to members of the body politic, in the United States, in Great Britain, and in most of the Western world. In part, but perhaps only in part, we were caught up in and by 'the fallacy of free elections,' perhaps the most serious error ever accepted as truth by leaders of opinion. This electoral fallacy presumes that governments can be and are effectively controlled so long as politicians and parties submit their records to the voters in periodic elections. Constitutional constraints are deemed sufficient if elections are open and free; if politicians 'represent' the people, the level of taxation (and public spending) cannot get seriously beyond limits desired by the citizenry at large.

The Founders knew better. They recognised that 'democracy' works only if government is tightly constrained within constitutional limits. And so did the great 18th and 19th century British and European philosophers. Let me interrupt my discussion here with only a few citations, all of which were used by Geoffrey Brennan and myself as chapter-heading citations in our book, *The Power to Tax: Analytical Foundations of a Fiscal Constitution.* [1]

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls would be necessary. In forming 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. (James Madison, *The Federalist, No. 51.*)

> It is better to keep the wolf from the fold, than to trust to drawing his teeth and claws after he shall have entered. (Thomas Jefferson, *Notes on Virginia.*)

> In constraining any system of government, and fixing the several checks and controls of the constitution, every man ought to be supposed a knave, and to have no other end, in all his actions, than private interest. (David Hume, *Essays Moral, Political and Literary.*)

> No doubt the raising of a very exorbitant tax, as the raising as much in peace as in war, or even the fifth of the wealth of the nation, would as well as any gross abuse of power, justify resistance in the people. (Adam Smith, *Lectures on Jurisprudence.*)

> The interest of the government is to tax heavily; that of the community is to be as little taxed as the necessary expenses of government permit. (J.S. Mill, *Considerations on Representative Government.*)

> . . . the very principle of constitutional government requires it to be assumed that political power will be abused to promote the particular purposes of the holder; not because it is always so, but because such is the natural tendency of things, to guard against which is the especial use of free institutions. (J.S. Mill, *Considerations on Representative Government.*)

The attitude expressed in these citations was largely lost to Western consciousness for more than a century. The challenge before us is to reconstruct a modern equivalent. In the leisure of our ivory towers, this challenge has spurred us on, and we can now begin to express some pride in the shift in public attitudes that has been discernible for at least a decade. The electoral fallacy is no longer accepted universally. Government, politics, bureaucracy - these institutions are now seen 'warts and all' by many observers. Sceptical views about politics have filtered down to the members of the thinking public.

But is there time for the slowly maturing shift in attitudes to work its will? How can such a turnaround in attitudes be channelled in support of a dismantling of the governmental Leviathan we encounter at every behavioural nook and cranny? The critically important bridge to be crossed is that between the increasingly realistic view about what government is, what it can and cannot do, and the actual translation of these ideas into institutional reality. How can we unscramble the eggs?

II. WHY ARE TAXES SO HIGH, AND HOW MUCH HIGHER CAN THEY GO?

Why are taxes so high? How much higher can they go?

To answer these questions we require a **positive** theory of how government operates, of how taxing and spending decis-

ions are made.[2] Why has government grown so rapidly in this century?

I shall introduce three explanatory approaches or 'models', without claiming to exhaust any possible listing. Each of the three models has some explanatory potential.

1. Redistributionist

The first broad explanation can be called 'redistributionist'. It explains observed taxing-spending levels exclusively in democratic electoral terms. The fiscal process is conceived basically as a transfer mechanism, with successful majority coalitions levying taxes for the purpose of transferring incomes to specific groups. In this model of government, there is no breakdown in the democratic electoral process; indeed what we observe is what we might have predicted to occur under unchecked majoritarian democracy.

There are several variants within the redistributionist model that have been used to explain the accelerating growth of taxation in this century. Professor Sam Peltzman suggests that the transfer process tends to increase as the variance in the pre-tax income distribution is reduced, as income differences are lessened. Professor Allen Meltzer, on the other hand, suggests that the transfer potential tends to increase as the median income diverges increasingly from the mean income.

2. Structuralist

A second broad category of explanation for the observed high levels of taxation involves analysis of the institutional structure through which political decisions are reached and especially of the possible biases in patterns of outcomes. One familiar bias highlighted is the asymmetry between tax incidence and benefit incidence, as these are translated into pressures on political representatives. Beneficiary groups, recipients of direct transfers or of governmentally-financed programs, tend to be concentrated, organised, and capable of exerting influence over elected politicians. By contrast, taxpayer groups, those who pay taxes, tend to be widely dispersed and, indeed, tend to include almost everyone due to the fact that taxes are general rather than specific. As a result of the asymmetry, it becomes easier to get political decision makers to expand budgets than to contract them. There is a structural bias toward expanded levels of taxation and spending, and this bias has become increasingly pro-

nounced as governments have invented and discovered new ways of spending.

Within the budget itself, there is a comparable bias toward outlays that provide direct benefits to concentrated groups as opposed to outlays (e.g. national defence) that provide benefits over the whole citizenry.

Other structural biases are perhaps more evident. If governments are allowed to spend and to finance this spending either by public debt issue or by money creation, the true costs tend to be concealed. In a sense, of course, 'taxes' must always be paid when government uses resources, paid either in some future period (under debt financing) or paid via inflation (under money creation), but the deficit-financing instrument allows politicians to generate fiscal illusions that bias decisions toward spending.

Much the same sort of bias exists when the base for taxation is such as to allow for growth-related automatic revenue increments. Perhaps the single most powerful explanatory factor for the growth of the United States federal government in this century is the 16th Amendment, adopted in 1913, which allowed the central government to levy income taxes at progressive rates. This amendment gave the government access to a revenue source that, with a given rate structure, generates automatic increases in real tax revenues as the economy grows, either in real or in purely monetary terms. The automatic increases in real tax rates generated by economic growth or by inflation tend to be concealed from the public, allowing the politicians to have revenues to spend without taxing in the apparent sense of the term.

3. Monopolist

Both the redistributionist and the structuralist models for explaining the high and increasing levels of taxation and spending suffer by their exclusive emphasis on demand-side elements in the fiscal process. The redistributionist model operates 'as if' all voters come together in a gigantic town meeting during which a majority coalition forms and takes money away from members of the minority. The structuralist model operates in the same way except that it allows for spending at least some part of tax revenues on real goods and services that may be beneficial to all voters. But, of course, politics cannot be described as a gigantic town meeting, even at the level of analytical abstraction allowed to the ivory-tower economist. Even in the most 'democratic' of settings, the political-fiscal process involves 'demanders', the voters

'purchasing' goods and/or transfers from 'suppliers', who make up 'government' itself. The active role of government, as an entity separate and apart from the citizenry, must be incorporated into any explanatory model of the taxing-spending process.

Once this elementary point is recognised, supply-side explanatory elements emerge to supplement and possibly to dominate those already suggested above. For any given political jurisdiction, there is, by definition, only one government. The economic theory analogue is monopoly, and analysis must commence with the potential for exercise of monopoly power rather than with competitive limits. Once the monopoly nature of government is accepted, we need only to look at how a government might try to squeeze out maximum 'surplus' (akin to the monopoly profit of a firm) in order to explain many features of what we observe all around us in modern politics.

The monopoly government model allows us to get some handles on the question about how high taxes will be. The economist's theory of monopoly can be directly utilised. Taxes will tend to be increased to that level at which the monopoly government's 'surplus' of revenues over required or obligated spending is maximised. This level of taxation is conceptually determinate once we specify the sources which the government is empowered to tax, the degree to which taxpayers can substitute between taxable and non-taxable sources of income or expenditure, and the constraints on government that define pay-out ratios determining how much of total revenues collected must be returned to the citizenry in program benefits and/or transfers.

Other elements drawn from the economic theory of monopoly may be applied in differing institutional settings. 'Democratic' controls over budget size can be allowed to be operative, with the monopoly government acting to influence the conditions of 'trade' between the citizenry and the state. By appropriate agenda manipulation, by tie-in or bundling arrangements with the budget, legislative majorities can be presented with biased options that generate budgets substantially in excess of those that might be approved in the absence of monopoly power. Such biases in the decision-making process are similar to those discussed under the structuralist models described briefly above. But the difference lies in the fact that, here, the biases are deliberately introduced by the monopoly government for the purpose of exploiting the fiscal potential of the community.

The monopolist model explains the modern growth of

taxing and spending levels in terms of the increasing centralisation, and hence monopolisation, of the governmental sector. Monopoly thrives in the absence of competition, actual or potential, and governmental competition effectively constrains taxing powers when fiscal authority is decentralised. In a federation, with separate states or provinces possessing independent taxing powers, there are built-in checks on the exercise of monopoly powers. To the extent that the central government assumes larger relative shares in the overall tax-spending mix, monopoly power necessarily increases. In the United States in this century, there has, of course, been a dramatic increase in the size of the central government relative to the states and localities.

III. THE EXPLANATIONS OR MODELS COMPARED

As I noted earlier, there are explanatory-predictive powers in each one of the three models, both in general and in specific detail. Nonetheless, there is one distinctive difference between the **redistributionist** model on the other hand and the **structuralist** and **monopolist** models on the other that is worthy of some emphasis here, and especially with respect to possible controls over levels of taxation.

Both the structuralist and monopolist models yield 'solutions' for levels of taxation and spending (for the relative size of the public or governmental sector in the economy) that are **inefficient** in the standard economist's meaning of this term. This result allows us to say 'scientifically', as it were, that the levels of taxation and spending are 'too high'. And as I shall note below, this result allows very different and important conclusions to be reached concerning prospects for reform or improvement. By dramatic contrast, the purely redistributionist model that explains the increasing and observably high levels of taxation does not allow such a 'scientific' statement to be made. The equilibrium result in this model, on any variant, defines the marginal trade-off between additional transfers and incentives to generate product. But the result cannot be labelled 'inefficient' in the ordinary economist's meaning of this term. To members of the majority coalition, the fiscal process is being utilised efficiently. Only those who find themselves in the exploited minority are dissatisfied, and there is no basis for equating mere dissatisfaction of one group with overall inefficiency.

This distinction becomes critically important when the issue of reform is addressed. To those who accept the redistributionist model, 'improvement' can only mean some

change in the make-up of the majority coalition. The basic political game is necessarily viewed as one of pure conflict, essentially zero-sum, and there can be no conception of generally agreed-on changes that might be expected to lead to improvement in the positions of **all** groups in the economy. Applied to levels of taxation, 'improvement' for the exploited minority can only take the form of 'defeating' the now-dominant majority, through either electoral victory or through revolution. Another way of putting this is to say that there is no genuinely 'constitutional' avenue for reform that is offered by the redistributionist model that is variously used to explain taxation and spending levels.

With both the structuralist and the monopolist models, on the contrary, such a 'constitutional' opportunity for tax reform exists necessarily. In labelling existing taxes 'too high', and 'inefficient', the analyst is indirectly demonstrating that changes can be made in such a way as to yield improvements for the positions of **all** groups in society, poor, middle and rich alike. The observed exploitative levels of taxation can be reduced to the benefit of **all** voters-taxpayers-beneficiaries. Consensus can be established on genuinely constitutional changes that will reduce levels of spending and taxes, and, more significantly, will keep rates of growth in such aggregates within defined constraints or limits. To use game-theoretic terminology, both the structuralist and the monopolist models of explanation diagnose the observed fiscal setting as one variety of the n-person prisoner's dilemma. There exists hope for genuine change from political consensus; revolution does not offer the only avenue of radical reform.

IV. HOW HIGH SHOULD TAXES BE?

Those who use the redistributionist model exclusively to explain the growth and level of taxation cannot answer the normative question, How high should taxes be? except in terms of their own privately-held moralities or their personal preferences. By contrast, for those whose analysis-diagnosis allows them to say that taxes are 'inefficiently-high', or simply 'too high', the 'should' question becomes a meaningful scientific issue. If taxes are 'too high' in terms of some determinate standard other than my own personal preferences, we can try to say how much they should be cut.

In approaching this question, we must take care not to slip too readily into the romantic absurdities of modern-day anarchists, even those of our friends who call themselves

anarcho-capitalists. It is perhaps self-satisfying in some sense to argue, quasi-seriously, that the optimal level of taxation is zero, and that any taxation at all is inefficient and undesirable. But any plausibly realistic assessment of human interaction as we know it must suggest that life in genuine anarchy would be just as Thomas Hobbes described it, 'poore, nasty, brutish, and short'. Government is a necessary element of viable social order, and government must be financed. The questions are: How much government? How much finance? How much spending? How much taxation? And of what sort?

It is essential at this stage of the discussion to separate **constitutional** questions and **political** questions. The first set involves general rules, the framework for political decision-making, within which ordinary political action takes place. It seems clear, for example, that most of us would allow our ordinary political representatives in our legislatures to set levels of taxation if we could be sure that there were some consititutional constraints that prevent excessive use of the taxing power. Recall both the structuralist and the monopolist models of politics discussed above. If constitutional constraints could correct for the high tax spending biases, then year-to-year levels of revenues and outlays might well be left to legislative assemblies. And, recognising that there will be attempts to use monopoly powers, government might be limited in its access to exploitable revenue sources by constitutional constraints.

V. INDIRECT CONTROLS VIA CONSTITUTIONAL CHANGE

At this point it will be useful to list, and to discuss briefly, each of several constitutional proposals designed to limit levels of taxation and/or spending. These proposals are of two sorts, those that seek to control taxing-spending levels indirectly by changing constitutional procedures and those that seek to control these levels directly.

1. Separation of decisions on tax structure from decisions of levels of tax rates

In *Law, Legislation, and Liberty* Volume III,[3] Professor Hayek has suggested that the constitutional structure be modified so that a specially-selected and 'senior' law-making assembly be granted powers of decision over the basic structure of taxation, over the distribution of tax shares among individuals and groups. This tax structure would presumably remain in

place quasi-permanently, and would not be expected to change from year to year with shifting political winds. Within such a tax structure, ordinary governmental majorities would then be allowed to decide on levels of tax rates and on budget size. Hayek's particular proposal in this respect was made, it seems, largely with reference to a parliamentary system of government, but the general idea warrants consideration in any setting.

2. Requirement of qualified legislative majorities for taxing or spending

Knut Wicksell, as early as 1896, called for qualified, larger-than-simple, majorities in order to guarantee that taxing-spending proposals are efficient and generally beneficial. He spoke of a five-sixths majority requirement in a legislature. Some modern advocates (e.g. Alan Greenspan) have called for a constitutional requirement that three-fifths or two-thirds of both houses of Congress be required to pass fiscal legislation. One of the neglected parts of Proposition 13, adopted by California in 1978, is the requirement that all new taxes be approved by two-thirds majorities in the legislature.

3. Proportional and progressive taxation

In his earlier treatise, *The Constitution of Liberty*,[4] Professor Hayek argued that progressive rates of income taxation violate the basic rule of law. By implication if not explicitly, Hayek's argument lends support to constitutional restrictions against the imposition of progressive taxes, or, in the United States setting, to repeal of the 16th Amendment. More recently Milton and Rose Friedman have also called for a repeal of the 16th Amendment and a constitutional stipulation of rate proportionality in income taxation.[5]

A constitutional prohibition of progression in tax rates would dramatically modify the distribution of tax shares among different individuals and groups in the economy. It is not at all clear, however, what the direction of effect on total tax revenue, and spending, would be. From a given tax base, government can always extract more revenue under a proportional than under a progressive rate structure.

4. Limitation of tax bases

In the work that Geoffrey Brennan and I have just published,[6] and in which we utilise essentially the monopoly model of

government described briefly above, we emphasise constitutional restriction of the bases or sources of revenue allowed to governments. If, through constitutional means, the taxing power can be limited to specified bases or sources, overall revenue extractions can be kept within bounds, regardless of the success or failure to modify year-by-year budgetary decisions.

From this perspective, our analysis lends strong support to the proposed **budget-balance amendment** to the United States constitution. If the central government could, in fact, be required to maintain budget balance as a normal rule, the debt-creation and money-creation options for raising revenues are ruled out. In general, both of these options involve 'taxation', and such a constitutional reform amounts to a denial of access to these two 'tax' sources.

Our analysis also suggests that governments should never be granted access to capital or wealth taxation since this source for revenue (like public debt) allows government to extend its powers of fiscal exploitation beyond the 'natural' limits dictated by gross income produced in a single time period.

In defence of tax loopholes

As noted earlier, any recognition of independent supply-side behaviour by government as a part of the fiscal process lends support to arguments for constitutional limits on the exercise of the fiscal power. Restrictions of allowable tax bases are suggested, but tax bases themselves may be so broadly defined as to make such restrictions meaningless. One means of reducing the maximum revenue potential of government is to define allowable bases for tax narrowly enough so as to allow potentially exploited taxpayers access to substitutable nontaxable options. There is a positive argument for the deliberate introduction of constitutional guarantees for 'loopholes' or 'escapes' from tax pressures. If governments know that excessively high tax rates will shrink the taxable base then this knowledge, in itself, will cause governments to keep such rates within limits. An example may be useful. Suppose that the Constitution allows government to tax wine but not beer. We can then be sure that the tax on wine will not become overly burdensome for the simple reason that the base for tax falls with every increase in rate as potential taxpayers switch to beer, the nontaxed option. With personal income taxes, restriction of the tax base to money income receipts will insure ceilings on

rates that are related to the ability of persons to shift into nonmoney, nontaxable options. I should point out that our argument here runs directly counter to the normative tax orthodoxy which elevates 'comprehensiveness' in tax base to a position of an ideal, and especially with the income tax.[7]

VI. DIRECT CONTROLS VIA CONSTITUTIONAL CHANGE

The various proposals listed above have the advantage that they allow governments to make taxing and spending decisions through ordinary political process, while this process itself is controlled by constitutional limits. In none of the schemes suggested, is there any attempt to specify directly what the level of tax rates (and spending) shall be. Government is allowed to respond to the pressures of citizens and to its own revenue-spending needs as conditions dictate. The constitutional checks are designed to prevent excessive exploitation of the taxing power.

A second, and quite different, set of proposed constitutional constraints on the fiscal authority of governments involves much more direct controls.

1. Constitutional definition of ratio between total tax revenue (or total spending) and total product or income, either in terms of levels or rates in increase

The most familiar of these proposals involves constitutional limits on the share in total product or income in the relevant jurisdiction that may be collected in taxes or used in governmental outlays or on rates of increase in this share. This type of constraint first gained prominence in 1973 with Governor Reagan's Proposition 1, which was soundly defeated in California. After the success of Proposition 13 in 1978, however, several states have incorporated ratio-type limits in their constitutions, and, in late 1979, an amendment to the United States Constitution was proposed which limits rates of increase in federal government outlays to rates of increase in gross national product.

The advantage of these direct constitutional controls lies in their specificity; the proposals put definitive ceilings on total tax revenues or on total spending. The disadvantage lies, however, in the same features; because they are quite specific, the flexibility of response of governments in the face of changing fiscal pressures is reduced. In recognition of this disadvantage, almost all proposals of this type have escape clauses incorporated. These clauses allow the

specified ratio to be waived in emergencies, with emergencies defined by a qualified majority of the legislative assemblies. Through these escape clauses, the direct control proposals collapse into the indirect controls noted earlier.

2. Constitutional ceilings on rates of specific taxes

The most prominent feature of Proposition 13 in California was the constitutional ceiling placed on the rate of tax on real property. It was probably this feature more than any other that ensured the overwhelming success of the proposition. Voters were able to predict the results directly, in terms of their own tax bills. The major disadvantage of such specific limits, however, lies in the incentive that such limits provide to government to shift to nonlimited sources and to higher-level governmental sources of revenues. Unless constitutional ceilings are placed on rates of all taxes, there is no assurance that overall levels of taxes will be reduced.

VII. TAX LIMITS IN THE 1980s: CONCLUDING REMARKS

I have listed and described briefly different proposals for constitutional change that have emerged in the tax-revolt climate of the late 1970s in the United States. The motivation and support for each one of these proposals arises from the conviction that existing levels of taxing (and spending) are 'too high', and that ordinary electoral politics are unlikely to correct the situation. Electing 'better' politicians and 'better' political parties may not be of much effect in modifying results, given the structural features of the fiscal process and the inherent monopoly powers of modern government.

It is natural in the American setting to turn to **constitutional reform** as a means of controlling governments that is independent of the direct electoral process. In this respect, my discussion in this paper is relevant only in the United States context. Constitutional history and constitutional attitudes are different in other Western nations. Imposing limits on government's power to tax will obviously not take on identical characteristics in different constitutional settings. And, to the extent that explicit constitutional constraint is not an important part of a nation's political heritage, tax limitation may prove more difficult.

Even in the American setting, the potential effectiveness of constitutional reform may be questioned. I have suggested elsewhere that our situation may be described as

one of 'constitutional anarchy', given the continuing erosion of meaning in our traditional constitutional precepts. It is tempting to conclude that modern Leviathan government is simply out of control and that we are tilting at windmills in all discussions of constitutional checks.

It seems to me, however, that those of us who care about liberty and who think about the structure of society are morally obligated to retain the faith that the people can change the structure of their political order by constitutional means and that politicians will honour the rules laid down, at least within some limits of tolerance. Personally, I was excited and encouraged by the post-Proposition 13 climate of opinion in the United States.

Relative to 1979, I am discouraged in 1980. My own assessment is that tax-limit advocates failed to 'seize the day'. The opportunity that seemed to be available during a few months in 1978 and 1979 may now have all but disappeared. The external events of late 1979 and early 1980 (Iran and Afghanistan) have shifted attention toward the needs for major increases in military spending. This shift in priorities may have precluded short-term success for any proposed fiscal limits. Honest prediction suggests a ratchet-like increase in the federal government budget in the United States, with consequent increases in the size of the deficits, and in the rate of inflation. Real tax rates seem more likely to rise than fall in the early 1980s. Once again we seem to be on the threshold of a period when military priorities may generate a permanent shift upward in the size of the governmental sector.

Such a shift does not, of course, modify the basic diagnosis. Nor does it mitigate the urgency of seeking some means of imposing fiscal limits. Indeed, the problem becomes worse with each upward move in the ratchet. But the attention span of the public is severely limited, and the whole tax-revolt package of notions may be placed on the back burner while we concern ourselves with shoring up our defences. In this setting, it becomes critically important to prevent government access to a **new** major revenue source, such as the proposed **value-added tax.** Enactment of legislation authorising utilisation of this tax base would be a tragedy of major proportions and would guarantee that real tax rates increase very substantially and to permanently higher levels.

It is also important to recognise more fully the hidden tax that inflation represents, and the automatic increases in real rates of income tax that inflation generates. It is also

important to recognise that the military draft is best interpreted as a very unjust tax on those who are conscripted, a tax that would not pass the constitutional tests of equity if called by such a name. Finally, the set of costs arbitrarily imposed in blunderbuss political attempts at preventing inflation directly amount to taxes that produce no revenues.

My diagnosis is that taxes are already 'too high', and that the disparity between what taxes should be and what they are will increase as real rates go up. I am convinced that constitutional limits on the taxing and spending power of government can be effective. The events of 1980 suggest to me only that implementation of constitutional reform will be more difficult than it seemed in 1979.

A constitutionally imposed and defined fiscal and monetary framework is a necessary requirement for the viability of a tolerably free society. There is now more agreement on this statement of normative principle than at any time during my three and one-half decades of reflections on such matters. This fact alone provides grounds for optimism. Ideas are changing; institutional change will follow unless we have passed the point of no return.

Notes

1. Cambridge University Press, 1980.
2. I have already suggested that, in my view, governments in this century, and throughout the Western world, have grown in size and scope beyond the limits that would have allowed us to explain their operation in terms of what we may call the traditional or orthodox model. For purposes of discussion here, we can label this model as that of the productive state. In this perspective, governmental activity is explained as the observed response to the emerging demands of the citizenry. The activity is productive in that desired public goods are supplied. Viewed in this light, there is no diagnosed breakdown or failure in political process. There is no cause for concern or alarm about taxes, or spending, being 'too high' or about how high they may go. As I noted, my view is that any such productive state model fails utterly to explain the growth of government in this century and notably during the decades of the 1960s and 1970s. We need, therefore, alternative positive theories of how government operates so as to move beyond any conceivable boundaries of 'productive' activity.
3. University of Chicago Press, 1979
4. University of Chicago Press, 1960
5. *Free to Choose*, Secker and Warburg, London 1980
6. *The Power to Tax*, Cambridge University Press, 1980.
7. At this point I should acknowledge some indebtedness to a beloved leader in the Mont Pelerin Society, the late Bruno Leoni. Many years ago he advanced essentially the argument that I have sketched out here in defence of commodity taxation as opposed to income taxation. At the time, my own mind-set was too close to the modern orthodoxy to appreciate fully Leoni's argument.

Appendix: Australian Commonwealth and State Fiscal Powers

Philip Clark

The principal taxing power of the Federal Parliament is contained in Section 51(ii) of the Constitution. This power is expressed in a general form but is subject to certain express qualifications. Thus, tax laws must not discriminate between States or parts of States. Section 99 provides that the Commonwealth shall not give preference to one State or any part thereof, and Section 88 requires that duties of customs shall be uniform. Section 114 prohibits the imposition by the Commonwealth of any tax on property of any kind belonging to a State, while Sections 53 to 55 contain provisions about the manner in which tax laws may be enacted.

The principal types of tax levied by the Commonwealth are income tax, customs, excise, sales tax and (until 1971) payroll tax. Estate duty and gift duty were abolished as from July 1st, 1979.

The Commonwealth and the States have concurrent powers of taxation, subject to the important exception that the Commonwealth has exclusive control over customs and excise. By virtue of s.90 of the Constitution, the States are prohibited from imposing this form of taxation. These duties of excise, especially in the form of sales tax and duties of customs on imports, are the most important revenue-raisers for the Commonwealth after income tax. The States are left with other forms of tax. However, as a practical matter the Commonwealth has acquired exclusive power to impose income taxes. This result has followed, not from anything contemplated in the Constitution, but from the interpretation of s.96 by the High Court in the First[1] and Second[2] Uniform Tax cases.

The history of the Uniform Tax Scheme began in World War II. For the duration of the war the Commonwealth took over the income tax field and the States were persuaded not to use their income tax powers. In return, the Federal government reimbursed the States on the basis of their annual average revenues from 1939 to 1942. At the 1946 Premiers' Conference the Chifley Government decided to continue the Uniform Tax Scheme. Under this arrangement the Common-

wealth imposes a general income tax and then makes grants to the States under Section 96, on condition that the States have not used their income tax powers in the past year. This scheme has effectively excluded the States from income taxation.

In 1976, however, the first stage of what has become known as the 'new federalism' was introduced with the passage of the *States (Personal Income Tax Sharing) Act*. Under this Act, which replaces the general revenue grants made under the States Grants Act, the Commonwealth has guaranteed the return of a fixed proportion of personal income tax revenue to the States.

Individuals with a taxable income of less than $4,041 pay no income tax under 1980-81 rates. From $4,042 to $17,239 the marginal rate is 32 per cent, from $17,240 to $34,478 it is 46 per cent and for taxable income above $34,479 it is 60 percent. Corporations pay a primary rate of 46 per cent on the whole of their taxable income and 50 per cent on undistributed profits. A shareholder receiving dividends does not receive a credit for the tax already paid by the corporation.

Borrowing by the Federal government and the States is largely controlled by the Australian Loan Council. The Federal government may still borrow independently for defence and both the Federal government and the States can still get loans for temporary purposes. The Loan Council usually meets once a year and it decides how much money should be borrowed on behalf of the Commonwealth, the States and other State and Federal bodies. It is usually composed of the six State premiers, the Federal Treasurer and the Prime Minister. The Loan Council was the result of the Financial Agreement which was entered into by the States and the Commonwealth in 1927 and inserted as Section 105A in the Constitution in 1929.

In recent years, recourse has been had to a part of the Agreement which enables States to borrow moneys abroad by unanimous decision of the Loan Council. While the moneys are borrowed in the name of the State, they are, for the purposes of the Financial Agreement, treated as moneys borrowed by the Commonwealth for and on behalf of the particular State or States.

Of great importance to Federal financial relations has been the use by the Commonwealth of Section 96 of the Constitution. Under this section, tied or special-purpose grants and general revenue grants are made by the Commonwealth. Any conditions whatsoever may be attached to these grants (other than those opposed to specific

Constitutional prohibitions or guarantees) and this has led to the Commonwealth's assuming control over State policy in areas such as health, education, transport, roads, conservation and the environment, despite the absence of any direct power allowing the Commonwealth to legislate in these fields.

In general, as a result of the Commonwealth's constitutional taxation powers, the Uniform Tax Cases and Section 96 grants, the Federal Government has assumed the dominant role in Commonwealth-State financial relations.

Notes

1. *South Australia* v. *Commonwealth* (1942) 65 C.L.R. 373.
2. *Victoria and New South Wales* v. *Commonwealth* (1957) 99 C.L.R. 575.

7

The Constitutional Protection of Property Rights: Economic and Legal Aspects

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The Constitutional Protection of Property Rights: Economic and Legal Aspects

G. de Q. Walker

I. INTRODUCTION

The social significance of property rights has been the subject of endless debate. The positions taken have ranged from Locke's thesis that property is a natural right which serves to protect the individual from the state, to Proudhon's cry that 'property is theft'.

Most of the time, the debate has tended to use the language and concepts of philosophy, politics or law. The science of economics has had comparatively little to say about the problem until recent times. This is because economic theory traditionally ignored the distinctions between the various possible schemes of property ownership, such as governmental, co-operative and private. Classical analysis assumed the existence of private property rights as the basis of economic behaviour and treated other forms of property ownership as if their consequences were no different. Even the discussion of issues such as nationalisation tended to assume that it was irrelevant whether the shares in an industrial concern were owned by the government or by members of the public.

This impression of irrelevancy was reinforced by the wide acceptance of Berle and Means's 1933 study[1] which concluded that a divorce of ownership from control in the modern corporation had made traditional concepts of property inapplicable and called for a new form of economic organisation in society. Although within a few years other studies using information which had not been available to Berle and Means cast doubt on their findings, the Berle and Means view rapidly found its way into orthodox doctrine.

However, in the last fifteen years or so, a number of economists, of whom the best known is perhaps Professor Armen Alchian, have made studies of different forms of property entitlement and tried to discover whether there are consistent differences in the results produced by the various forms. From the evidence so uncovered, they have endeavoured to construct a theory to explain these differences in a

manner which is consistent with economic doctrine.

The resulting 'property rights approach', as the new learning is commonly called, takes the view that there is a nexus between ownership rights, incentives and economic behaviour. Its findings are said to explain a wider class of observable economic facts than previous doctrine; it certainly constitutes a further demonstration of the interdependence of the legal system and economic performance.

The relevance of this learning to Australian constitutional practice is this. One of the few specific protections for individual rights contained in the Commonwealth of Australia Constitution is s.51(xxxi). This paragraph gives to the Commonwealth Parliament power to make laws with respect to 'the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws'. This provision was adopted at the Constitutional Conventions with almost no discussion.[2] It was designed to make it clear that the Commonwealth did have such a power, rather than leaving the power to be inferred from other paragraphs of s.51, such as the incidental power in paragraph (xxxix). The 'just terms' requirement appears to have been taken for granted, although one delegate, with touching Victorian innocence, asserted that the phrase was unnecessary because it could be presumed that the Federal Parliament would always act in accordance with principles of justice.[3]

Like any other constitutional provision expressed in general terms, s.51 (xxxi) could be given a wide interpretation or a restrictive one, or something in between. The High Court Justices who apply it are presumed to be above partisan passions, but at the same time they must to some extent share the attitudes and beliefs of the day if their decisions are to be generally acceptable. Accordingly, if property rights are seen as having a philosophical and social importance, but no particular economic significance, it is more likely that they will be required to give way to other competing interests than if they are seen to have an important and continuing role in the day-to-day working of the economy.

This essay will therefore begin by outlining the new economic theory of property rights. Then, assuming this theory to be sound (and as far as I know it has not yet been dented by other economists), the essay will analyse the operation of the constitutional provision, especially in recent times, to see whether this new knowledge makes any changes of judicial approach desirable or likely.

II. ECONOMIC SIGNIFICANCE OF PROPERTY RIGHTS

It is clear enough that a law giving effect to private **contracts** is basic to the operation of a market economy. Contract law enforces compliance with private bargains for one simple reason: to keep down interest rates. As Adam Smith said, 'When the law does not enforce the performance of contracts, it puts all borrowers nearly on the same footing with bankrupts or people of doubtful credit in better regulated countries. The uncertainty of recovering his money makes the lender exact the same usurious interest which is usually required from bankrupts. Among the barbarous nations who over-ran the western provinces of the Roman Empire, the performance of contracts was left for many ages to the faith of the contracting parties. The Courts of Justice of their kings seldom intermeddled in it. The high rate of interest which took place in those ancient times may perhaps be partly accounted for from this cause'.[4] In economic terms, the law of contract is designed to keep down transaction costs so as to enable more exchanges to take place, thereby increasing the national income.

If a law of contract were all that was necessary for a market economy, then one would think that it would not be too difficult to establish operating markets in socialist countries, where virtually all property is owned by the state. Attempts have been made to do this, but socialist-bloc economists appear to be dissatisfied with the results and continue to ask their Western colleagues how their markets can be made to match the performance of those in western countries. The reply has usually been that it would be necessary to introduce more private property rights in order to make markets work as they should. Unless this is done, the results of market allocation would, it is said, seem perverse or deficient. Private property rights are therefore seen as the second indispensable ingredient of a market system. The new property rights theory offers an explanation as to why this should be so.

Property rights are defined for these purposes as the sanctioned behavioural relations among men that arise from the existence of goods (including land and intangibles) and pertain to their use. These relations specify the norms of behaviour with respect to goods that every person must observe in his daily dealings with other persons, or suffer the sanctions for non-observance. The result of these specified norms of behaviour is that the holder of a property right has

an expectation that his decisions about the uses to which goods will be put will be effective. The owner will thus reap the fruits of a wise decision or will be responsible for the consequences of a bad one.[5]

The function of private (or, to use Maine's convenient term, 'several') property is to give as many people as possible an interest in the efficient use of resources. It does so by enabling the owner to decide how his property will be used, and allowing him to appropriate the income stream generated by its productive use (subject to taxation and other constraints). Making the owner's present income depend on the way in which resources are employed encourages him to search for the most efficient present use of those resources.

Where day-to-day control is delegated to management, this motivation is transmitted to the manager via a process described as the individual decision-maker's 'utility maximisation curve'. This utility maximisation postulate, of which more will be said later, explains why a manager would seek to maximise the profits available to shareholders in a company where shareholdings are widely dispersed. Thus, as an end result, the fact that, even in the absence of real competition, Ansett Airlines uses resources more economically than Trans-Australia Airlines, its government-owned counterpart, is ascribed to the action of private property rights.[6]

More importantly, by making the owner's present capitalisable, saleable wealth depend on the future income-earning capacity of the property, property rights give him an incentive to husband the resource and preserve some of its productive capacity for future generations. The fact that a house occupied by its owner is usually maintained in better condition than one occupied by a tenant is a familiar illustration of this tendency. Similarly, it is for this reason that (conventional wisdom to the contrary[7] notwithstanding) the greatest damage to the environment has occurred where private property rights to the resource in question are **not** recognised, such as in relation to streams, the seas, the air, whales and the like. Thus, if whales are over-hunted, it is because it is not possible to take title in a live whale; this fact gives the whaler an incentive to kill as many whales as possible in the short term, since restraint on his part alone will not ensure that larger numbers of whales are available in the future. On the other hand, the taking of title by the Commonwealth to a two-hundred mile maritime economic zone should give the Government an incentive to practise conservation in relation to whales and other undersea resources.[8]

This does not mean that private property is a sacred absolute. As an empirical institution it is, and should be, subject to regulation. Parliaments have in fact thought it desirable to remove from the bundle of rights that constitute ownership a number of prerogatives that are judged detrimental to others, such as the right to erect a tall building on the approach to an airport, the right to abuse a patent for the purposes of monopolisation, or the right to open a glue factory in Bellevue Hill. But, subject to limitations of this kind, the owner's decisions about the uses to which his property will be put remain effective, as does his expectation of being able to reap the income generated by its productive use. Or rather, that was the general position until the advent of s.47 (8) and (9) of the *Trade Practices Act 1974-77*, which is used as our legal case study below.

Property rights learning has relevance to a variety of other fields as well, besides public law. It may, for example, help management to choose between possible schemes for employee participation. If employees are issued with share options, the effect of the employees' actions on the company's prosperity will be capitalised in the present market value of the shares. A propensity among worker-shareholders to support wild-cat stoppages or demarcation disputes will become known to the stock market and will immediately depress the saleable value of the shares held by the employee. On the other hand, a system of profit-sharing will be less effective in directing employees towards awareness of the total range of the effects of their actions, since earnings do not adequately reflect changes in capital value. Current earnings reflect the short-term effects of present conduct but are less responsive to its longer-run implications. Accordingly, a management which wants its employees to have an interest in both the short-term and the long-term prosperity of the company should opt for the issue of share options rather than for profit-sharing.[9]

Internalising externalities

We should now look a little more closely at the conceptual basis of property rights theory. The theoretical basis for the conclusions about the function of property rights is the proposition that these rights provide an incentive to achieve **greater internalisation of externalities.** An externality, for these purposes, includes costs and benefits (whether pecuniary or not) which are not brought home to the person bringing them about. Thus, I may wantonly throw garbage

into a public lake, thinking of it as a kind of 'free' dump. But my action is not free; it has a cost, namely the detriment imposed on other users of the lake. But after the garbage has drifted away, that cost is not brought home to me in any substantial way. It is an 'externality'. On the other hand, if the lake is on my property and I can with relatively little cost exclude trespassers who might themselves pollute the lake, that externality is internalised: I now have an incentive to keep the lake clean, because a piece of land with a clean lake has a higher capital value than the same piece of land with a polluted lake.

Property rights can develop of their own accord whenever the gains from internalisation become larger than the costs of internalisation. The paradigm illustration of this phenomenon is the growth of private property rights in hunting land among the Indians of the Labrador Peninsula. As was indicated above, externalities can often be observed in relation to hunting. Because no hunter can control hunting by others, it is not in his interest to invest in maintaining or increasing the stock of game. The result is over-hunting. The externality generated by a successful hunt is the cost imposed on later hunters who must work all the harder to catch any game.

Before the commercial fur trade became established in Labrador, the Indians hunted game primarily for food and only incidentally for the relatively small number of furs required for the hunter's family. An externality was clearly present, but it was of such small economic significance that it did not need to be taken into account. At this stage there was no private ownership in land. But when the fur trade began to grow, the value of furs to the Indians greatly increased and the scale of hunting soared accordingly. The externalities involved in free hunting became much more apparent, and the property system therefore began to change so as to take account of the economic effects which had become important because of the fur trade.

By the beginning of the eighteenth century, territorial hunting and trapping arrangements by individual families were starting to develop. Particular pieces of land about two leagues square were appropriated for each group to hunt exclusively. Sanctions against trespassing came into use. In some instances extensive conservation practices were adopted. Thus, the fur trade made it economic to encourage the husbanding of fur-bearing animals; this made it necessary to prevent poaching; this in turn led to the socio-economic, and subsequently 'legal', changes in the tenure of hunting land.[10]

Derogation from private rights

The growth of private property rights, therefore, is the result of such factors as new technology, changes in the basic conditions of supply or demand, and changes in attitudes. They develop when the gains of internalisation become larger than the cost of internalisation. Once established, they produce the resource allocation and conservation consequences which we have noted. Derogations from private property rights have corresponding results in the opposite direction.

Communal ownership may be taken to mean a right that can be exercised by all members of a community. Grazing rights in England to a considerable extent had this communal quality before the enclosure movement. Communal ownership would be rare or non-existent in Australia, though. An attempt in *Milirrpum* v. *Nabalco Pty. Ltd.* to obtain legal recognition for a doctrine of communal aboriginal title was unsuccessful, although the legal obstacle to recognition was not the collective element but the absence of any concept of land ownership in aboriginal law. Again, contrarily to a widespread belief, public streets, parks and beaches are actually instances of private, not public, ownership. They are the private property of the municipality, of trustees or of the State or Federal government, who generally choose not to exercise their right to exclude us from them. Communal ownership is from time to time put forward as a more enlightened form of entitlement than private property, with its mean-sounding right of the owner to exclude others from exercising the owner's private rights.[11]

But as a general system of property entitlement, communal ownership has serious disadvantages. This is especially true in the context of producer goods, where communal ownership will tend to lead to actions that are wasteful or short-sighted. Professor Demsetz gives this example of the problems of communal land ownership:

> Suppose that land is communally owned. Every person has the right to hunt, till, or mine the land. This form of ownership fails to concentrate the costs associated with any person's exercise of his communal rights on that person. If a person seeks to maximise the value of his communal rights, he will tend to over-hunt and overwork the land because some of the costs of his doing so are borne by others. The stock of game and the richness of the soil will be diminished too quickly. It is conceivable that those who own these rights, i.e., every

> member of the community, can agree to curtail the rate at which they work the lands if negotiating and policing costs are zero. Each can agree to abridge his rights. It is obvious that the costs of reaching such an agreement will not be zero. What is not obvious is just how large these costs may be.[12]

The great drawback with communal property, therefore, is that the effects of a person's actions on his neighbours and on future generations will not be taken fully into account in individual decision-making. Communal property therefore gives rise to great externalities. Thus, the destruction of the forest lands of England and of China is attributed to the lack of any well-defined property rights in them. On the other hand, the private owner with his power to exclude others can usually expect to realise the rewards associated with conserving forests or game and enhancing the fertility of the land. This concentration of benefits and costs on owners (the internalisation of the externalities) creates incentives to use resources more efficiently, both in the short term and the long term.

The mere failure to enforce the law against theft or trespass may have economic repercussions of a similar nature. Non-enforcement will raise the cost of protection against invasions of property rights. The more expensive this protection becomes, the more theft and trespass there will be. People will then be prepared to pay only a lower price for property which is vulnerable to such incursions. This lower market price will understate the real value of those assets and thereby reduce the incentive to produce them. Thus, the more likely it is that something will be stolen, the less of it will be produced.

Both the problems of communal ownership and the consequences of failure to police theft are illustrated by an example drawn from the nut farms of Tripolitania. There, it would appear, potentially lucrative almond trees have been forsaken in favour of cattle-raising because of the common ownership of land. This is explained by the fact that the cost of policing the investment in an almond tree, which is permanently attached to the common land, is high, whereas cattle may be driven home at night. Similarly, in South-East Asia, some types of investment tend to decline when a private fishing ground becomes non-exclusive. A privately owned paddy-field fishery will receive more intensive feeding than if the same fish were placed in a common lake. Here again, the cause is the higher cost of protecting the investment in

private feeding, arising from the non-exclusive use of the common lake.[13]

The ownership and control issue

It might be argued that the foregoing may be all well and good, but that it has no application to modern corporate enterprise in which there has been such a divorcement between the ownership of shares and the control of the corporation by management that the shareholder should no longer be entitled to the full receipt of the advantages derived from ownership. The behaviour of managers and employers is so insulated from the interests of the owners that the conventional picture of a manager working to increase the wealth of the owners is no longer true.

Of these and similar views Alchian says: 'Though these pronouncements lack empirically refutable content, their emotional impact rivals that of a national anthem'.[14]

The approach of the property rights school to the separation issue is two-fold. First, they do not directly rely on the assumption that the objective of the organisation is to maximise shareholders' profits. This they regard as too blunt an instrument. Instead, they concentrate their attention on the motivation and behaviour of the individual decision-maker in the organisation. It is **his** objectives that are under scrutiny, not those of the organisation. Instead of treating the firm as the unit of analysis and assuming that the interests of the owners are given exclusive attention through the process of the firm's profit maximisation, the emphasis on the individual manager's 'utility maximisation curve' highlights individual adjustment to the economic environment and seeks to explain the firm's allocation of resources by studying individual actions within the organisation.

This rejection of the firm's profit maximisation as the basic behavioural postulate to explain the actions of decision-makers in a market economy is an important step. It apparently makes it possible to study a variety of different patterns of managerial behaviour, all based on the assumption that the decision-maker is motivated by self-interest and a desire to move towards the most favourable position in the organisation that is open to him.

The profit-making objectives of the shareholders remain in the picture as a set of institutional constraints which the manager must take into account when pursuing his own happiness.[15] It is in the interests of the individual decision-maker to keep in mind the profit-maximising aspirations of

the owners, because he himself is competing in a market consisting of individuals offering management services on the one hand, and investors seeking to buy managerial services for their investments on the other hand. A manager who in the past has shown an ability to generate higher profits for shareholders will himself have a higher market value. His higher price represents the market's anticipatory capitalisation of his value as a generator of profits. This process takes place not merely in the open market for managers, but also, in large organisations, in a highly efficient internal market. Many readers, and not only academics, would agree with Alchian that the market for men engaged in business management is not the only one of its kind:

> Few of us at the University of California strive to produce superior products in research and teaching because the taxpayers of California are uppermost in our interests. It is the appeal we offer to other potential employers that induces us to act as if we were trying to satisfy our present employer's interests. Only if my future were irrevocably tied, like a slave, to my present employer would my behaviour match that of the folklore indolent manager.[16]

The utility maximisation postulate seems to be a more flexible and refined instrument than the classical notion of firm profit maximisation, but it still assumes that share owners in one way or another have an influence on the behaviour of managers. Consequently, the property rights approach could not allow the basic Berle and Means thesis to go unchallenged. Alchian accordingly points out that the empirical evidence for the separation theme consists solely of the dispersion of shareholdings in the largest corporations, combined with the advantages which management possesses in a proxy contest. E.L. Wheelwright's study of the ownership and control of Australian companies certainly seems to assume that dispersion equals separation. But this is not enough, in Alchian's view. A greater number of owners implies a greater variety of owners, some of whom will have more knowledge of the particular business. Again, if the executives of management-controlled companies in fact subordinated the interests of shareholders to their own, one would expect that such companies would be less profitable and that their shares would decline in value by comparison with those of owner-controlled companies. One would also expect that the tenure of office of executives in manage-

ment-controlled companies would be longer. Over time, it might be expected that investors would have lost interest in buying shares in companies in which shareholder interests were less heeded. Yet, after forty years, Alchian argues, there is no empirical support for any of these propositions.

At the same time, the findings of other American researchers have suggested that the separation theory no longer applies; they have, indeed, cast great doubt on whether it was **ever** true. This new work makes use of shareholding data which have only recently become available because of changes in the Securities and Exchange Commission's insider disclosure rules, which make the stock held by the immediate family of officers and directors more visible. This evidence challenges the contention that the stock of large corporations is so widely dispersed that non-owning managers are in control. An instance of this new evidence concerns a director of Texaco, who reported in 1963 that he was the owner of, or interested in, 225,474 shares - somewhat less than 0.1%; in 1970, under the new requirements to disclose family share transactions, he reported an interest in 2,952,030 shares - the difference being the holdings of his wife, who was reporting the sale of 200,000 shares.

The original Berle and Means findings were almost at the outset put in doubt by, among others, the study published by the Temporary National Economic Committee in 1940. This study, because it had access to particulars of the holdings of the twenty largest shareholders (information unavailable to Berle and Means) found controlling shareholder interests in fifteen corporations that had been declared to be management-controlled by Berle and Means.

Moreover, there seems to be a good deal of evidence to suggest that in the United States owner control has been increasing as a result of merger activity in the 1960s and 1970s, so that control of business in the United States is in fact increasingly passing into the hands of a small group of wealthy individuals and families. Therefore, according to one study, not only were over 5/6ths of the nation's non-regulated productive businesses controlled by owner-managers, but increases in owner control were proceeding with the increased aggregate concentration brought about by mergers.[17]

If these findings are sound, and if they can, as seems likely, be transposed to Australia, we are driven to the conclusion that the ownership and control of corporations indeed presents a problem. But the problem is exactly the

reverse from that which orthodoxy has believed. It is not that there is a separation between ownership and control, but that if anything there is an **increase** in ownership control which presents dangers because the ownership is concentrated in relatively fewer hands, with an increase in the likelihood that the same owner will control competing corporations. The anti-competitive risks inherent in this suggest that an amendment to the *Trade Practices Act* may be needed. But at the end of the day we are left with no apparent justification for the proposition that property rights no longer have economic relevance because ownership has been separated from control.

III. LEGAL OPERATION OF THE CONSTITUTIONAL SAFEGUARD

Section 51(xxxi) of the Constitution is 'a provision of a fundamental character designed to protect citizens from being deprived of their property by the Sovereign State except upon just terms'.[18] The grant of an express power subject to the just terms limitation means that other powers must not be interpreted so as to give the Commonwealth power to legislate for the acquisition of property otherwise than under para. (xxxi).[19] The exercise of the power is subject to two limitations: (1) it must be for a purpose in respect of which Parliament has power to make laws; and (2) it must be on just terms.[20] Every valid law under paragraph (xxxi), therefore, will have two purposes, acquisition and another legislative purpose within s.51. It is clear (although the contrary was argued by the Solicitor-General in *Trade Practices Commission* v. *Tooth & Co.*, discussed below) that a statute must satisfy paragraph (xxxi) even if the party acquiring the property is not to be the Commonwealth itself, but some other person. Thus, if the Commonwealth were to exercise its power of 'eminent domain' so as to resume land for a privately-owned railway company, as was commonly done in Britain and North America in the nineteenth century, just terms would be required.[21]

Section 51 (xxxi) is not restricted to acquisition by particular methods or of particular types of interests, or to particular types of property. Innominate and anomalous interests are included. In *Dalziel*'s case, Rich J. made some useful remarks on this point (I will henceforth use the lawyer's postscript abbreviations 'J.' 'C.J.' meaning 'Mr Justice' and 'Chief Justice' respectively). 'Property, in relation to land, is a bundle of rights exerciseable with

respect to the land . . . [T]here is nothing in the placitum to suggest that the legislature was intended to be at liberty to free itself from the restrictive provisions of the placitum by taking care to seize something short of the whole bundle owned by the person whom it was expropriating'. Dalziel held a weekly tenancy of some city land and earned his living by operating a parking lot upon it. The Commonwealth took possession of the land, but did not acquire Dalziel's tenancy or the freehold. This was held to be an acquisition of property: '[T]he Minister has seized and taken away from Dalziel everything that made his weekly tenancy worth having, and has left him with the empty husk of tenancy'.[22]

The 'just terms' must be objectively just, but the High Court has left to Parliament a certain amount of discretion and some liberty to give due weight to the public interest.[23] The obligation to give just terms was primarily intended to protect the owner, but it also has the important preventive side-effect of deterring Parliament from dealing too freely with other people's rights in the exercise of its legislative powers.

The bulk of the case-law, on s.51 (xxxi) arose as a result of challenges to the validity of emergency legislation enacted during World War II and its immediate aftermath. These cases left a number of points still in doubt, but since the paragraph lay almost forgotten for nearly thirty years, the doubts remained unresolved. They were compounded by the additional uncertainty arising from the complete change in the personnel of the High Court bench. There is accordingly all the more instruction to be gained from the only recent decision of the High Court on the paragraph, *Trade Practices Commission* v. *Tooth & Co. Ltd.*,[24] a case on the exclusive dealing provisions of the *Trade Practices Act*, which was decided on 28th September 1979.

Trade Practices Commission v. Tooth & Co. Ltd.

The decision in *Trade Practices Commission* v. *Tooth & Co. Ltd.* presents a triple paradox. First, although it is a victory for the Commission's contention that s.47(9)(a) of the *Trade Practices Act* 1974 is valid, the victory is a Pyrrhic one, since in reaching that result the High Court has interpreted the provision in such a way as to remove most of the practical objections which led to the constitutional challenge in the first place. Secondly, from the point of view of constitutional development, the decision is as important for the

propositions that it rejects as for its actual decision on the facts. Thirdly, although the result is in that sense a reverse for the Commission, the longer-term result could well be more effective enforcement of the Act and a stronger competition policy. (In this paper we will not be concerned with this aspect of the case.)

Issue and decision

Section 47(9)(a) was inserted into the exclusive dealing provisions of the *Trade Practices Act* in 1977. It prohibits a corporation from refusing to renew a lease or licence of land for the reason that another party to the lease or licence has acquired, or has not agreed not to acquire, goods or services from a competitor of the lessor. A purpose or effect of substantially lessening competition is required (s.47(10)) (although paragraph (d) of the same sub-section creates a *per se* contravention in relation to forcing on a customer the products of a third person).

The subsection appears to have had its genesis in a misunderstanding of the United States law[25] and was enacted at the instance of the Trade Practices Commission. It embodies the proposition that where a supplier owns an outlet for the distribution of his products and the outlet is operated by his lessee or licensee, the supplier will be in breach of the Act if he takes any steps to prevent his lessee or licensee from using the property to distribute the products of a competitor of the lessor instead of the products of the lessor himself. It sets out to achieve a particular policy objective by a method that assumes the owner's property rights to be totally irrelevant.

The issue in the appeal was whether the Full Federal Court was correct in its decision that s.47(9)(a) was invalid under s.51(xxxi) of the Constitution in so far as it uses the words 'or renew'. It should be emphasised that the remaining 12 subsections of s.47, which deal with the most common forms of exclusive dealing conduct, were not under attack in the appeal.

The High Court found in favour of the appellant Commission by a majority of four to two (there was a vacancy on the bench at the time the case was argued). The ground relied on by the majority was that when the relevant provision uses the word 'renew', it does not mean renewal on the same terms (except as to expiry date) as those in the original lease. The terms of the new lease must be the subject of agreement between the parties, for otherwise the

paragraph might indeed effect an acquisition. In particular, the lessor is entitled to seek a full commercial rental for the new term. There is no restraint on the lessor's power to require the rental that he considers appropriate, save that the Court would not countenance the demanding of a discriminatory rent from a lessee as a means of evading the prohibition in the paragraph.

Here we meet the first paradox presented by the case. Although the provision has been held valid, it has been interpreted in such a way as to remove the main incentive for lessees to change suppliers in any event. A retailer operating a supplier-owned outlet usually enjoys a subsidised rental. The supplier acquires the land, constructs the outlet and leases it to a lessee on this subsidised basis on the assumption that the sales of the lessor's products through the outlet will generate a sufficient return to pay for the costs of the land and buildings and to offset the subsidised rental. The lower rental is therefore intended as an incentive to the dealer to conduct the business on the lessor's premises in such a way as to make it a profitable outlet for the lessor's products. In the vast majority of cases, that in fact is what happens.

In some instances, however, a rival supplier may be prepared to offer the retailer an incentive to use the leased premises to sell the rival's products instead. This offer will normally be attractive to the lessee only if he is able at the same time to retain both the incentive offered by the rival supplier and the reduced rental charged by his lessor. If he is required to pay a full commercial rental for the premises, he will normally be little better off than if he had continued to distribute the lessor's products exclusively.

The High Court's interpretation therefore inserts an enormous qualification into the operation of s.47(9)(a). By denying the lessee the opportunity to keep both suppliers' incentive payments (while falsifying the basis on which the lessor's incentive was given), the Court has removed the most contentious class of case to which the provision might have applied. It still produces what Barwick C.J.'s dissent describes as 'the extraordinary result . . . that the owner of land is denied the capacity to use his own land to sell his own goods if he has theretofore leased the land to another', but the interpretation of the word 'renew' has greatly reduced the range of cases in which it would be in the lessee's interests to deny the owner that capacity.

This case required the Court for the first time to determine the validity of a provision under which any acquisition

of property would have an **incidental** result of the legislation, not its primary purpose. The holding that there could be no compulsory acquisition of a leasehold interest under a provision which left the owner with the power to charge a full commercial rent represents a compromise. This compromise is acceptable only if one is prepared to take a narrow view of the nature of property and to overlook the economic function of private property rights in encouraging the most efficient use of resources and ensuring the conservation of productive capacity for future generations. For although under this compromise result the lessor retains the right to charge an economic rent, he has lost the right to decide the use to which the property will be put, which is a normal incident of ownership and an essential requirement if property rights are to perform their economic function in a market system, which is to permit decentralised decision-making aimed at efficiency and the maintenance of productive capacity.

Additional reasons of the majority

Three of the four majority Justices gave additional reasons for the validity of the provision, but all of these dicta present serious difficulties.

Gibbs J., while conceding (i) that the powers given by the other paragraphs of s.51 of the Constitution do not authorise legislation for the acquisition of property, (ii) that the court will not permit the adoption of circuitous devices for avoiding the safeguard and (iii) that s.51(xxxi) is not limited to acquisitions by the Commonwealth, went on to say that not every compulsory divesting of property would be an acquisition within s.51(xxxi). His Honour cited the examples of the forfeiture of prohibited imports, taxation, the forfeiture of enemy property and the sequestration of the property of a bankrupt. The provisions of s.47(9), in his Honour's view, were in the nature of provisions for penalty or forfeiture. 'If s.47(9) is regarded as having the effect that in certain circumstances a corporation is obliged against its will to grant or renew a lease, it only has that effect where the corporation is engaging in the practice of exclusive dealing forbidden by the subsection . . .[I]ts effect is to deter or punish forbidden conduct'.

An answer to this proposition can be found in the dissent of Aickin J., whose reasons for decision are the most exhaustive of the six. In his Honour's view, the apparent exceptions to the constitutional requirement for just terms in the cases of bankruptcy, taxation, penalties and forfeiture prove on

closer examination not to be exceptions at all since they do not involve what could be described either today, or in 1900, as the 'acquisition of property'. Taxation created a debt but did not compulsorily acquire property. Citing the reasons of Dixon C.J. in *Burton* v. *Honan*[26] his Honour said that confiscation by customs was a forfeiture and had never been treated as an acquisition of property. The same was true of fines: 'Both forfeiture and customs legislation and the imposition of fines by way of punishment for criminal offences were well known in 1900 and would not then or now ordinarily be described as the "acquisition of property"'. As to enemy property, Aickin J. pointed out that enemy property legislation such as that considered in *A.-G.* v. *Schmidt*[27] merely suspended the beneficial ownership in the property for the duration of the war 'so that it might await both the result of the war itself and a determination, by a variety of means including perhaps a final peace treaty, of matters to be dealt with by international agreements'. Its operation was more akin to executive forfeiture than to acquisition of property.

The minority also had an answer to the proposition that bankruptcy was an exception to the rule in paragraph (xxxi). Barwick C.J., in the course of argument, remarked that it was difficult to characterise as an acquisition the transfer of a bankrupt's assets to his receiver in order to pay his debts and to pay him back the surplus.[28]

There is a more fundamental objection to Gibbs J.'s parallel between s.47(9)(a) and the bankruptcy, penalty and forfeiture cases, however. In all of these categories of case, any transfer of property to the Commonwealth or to some other person can be characterised as a punishment for, or a purging of, some act dangerous to society, for which the property-owner is responsible. His wrongful act may have been the importation of prohibited goods, breach of a criminal statute, or incurring more debts than he is able to pay. The same is essentially true in the case of enemy property forfeitures; thus, enemy aliens such as Dohnert, Mueller, Schmidt & Co. in *Schmidt*'s case were dealt with as if they were 'vicariously' responsible for the wrongdoing of the National-Socialist government of Germany. Gibbs J., as we have seen, likened s.47(9)(a) to provisions for penalty or forfeiture. But this is not how the provision operates. There is a vesting of property under s.47(9)(a) in the tenant when the lessor does **not** refuse to renew the lease after his lessee changes to another supplier. The paragraph is contravened only when it can be shown that the tenant has not received the grant of a new term. It is not necessary

that the original lease should have been conditional on exclusive dealing, although the tenant may in fact have been buying only from the owner. Thus, whereas in the forfeiture and penalty cases the owner is liable to lose property because he has **broken** the law, under s.47(9)(a) he is deprived of property when he **obeys** the law.

The additional reasons of Stephen J. proceeded by examining s.47 as a whole and equating it with the kind of restriction on property rights which is brought about by town and country planning legislation suppressing a noxious use of land. Presumably in order to fortify this analogy, his Honour repeatedly described the exclusive dealing conduct prohibited by the paragraph in terms such as 'exploitation', 'noxious', and 'weapon'. (This seems rather overwrought imagery to apply to an owner's using his own land to sell his own goods; it also suggests certain underlying assumptions about the anti-competitive effect of exclusive dealing conduct which no longer command the general support of economists.) His Honour referred by way of illustration to *Belfast Corporation v. O.D. Cars Ltd.*[29] in which the House of Lords held that a local government restriction on the use of property did not constitute a taking of property requiring compensation under the Government of Ireland Act 1920. In his view, the restriction on property rights effected by s.47(9) was less sweeping than those customarily imposed under planning legislation.

But treating s.47 as a whole tends to obscure the special features of subsection (9) that most clearly point to the occurrence of an acquisition. Further, as Barwick C.J. and Mason J. pointed out, the *O.D. Cars* reasoning has no application to a case where the provision does in fact result in the divestiture of an actual recognisable interest in land and its tranfer to the Commonwealth or another person. The analogy with the control of noxious uses by town planning statutes becomes weaker still if one keeps in mind that s.47(9)(a) does not prevent a piece of property from being used for a particular purpose; it simply prevents the lessor from ensuring that his land will be an outlet for **his** products rather than those of his competitors. It is not a question of an inherently noxious use, since the competitor is to be allowed to use the property for the same purpose as the owner would like to use it, that is, as a retail outlet.

Murphy J., after agreeing with Gibbs J. that the foundation of the Federal Court's holding of invalidity collapsed if the word 'renew' were interpreted as not being confined to renewal on identical terms, then went on to add (and on this

point he stood alone) that he saw force in the view of Dixon C.J. that s.51(xxxi) is concerned only with acquisition of property for use or application by the executive government. Developing this point, Murphy J. observed that if all Federal laws which provided for the alteration of property rights and obligations between citizens were to be regarded as acquisitions of property within s.51(xxxi), the validity of a wide range of legislation would for the first time be called in question. That is no doubt true, but it has never been seriously suggested that any law which **alters** property rights is to be regarded as providing for the **acquisition** of those rights.

Rejected propositions

By rejecting a number of propositions which were argued on behalf of the Commission or which had previously been thought to be open, the Court in *Trade Practices Commission v. Tooth* reaffirmed the accepted doctrine on s.51(xxxi) and helpfully clarified its attitude to some areas of doubt.

Thus, none of the Justices accepted the Solicitor-General's primary argument: that unless a law could be characterised as being a law with respect to the acquisition of property, it was not subject to the constitutional requirement of just terms even though it did **in fact** acquire property. That they would not accept this submission is unsurprising: in its very terms, s.51(xxxi) contemplates that a law with respect to acquisition of property will involve a purpose relevant to some other head of power, and the authorities had always recognised this.

Again, all the Justices held, or seemed prepared to assume, that a law is subject to the requirement of just terms even if, as in the case of s.47(9)(a), the acquisition of property is not its main purpose but is merely incidental to the achieving of some other purpose.

Finally, all the Justices except Murphy J. expressed the opinion (though Stephen J. was somewhat less positive about it) that s.51(xxxi) applies even where the acquisition is not for or on behalf of the Commonwealth but for a third person. Their Honours at the same time buried the troublesome passage in *Schmidt*'s case in which Dixon C.J. had conjectured whether s.51(xxxi) might apply only where the acquisition was for the 'use or service of the Crown'.

Consequences of Trade Practices Commission v. Tooth & Co.

The sovereignty of Parliament and the rule of law are the two

politico-legal concepts that lie at the core of constitutional law. Although both concepts are vital to the theory of constitutional government as we understand it, they are mutually inconsistent - it is not possible to assert one concept without weakening the other.

As Dixon C.J. pointed out in his essay 'The Law and the Constitution',[30] at any given point in history, either parliamentary sovereignty or the supremacy of the law will be the more influential principle, and the other principle will be pushed into second place. This periodic shift of emphasis may be independent of current ideas about the limits *inter se* of Federal and State powers.

For the past half-century at least, the dominant principle, arguably, has been the sovereignty of Parliament. The reasons for this may partly have been the ascendancy of legal positivism and a perceived need for sweeping Government powers to enable the more effective prosecution of the world wars and the adjustment to their aftermaths, together with a certain amount of momentum acquired by those ideas when put into operation. Another factor may have been the popularity of views based on a misinterpretation of Rousseau which see the political state as the vehicle whereby the General Will (which is not necessarily the will of the majority) liberates the individual from existing social institutions, such as the local community, ethnic group, private property, the economic enterprise, the church and the family. The supremacy of the national legislature is essential for this process of annihilation and reconstruction: 'Each citizen would then be completely independent of all his fellow men, and absolutely dependent on the state: . . . for it is only by the force of the state that the liberty of its members can be secured'.[31]

It is interesting to speculate whether the High Court's decision in *Trade Practices Commission* v. *Tooth & Co.* may be a pointer to a shift towards a more pluralist, Burkean philosophy under which the principle of the rule of law would once again move into the ascendant at the expense of the sovereignty of Parliament. *Sankey* v. *Whitlam*[32] might be regarded as signalling the start of such a trend, for while in that case the law was given supremacy over the executive rather than over the sovereign Parliament, in modern Westminster systems the executive and the legislature are in important respects almost one. The stern dicta of a majority of the Court in *Watson* v. *Lee*[33] about the danger of tyranny inherent in the practice of not ensuring that adequate copies of a regulation are available before it takes effect may be a

pointer in the same direction. Although the sovereignty of Parliament may well be itself a doctrine of common law,[34] there is of course a definite limit to how far the courts could re-create an 'activist' common law before colliding with the principles underlying the Revolution Settlement of 1688. Nevertheless the courts could, if so inclined, go some distance towards re-establishing the pre-eminence of the rule of law by interpreting liberally the constitutional protections for individual legal rights such as s.92 and s.51(xxxi). Even though in *Trade Practices Commission* v. *Tooth & Co.* the court upheld the validity of the impugned statute, in the course of so doing it restated the constitutional doctrine so as to remove ambiguities which might have lessened its effectiveness as a safeguard of individual rights - by extending it to cover purely incidental acquisitions and by rejecting the suggestion that the constitutional safeguard operated only in cases where the property was acquired for the use and service of the Crown. It also interpreted s.47(9)(a) in such a way as to eliminate the possibility that lessees could at the same time, and possibly *mala fide*, retain the benefit of a subsidised rental offered by the lessor while converting the premises into an outlet for a rival product, in return for payment by the rival of a second financial inducement. Since the Court has made it clear that in such a case the lessor could charge a full commercial market rent for the premises on renewal, that possibility has now been excluded and the number of cases in which it would be worthwhile from the lessee's point of view to change suppliers has been greatly reduced.

If *Trade Practices Commission* v. *Tooth & Co.* is thus part of a broader shift in constitutional philosophy, it is in harmony with some significant intellectual currents of the times, as evidenced by such trends as the world-wide movement towards economic deregulation and the increasingly strict attitude towards the wide powers of statutory commissions.[35]

IV. CONCLUSIONS

The role and function of several, dispersed, private property in society is now becoming better understood by social science. The conventional Marxist view of individual property as a product of alienated labour and the rise of capitalism in the fourteenth century now appears untenable. Modern anthropology confirms that private property rights appear at quite primitive levels of social organisation

and that they are a prerequisite of virtually any ordered cultural action.[36] Indeed, recent research on comparative behaviour has discovered property rights among animals, not only the higher mammals, but also birds and crustaceans, a particularly elaborate system of property tenure having been observed among crayfish.[37]

The attempt to differentiate between property rights and 'human' rights, another practice that forms part of current received wisdom, is likewise becoming difficult to sustain. One recalls Lord Acton's dictum that 'a people averse to the institution of private property is without the first element of freedom'[38] or Sir Henry Maine's observation that 'nobody is at liberty to attack several property and to say at the same time that he values civilization. The history of the two cannot be disentangled';[39] likewise Bentham's oracular 'Property and law are born together and would die together'.[40] Empirical support for these propositions can be found through a moment's contemplation of the condition of human rights in nations where several property rights do not exist.

But our principal concern here has been with the new economic evidence concerning the function of property rights in promoting economic efficiency and the conservation of resources. The insights provided by this new evidence are of particular importance in view of the sustained attacks on the legal system and the rule of law on the ground that the law requires the judges to uphold a system of rights which serves only the interests of a particular social group, the owners of property. But the justification of a system of several, dispersed property has never been the interests of current property owners - if it were, that system would deserve most of the attacks that are made on it. The rationale of a system of individual property is that it makes possible an economic order that has been more successful in meeting the wants of its people than any other system that is available now or, so far as is known, has been available in the past. As such, the system of several property serves as much the interests of those who currently own no property as the interests of those who do.[41]

The new economic learning on property rights goes some distance towards explaining how that can be so. If sound, this evidence would by itself provide a sufficient, empirically supportable reason for a constitutional protection of property rights such as that contained in s.51(xxxi). This does not mean, however, that property rights cannot be restricted for the common good, such as by regulations covering the height of buildings, without compensation. Stephen J. in *Trade*

Practices Commission v. *Tooth & Co.* did refer with approval to the remark of Holmes J. in *Pennsylvania Coal Co.* v. *Mahon* that 'the general rule at least is, that, while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking'.[42] But the protection of property rights does not mean that reasonable restrictions on the use of property should be treated as acquisitions requiring compensation. Property rights theory appears to have no quarrel with this kind of regulation.

What the theory does say, however, is that derogations from the exclusive character of ownership such as taking from an unwilling owner a leasehold interest and giving it to a tenant at a rental negotiated on entirely different assumptions (as the Federal Court had held was the effect of s.47(9)(a) of the *Trade Practices Act*) will have long-term economic costs which will be reflected in waste of resources and in a generally lower standard of living. Such derogations deprive the owner of the power to make his decisions effective, a vital element in the working of the market. They should therefore be recognised as acquisitions requiring compensation, for reasons of 'deterrence' as well as fairness. Government departments will from time to time recommend legislation that abrogates private property rights in this way, because cutting away private property rights (or any other private rights for that matter) will give the bureaucracy a greater power over the disposition of wealth in society. In some instances their recommendations may be supported by sound arguments that warrant acceptance. Nevertheless, all such enactments should be seen as acquisitions requiring compensation, both for the sake of the dispossessed owner and for the sake of the efficient running of the market economy.

In *Trade Practices Commission* v. *Tooth & Co.*, the High Court effected a compromise by interpreting the impugned statute in such a way as to neutralise most of its impact on the owner's right to exclude. If this compromise solution had not been available, it seems quite possible that the provision would have been held unconstitutional, even though its operation was indirect, the person acquiring the property was not the Commonwealth itself but another person, and even though the property was not acquired for the 'use and service of the Crown'. Although it was prepared to limit the owner's right to determine the use to which the property would be put, a right which is an important factor in proper decentralised decision-making in a market economy, the fact that in other respects the Court consolidated and slightly extended the

protection given by s.51(xxxi) of the Constitution should operate as a clear warning to Parliament of the danger of treating an owner's rights as irrelevant.

But while at the Federal level s.51(xxxi) is tending to keep economic understanding and constitutional practice tolerably in harmony, the absence of a comparable provision in State constitutions is leaving State governments free to act with increasing arbitrariness in relation to their citizens' property. In Queensland, where some 90 per cent of all land is held on Crown leasehold rather than freehold, the government has allegedly intervened to refuse its consent to the sale of a leasehold grazing property to a group of Aurukun aborigines, part of its reason being a policy against allowing further large transfers of leasehold **or freehold** land to aborigines or groups of aborigines in isolation. It appears that contracts had been exchanged and a deposit had been paid. This action is currently the subject of litigation in the High Court.

An even more sweeping measure is the Coal Acquisition Act 1981 (New South Wales), which expropriates all privately-owned coal in the State while attempting to exclude the normal common law right to just compensation. In New South Wales, as in most of Australia, the rights to coal and most other minerals had been reserved to the Crown at the time of the original grant of the land, but some grants in the nineteenth century had conveyed the minerals with the freehold, as was the practice in Britain and North America. These rights had subsequently been developed and traded for over a century by mining companies, retired coal-miners and others and were an inflation-proof asset of real value. The Coal Acquisition Act appears to be the first instance in the Anglo-American common law world in which a legislature has sought, in peacetime, to confiscate the valuable property of its own citizens while purporting to exclude the usual right to compensation. The Act does contemplate the possibility that some owners might receive some recompense *ex gratia*, but purports to reserve to the government an unfettered right to decide how much, if any, reimbursement will be paid, and to whom. This in itself appears to be unprecedented. Besides its far-reaching implications for property rights, the Act drives a major breach through the principles of the rule of law.

The overall Australian picture is thus somewhat confused. It is clear that economic development is favoured only in conditions where there are incentives to efficiency and conservation in the use of resources. These incentives,

according to the new economic learning on property rights, are maximised under a system of dispersed, several, property ownership. The constitutional protection in s.51(xxxi) appears to be operating so as to protect most of those conditions from Federal interference, but its effect may be more than offset by a sharp increase in arbitrary and unpredictable action by States. The challenge to the law and to legislation in the near future will be to help to maintain, through all levels of government, the patterns of incentives that are the necessary conditions for successful economic development. This will benefit not least those who at present hold no property and who therefore have the most to gain from economic growth.

Notes

1. *The Modern Corporation and Private Property*, (New York 1933.) Cf. E.L. Wheelwright, *Ownership and Control of Australian Companies*, (Sydney, 1957), pp. 104-08.
2. *Australian Convention Debates, Third Session, Melbourne, 1898*, pp. 151-54, 1874.
3. *Ibid.* p. 153.
4. *The Wealth of Nations* (1776) Book I, Chapter IX.
5. E. Furobotn, S. Pejovich (eds.) *The Economics of Property Rights*, (Cambridge, Mass. 1974), p. 3. I recommend this work to anyone wishing to become acquainted with this topic. I have drawn liberally on it for this paper, especially the contributions of the editors, S. Cheung, H. Demsetz, A. Alchian, R. McKean and G.W. Nutter.
6. D.G. Davies, 'Property Rights and Economic Efficiency - the Australian Airlines Revisited', (1977) 20 *Journal of Law and Economics* 223. See also, M.G. Kirby, *Domestic Airline Regulation: The Australian Debate*, (Centre for Independent Studies, St Leonards, 1981.)
7. C.B. MacPherson, 'Capitalism and the Changing Concept of Property', in E. Kamenka and R. Neale (eds) *Feudalism, Capitalism and Beyond*, (Canberra, 1975), p. 105 at 118.
8. A. Alchian and W.R. Allen, *Exchange and Production: Competition, Co-ordination and Control*, 2nd edn., (Belmont, California, 1977), p. 427; same authors, *University Economics: Elements of Inquiry*, 3rd edn., (Belmont, California, 1972), p. 143.
9. Alchian and Allen, *University Economics*, *op. cit.* p. 191.
10. Demsetz, in Furobtn and Pejovich, *op cit.* pp. 34-37.
11. *Milirrpum* v. *Nabalco Pty.Ltd.* (1970) 17 F.L.R. 141. For an example of current advocacy of communal ownership, see C.B. MacPherson, *op cit.*
12. Demsetz, *op. cit.* p. 38.
13. S. Cheung, in Furobtn and Pejovich, *op. cit.*, p. 14.
14. *op cit.* n.5, p. 134.
15. Furobotn, Pejovich, *op. cit.* pp. 2-3.
16. *op cit.* n.5 p. 135-6.
17. L. Pedersen, W.R. Tabb, 'Ownership and Control of Large Corporations Revisited', (1976) 21 *Antitrust Bulletin* 53, 65; see also J.M. Chevalier, 'The Problem of Control in Large American Corporations', (1969) 14 *Antitrust Bulletin* 163. Cf. K. Sheridan, *The Firm in Australia*, (Melbourne, 1974), pp. 53-55, 67-68; in that study the findings arguably weaken the Berle-Means inference, since the results show **generally** lower profitability among larger firms, not just those that might be regarded as management-controlled.
18. *Minister of State for the Army* v. *Dalziel*, (1944) 68 C.L.R. 261, 285.
19. *Johnston Fear and Kingham* v. *Commonwealth* (1943) 67 C.L.R. 314, 325; *Andrews* v. *Howell* (1941) 65 C.L.R. 255, 268; *Dalziel*'s case, *supra*, at 294; *A.-G.* v. *Schmidt* (1961) 105 C.L.R. 361, 371; *Strickland* v. *Rocla Concrete Pipes Ltd.* (1971) 124 C.L.R. 468, 507.
20. *Bank of New South Wales* v. *Commonwealth (Bank Nationalization Case)* (1948) 76 C.L.R. 1, 205, 265-66, 299, 301, 303, 352; *W.H. Blakeley & Co. Pty. Ltd.* v. *Commonwealth* (1953) 87 C.L.R. 501, 519, 521; *P.J. Magennis Pty. Ltd.* v. *Commonwealth* (1949) 80 C.L.R. 382, 403, 422; *Dalziel*'s case, *supra*, at 285.
21. Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901, reprinted Sydney 1976), p. 641.

22. 68 C.L.R. at 286.
23. *Grace Bros. Pty.Ltd.* v. *Commonwealth* (1946) 72 C.L.R. 269, 279, 280, 291.
24. (1979) A.T.P.R. para. 40-127.
25. See Walker, 'Exclusive Dealing and Property Rights', (1979) 53 *A.L.J.* 70, 71.
26. (1952) 86 C.L.R. 169, 180.
27. *supra*, n. 19.
28. Transcript of Argument, 9 April 1979, 87.
29. [1960] A.C. 490.
30. *Jesting Pilate and Other Papers and Essays*, (Sydney, 1965), p. 38.
31. *The Social Contract*, Everyman's edn., (New York, 1950), p. 52. As to the misinterpretation of Rousseau, see Sartori, 'Liberty and Law', in K. Templeton ed., *The Politicization of Society*, (Indianapolis, 1979), pp. 251, 274-86.
32. (1978) 53 A.L.J.R. 11.
33. (1979) 54 A.L.J.R.1.
34. Owen Dixon, 'The Common Law as an Ultimate Constitutional Foundation', *op. cit.*, n.30, 203.
35. *Science Research Council* v. *Nasse* (1978) 3 All E.R. 1196, 1200-08.
36. F.A. Hayek, *The Constitution of Liberty*, (London, 1960), p. 140.
37. F.A. Hayek, *Law, Legislation and Liberty*, (London, 1973), Vol.I, p. 75.
38. *The History of Freedom*, (London, 1907), p. 297.
39. *Village Communites*, (London, 1876), p. 230.
40. *The Theory of Legislation*, Atkinson tr., (London, 1914), Vol. I, p. 146.
41. F.A. Hayek, *op cit supra* n. 37, p. 121.
42. (1922) 260 U.S. 393.

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