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costituzionalismo britannico e irlandese

Modello Westminster nel mondo

Federal Representative Democracy In Australia: British, American and Swiss

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FEDERAL REPRESENTATIVE DEMOCRACY IN AUSTRALIA: BRITISH, AMERICAN AND SWISS*

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ABSTRACT (ITA): È opinione diffusa che la costituzione australiana sia una sintesi tra l'approccio britannico e quello americano al tema del governo. Questo articolo mostra come le idee federali canadesi, tedesche e soprattutto svizzere furono utilizzate anche dagli autori della Costituzione australiana, adattandole in una forma ritenuta adatta alle condizioni e alle aspettative australiane. In particolare, la Costituzione svizzera offriva due idee influenti: il referendum e l'esecutivo conciliare. Gli australiani sono stati tra i primi al mondo a utilizzare il referendum come mezzo per ratificare una Carta costituzionale, con implicazioni di vasta portata per la progettazione del sistema federale australiano. Anche se il modello conciliare dell'Esecutivo non è stato adottato, esso ha influenzato la struttura del Senato australiano in maniera alquanto significativa. Con il successivo sviluppo del voto proporzionale, il Senato australiano ha costituito un'importante innovazione nel modello di governo parlamentare.

ABSTRACT (ENG): It is conventional wisdom that the Australian constitution is a unique synthesis of British and American approaches to government. This article shows how Canadian, German and especially Swiss federal ideas were also utilised by the framers of the Australian Constitution, adapting them into a form considered suitable to Australian conditions and expectations. In particular, the Swiss constitution offered two influential ideas: the referendum and the conciliar executive. The Australians were among the first in the world to use the referendum as means of ratifying a constitution, with far-reaching implications for the design of the Australian federal system as a whole. While the conciliar executive was not adopted, it influenced the design of the Australian Senate in ways that have also proven highly significant. With the later development of proportional voting, the Australian Senate has become a very important Antipodean innovation of parliamentary government.

PAROLE CHIAVE: formula elettorale proporzionale; governo rappresentativo; referendum
KEYWORDS: proportional voting; representative government; referendum

1. Introduction

It is the conventional wisdom that the Australian constitutional system is a unique synthesis of the British and American systems and theories of government. As the now famous remark puts it, 'the waters of the Thames and the Potomac both flow into Lake Burley Griffin'[1].

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[1] See G. WINTERTON, *Monarchy to Republic: Australian Republican Government*, Oxford, Oxford University Press, 95. J. KILLEN, *Book Review*, in *Australian Journal of Politics & History* 33(2), 1987, 144. points out that Lake Burley Griffin, the artificial lake that lies at the centre of the federal capital, Canberra, was of course not completed until 1963, long after the Australian Constitution was enacted into law in 1900.

The Australian Constitution is not, however, simply a 'cut-and-paste job'[2], nor a 'Washminster mutation'[3]. It is the result of more complex and careful deliberation than either of these descriptions imply. It is the consequence of what usually happens when new constitutions are formed as a result of reflection, discussion and debate. When drafting a constitution, conscientious drafters look to the leading political models, the scholarly literature, and their own history, experience and values. They endeavour to meld this learning into a coherent, practicable whole, while at the same time adopting those compromises that are necessary to secure sufficient political support for the constitution-making project. This is precisely what the framers of the Australian Constitution sought to do.

The Constitution of the Commonwealth of Australia came into force in 1901 through a process that was, by the standards of the time, considered to be progressively democratic[4]. The delegates to the two Federal Conventions (1891 and 1897-8) at which the Constitution was drafted were ordinary politicians, nominated by the colonial Parliaments to the first Convention, and most of them directly elected to the second Convention. This meant that the discussion in the two Conventions had much of the character of ordinary parliamentary debate, with the usual doses of florid rhetoric, rancorous invective and hyperbolic exaggeration[5]. There was plenty of ignorance on display, and not a few mistakes of fact and misinterpretations of data. And yet, the delegates took the task of drafting a new constitution very seriously. Most of them made every effort to be constructive, many expressed themselves carefully and thoughtfully, and several demonstrated they were very learned.

The most knowledgeable and diligent among the founders undertook careful studies of the constitutions of those countries most likely to assist them in the task of fashioning a federal constitution[6]. They read the state of the art literature[7]. They tried to understand the practical workings of the constitutional models that recommended themselves for

[2] J. WILLIAMS, *Click Go The Shears: The Reception of Constitutional Models and Australian Constitutional Theory*, Paper presented at *Constitutionalism,* 1999; G. CRAVEN, *A Liberal Federation and a Liberal Constitution*, in J. NETHERCOTE (eds.), *Liberalism and the Australian Federation*, Leichhardt, Federation Press, 2001, 61.

[3] See E. THOMPSON, *The 'Washminster' Mutation*. *Politics* 15(2), 1980, 32.

[4] See H. IRVING, *To Constitute a Nation: A Cultural History of Australia's Constitution*, Cambridge, Cambridge University Press, 8-11. The point is not that the process was democratically inclusive, for women and many indigenous people were excluded from having a direct role in voting for delegates to the Federal Conventions and voting in the ratifying referendums in most of the Australian colonies.

[5] Eg. A. DEAKIN, *The Federal Story: The Inner History of the Federal Cause*, ed. Herbert Brooks. Melbourne, Melbourne University Press, 1944.

[6] R. BAKER, *A Manual of Reference to Authorities for the Use of the Members of the National Australasian Convention*, Melbourne, E. A. Petherick and Co., 1891; J. QUICK, *A Digest of Federal Constitutions.* Queanbean, J. B. Young; 1896; R. GARRAN, *The Coming Commonwealth: An Australian Handbook of Federal Government*, Sydney, Angus and Robertson, 1897; S. GRIFFITH, *Notes on Australian Federation: Its Nature and Probable Effects*, Brisbane, Edmund Gregory, Government Printer, 1896.

[7] See J.A. LA NAUZE, *The Making of the Australian Constitution*, Melbourne, Melbourne University Press, 1974, 335-361; L.F. CRISP (eds.), *Federation Fathers*, Melbourne, Melbourne University Press, 1990.

adoption[8]. And they thought hard about how best to integrate the models into a coherent workable whole, appropriate for Australian conditions[9]. As a document that had to secure the agreement not only of the delegates, but also the voters in the six Australian colonies, the draft constitution that emerged necessarily contained compromises between conflicting interests. The framers knew this. They knew that the draft contained tensions between competing principles they were not quite able to resolve by negotiation[10]. For this is what a constitution born out of vibrant democratic contestation must necessarily be[11].

The particular form of parliamentary government to be established by the Australian Constitution was a focal point of debate at the Federal Conventions. It was also probably the most conspicuous point at which the framers of the Constitution constructed a synthesis of British and American political ideas and practices[12]. However, to describe the Australian system simply as an amalgamation of these two models does not do justice to the many subtle modifications, adaptations and compromises that were involved. Indeed, unless the influence of other models – the German, the Canadian and especially the Swiss – is taken into account, the course of debate and the Constitution that resulted are likely to be misunderstood.

2. A Federal Parliament

The Parliament of the Commonwealth of Australia is deliberately described in the Australian Constitution as a 'Federal Parliament'[13], a term which reflects the governing idea that the Constitution was meant to bring a 'federal commonwealth' into being[14]. The term 'federal commonwealth' seems first to have been used by Samuel Griffith[15] and can almost certainly be traced to James Bryce's highly influential book, *The American Commonwealth* (1889)[16]. Bryce's influence upon the framers of the Australian Constitution is

[8] N. ARONEY, *A Commonwealth of commonwealths: Late nineteenth century conceptions of federalism and their impact on Australian federation*, in *The Journal of Legal History* 23(3), 2002, 253.
[9] N. ARONEY, *Imagining a Federal Commonwealth: Australian conceptions of federalism*, in *Federal Law Review*, 30(2) 2002, 265.
[10] See B. GALLIGAN, J. WARDEN, *The Design of the Senate*, in G.J. CRAVEN (eds.), *The Convention Debates 1891-1898*, Sydney, Legal Books, 1986.
[11] *Attorney-General (Cth) v Colonial Sugar Refining Co Ltd* (1913) 17 Commonwealth Law Reports 644, 652-3 (Lord Haldane).
[12] E. THOMPSON, *The 'Washminster' Mutation*, in *Politics* 15(2), 1980, 32.
[13] Australian Constitution, s. 1.
[14] Commonwealth of Australia Constitution Act 1900 (UK), preamble, s. 3. See J.A. LA NAUZE, *The Name of the Commonwealth of Australia*, in *No Ordinary Act: J.A. La Nauze on Federation and the Constitution*, in H. IRVING, S. MACINTYRE (eds.), Melbourne, Melbourne University Press, 2001; N. ARONEY, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution*, Cambridge, Cambridge University Press, 2009, 1-11.
[15] S. GRIFFITH, *Convention Debates*, *Sydney*, 1891, 523. The bare term 'commonwealth' was first used by Henry Parkes. See J.A. LA NAUZE, *Ib.*, 158-72.

[16] There was also a hint of the idea of a federal commonwealth in Edward Freeman's influential essay, 'Presidential Government' (1886, 392). On Bryce and Freeman and their influence in Australia, see J.S.F. WRIGHT, *Anglicizing the United States Constitution: James Bryce's Contribution to Australian Federalism*, in *Publius: The Journal of Federalism* 31(4), 2001, 107; N. ARONEY, *The Constitution of a Federal Commonwealth*, cit., 78-92.

well known[17]. His basic idea was that the American political system is best understood as consisting of 'a Commonwealth of commonwealths, a Republic of republics, a State which, while one, is nevertheless composed of other States even more essential to its existence than it is to theirs'[18]. Bryce was here echoing a conception of the federal commonwealth which had been previously described by Baron Montesquieu in his famous *De l'esprit des Lois*, first published in 1748. Montesquieu had said that a 'federal republic' arises when: several smaller States agree to become members of a larger one, which they intend to form. It is a kind of assemblage of societies, that constitutes a new one, capable of increasing by means of new associations till they arrive at such a degree of power as to be able to provide for the security of the united body. … As this Government is composed of small Republics, it enjoys the internal happiness of each, and with respect to its external situation, it is possessed, by means of the association, of all the advantages of large Monarchies[19].

The influence of this idea can be traced in a line from Montesquieu, via the framers of the American Constitution, to those who drafted the Australian Constitution in the late nineteenth century. Alexander Hamilton—although the sincerity of his attachment to the idea may be doubted—adopted Montesquieu's definition of the federal republic in one of his letters to the *Independent Journal*, calculated to convince voters in the State of New York to ratify the proposed Constitution and soon thereafter republished in the collection of 85 essays which we now know as *The Federalist Papers*[20]. In turn, Hamilton's essay (*Federalist No. 9*) was cited by Thomas Just in a little known, but highly significant, compendium which he prepared for the delegates to the Federal Convention of 1891 on the order of the government of Tasmania, and most probably on the instructions of the Tasmanian Attorney-General, Andrew Inglis Clark[21].

Thomas Just's book contained a variety of extracts from various important writings deliberately arranged, it seems, to guide the reader in a certain direction. Most conspicuous among these were a number of extracts from *The Federalist Papers*, including Hamilton's *Federalist No. 9* and James Madison's *Federalist No. 39*. In Just's presentation, these extracts seemed to provide appropriate guidance on almost all the important issues relating to Australian federation, apparently on the premise that 'the Constitution of the United States was framed under similar circumstances to those which should mark the formation of the Constitution of United Australasia'[22] Just used Madison, Hamilton and Montesquieu to present the idea that a federation is essentially an 'assembly of States' which is at the same time itself a 'State', and in which the several States are constituent members, entitled to

[17] J.A. LA NAUZE, *Ib.*, 158-172.
[18] J. BRYCE, *The American Commonwealth*, 2nd ed. London, Macmillan, 1889, 332.
[19] C.L. DE SECONDAT – MONTESQUIEU, *The Spirit of the Laws*, trans Nugent, T. New York, Hafner, 1949, I-IX.
[20] See C. ROSSITER, *The Federalist Papers,* New York, New American Library of World Literature, 1961.
[21] See T. JUST, *Leading Facts connected with Federation*, Hobart, The Mercury Office, 1891; J.A. LA NAUZE, *The Making of the Australian Constitution*, Melbourne: Melbourne University Press, 1974.

[22] T. JUST, *op. ult. cit.*, 33. See also 33-4, 37-8, 44, 49-7.

separate representation in the institutions of the federal government and an exclusive sphere of 'sovereign' power over their own internal affairs[23]. The idea was persuasive. It was reflected in the draft constitution which Inglis Clark prepared in 1891[24], it was repeated in the draft constitution that emerged under Samuel Griffith's leadership at the end of the Federal Convention of 1891, and it persisted throughout the deliberations of the Convention of 1897-8 despite concerted efforts on the part of a determined minority to deconstruct it[25].

As the framers of the Australian Constitution understood it, the federal character of the Australian Parliament was expressed in two important ways, largely similar to the manner in which the American and Swiss federal legislatures were also constructed. Firstly, the legislative power of the Commonwealth was constitutionally limited, extending only to the specific topics enumerated in the Constitution (Australian Constitution, ss 51 and 52), in contrast to the broad legislative powers of the States, which were to 'continue' subject to the Constitution (Australian Constitution, ss 106 and 107). Secondly, the Federal Parliament consisted of the Queen, the Senate and the House of Representatives. This tri-partite structure resembled that of the British Parliament, except that the two houses of the Australian Parliament were designed to give effect to the federal character of the Commonwealth by providing, as in the United States and Switzerland, that the people of the States are represented in the Senate and the people of the Commonwealth are represented in the House of Representatives (Australian Constitution, ss 7 and 24).

The framers of the Australian Constitution deliberately used the term 'Senate' rather than 'Legislative Council' or 'House of Lords'. The term was derived from the Constitutions of the United States and Canada, although the deeper origin of the term, as the Australians well knew, was the Senate of ancient Rome[26]. The terms used in Switzerland for the corresponding institution were *Conseil des Etats* (French) or *Ständerat* (German), meaning 'Council of States'[27]. The corresponding term, 'state's house', was often used by the Australians in relation to the Senate. Like the American and Swiss models, the Australian Senate is based on the equal representation of each the Australian States (Australian Constitution, s 7). The Australians knew about the Canadian and German systems, where 'representation' of the constituent Länder and Provinces in the second chamber was not

[23] T. JUST, *op. ult. cit.*, 37.
[24] See J. REYNOLDS, *Clark's American Sympathies and His Influence on Australian Federation*, in *Australian Law Journal* 32: 62, 1958; J. WILLIAMS, *'With Eyes Open': Andrew Inglis Clark and Our Republican Tradition*, in *Federal Law Review* 23: 149, 1995.
[25] This minority appealed to the alternative, much more nationalist reading of the United States Constitution advanced in works such as J. BURGESS, *Political Science and Comparative Constitutional Law. Boston*, Ginn and Co., 1890.
[26] See J. QUICK – R. GARRAN, *The Annotated Constitution of the Australian Commonwealth*, Sydney, Angus and Robertson, 1901, 415.
[27] R. BAKER, *A Manual of Reference to Authorities*, cit.; F.O. ADAMS – C.D. CUNNINGHAM, *The Swiss Confederation*, London, Macmillan, 1889.

equal, nor directly or popularly elected[28] They also knew about the competing interpretations of the federal foundations of the American Constitution that had been advanced by figures such as John C Calhoun and Daniel Webster[29]. Some of the Australians wanted representation in the Senate to be broadly proportional to population, but they were outvoted by those who considered equal representation in the Senate and proportionate representation in the House of Representatives to be more appropriate in a 'federal commonwealth', understood as a 'commonwealth of commonwealths', or a 'compound republic'[30].

The Australians departed from the American model, however, in several important respects. The Federal Convention that had been held in 1891 consisted of delegates chosen by the colonial Parliaments. Much like the American federal convention that was held in Philadelphia in 1787, it proposed the establishment of a federal constitution in which the State Parliaments would play a key role in ratifying the constitution, choosing representatives to sit in the federal Senate and approving any proposed amendments to the constitution in the future. For various reasons, the draft constitution that emerged in 1891 did not secure sufficient support. However, a revitalised federation movement re-emerged in 1895 when colonial leaders agreed to a constitution-making process which involved a more direct role for the people of each colony. According to this new process, delegates to the second Federal Convention would be directly elected by the voters in each colony and the draft constitution prepared by the Convention would be submitted to the voters in each colony for approval at a referendum (*Official Report of the Federation Conference Held in the Court-House, Corowa*, 1893, 27).

The Australians drew on the Swiss example but extended it. The Swiss Constitution of 1848 had been ratified by a majority of cantons (15½ in favour, 6½ opposed), each canton deciding in accordance with its own constitutional traditions, some of them using representative institutions, others forms of direct democracy, such as the ancient *Landsgemeinde* then practiced in the cantons of Uri, Schwyz, Obwalden, Nidwalden, Glarus, Zug, Appenzell-Inner Rhodes and Appenzell-Outer Rhodes[31]. The Constitution of 1848 provided that it could be amended only by a referendum in which the proposal was approved by a majority of voters in the federation, as well as a majority of voters in a majority of cantons, and in 1874 extensive constitutional revisions were approved by a

[28] See R. BAKER, *op. ult. cit.*; J. BLUNTSCHLI, *The Theory of the State*, trans D. G. Ritchie, P. E. Matheson and M. A. Lodge, Oxford, Clarendon Press, 1885; J. BOURINOT,. *Federal Government in Canada*, Baltimore, Johns Hopkins University Press, 1889; G. SMITH, *Canada and the Canadian Question*, cit. On the influence of German state theory in Australia, SEE N. ARONEY, *The Influence of German and Swiss State-Theory on Late Nineteenth Century British, American and Australian Conceptions of Federalism*, in *International and Comparative Law Quarterly* 59, 2010, 669.
[29] See R. BAKER, *op. ult. cit.*, cit., and ID., *Federation*, Adelaide, Scrymgour and Sons, 12.
[30] See J. STORY, *Commentaries on the Constitution of the United States*, New York, Little, Brown and Co., 1891, 518-519; C. SHARMAN, *Australia as a Compound Republic*, in *Politics* 25(1), 1990, 1; G. MADDOX, *'Australian Democracy and the Compound Republic'*, in *Pacific Affairs* 73(2), 2000, 193.
[31] See G. THÜRER, *Free and Swiss: The Story of Switzerland*, R P Heller and E Long trans. London, Oswald Wolff, 1970, 113.

majority of voters in a majority cantons (14½ in favour, 7½ opposed)[32]. The Australians adapted these aspects of the Swiss Constitution to their own circumstances. Most importantly, because what was being proposed was a federation of mutually independent, self-governing colonies, it was widely accepted that only those colonies that agreed to unite would become part of the federation, as had been the case in the United States[33]. The ratification of the Australian Constitution therefore rested on the principle of unanimity among the colonies[34]. Consistent with this principle, it was agreed that each colony would, as self-governing political community in its own right, enact its own Enabling Act authorising the appointment of delegates to the Federal Convention and providing that the draft constitution prepared by the Convention would be submitted to the voters in each colony for approval. While the constitution would then be submitted to the British Parliament for formal enactment, the formative process and the substantive content of the constitution was determined entirely by the Australians themselves[35]. Approaching the matter in this way, the Australians went considerably further than the Canadian colonies, which had federated in 1867. While the elected representatives of the Canadian colonies had negotiated the general terms of a proposed federal union and had formulated these in a series of resolutions, the *British North America Act 1867* (UK) was drafted in Britain, enacted by the British Parliament, and did not confer on the Canadians a local power to amend it. Canadians remained dependent upon the British Parliament for amendments to the *British North America Act* until it was patriated in 1982 pursuant to the *Canada Act 1982* (UK) and the *Constitution Act 1982* (UK). Most of the Australian framers believed that the United States and Switzerland were better models than Canada in these respects (eg, *Conference Debates, Melbourne* 1890, 108-10, 133-8)[36].

The decision in Australia that the voters in each colony would play a direct role in the ratification of the Constitution had a far-reaching effect on the deliberations of the framers of the Constitution at the second Convention in 1897-8. It contributed to their decision to provide that the Senate would be directly elected by the voters of each State rather than chosen by the State Parliaments (Australian Constitution, s 7), an innovation which predated the adoption of direct election of the American Senate by some thirteen years (Zywicki 1997). Consistent also with the 'popular' foundations of the Constitution, the

[32] *Ib.*, 124.
[33] See *Convention Debates, Adelaide* 1897, 50–51 (Charles Kingston).
[34] This principle of unanimity remains fundamental to the Australian Constitution. Amendments to the boundaries of a State or to its representation in the federal Parliament can only occur with the consent of the people of that State (s 128, para 5). The *Australia Acts 1986* (UK) and (Aust), by which the British Parliament abdicated its authority to legislate for Australia, can only be amended with the unanimous approval of the Commonwealth and State Parliaments (s 15). The Australian version of the *Australia Act 1986* was itself enacted pursuant to s 51(xxxviii), which authorises the federal Parliament to exercise the powers of the British Parliament within Australia, but only 'at the request or with the concurrence of the Parliaments of all the States directly concerned'.
[35] See J. QUICK – R. GARRAN, *The Annotated Constitution*, cit., 96-98.
[36] See J. QUICK, *A Digest of Federal Constitutions,* Queanbean, J. B. Young, 1896, 59-60.

Australians similarly decided, following the Swiss model, that amendments to the Constitution ought to be approved by a 'dual' referendum in which the approval of a majority of voters in the Commonwealth as a whole as well as a majority of voters in a majority of States would be required (Australian Constitution, s 128). The simultaneous involvement of the people of the Commonwealth and the peoples of the States was seen as the most appropriate way of amending the constitution of a federal commonwealth. As Charles Kingston, Premier of South Australia, put it, these elements, understood as a coherent whole, were the 'democratic essentials of a Federal Constitution'[37].

Although many of the Australians continued to speak and write as if the Senate would represent the 'interests' of the States (eg, *Convention Debates, Sydney* 1891, 89-90)[38], the direct election of the Senate by the people of the States meant that it would inevitably reflect the diverse political interests of the voters in the States, rather than those of the State Governments (as in Germany) or the State Legislatures (as in the United States)[39]. It is often observed in this respect that the Australian Senate has failed in its purpose to 'represent the States', largely because it is dominated by party politics rather than regional allegiances. It is argued that there are very few if any examples where the Senate has adopted a view different to the House of Representatives on a matter in which the concerns of the States were opposed to the interests of the Commonwealth as a whole[40]. It has also been argued that the Senate has failed to be a forum where the smaller States are protected from the larger States. Many who make these points consider the construction of the Senate as a 'states' house' to be a failure, or a mistake[41].

Several points can be made about this line of criticism of the Australian Senate. The first is that although party politics has dominated, the Senate has still provided opportunity for senators to advocate for the interests of their constituents at a state level[42] and it has ensured that even when one of the major parties performs so poorly in the House of Representatives that it has no or very few representatives from a particular State, it will secure at least some representatives in the Senate[43]. Moreover, although party discipline means that divergent

[37] See C. KINGSTON, *The Democratic Element in Australian Federation,* Adelaide, J.L. Bonython and Co., 1897, 8-10.
[38] J. QUICK – R. GARRAN, *The Annotated Constitution*, cit.
[39] See H. EVANS – R. LAING, *Odgers' Audtralian Senate Practice*, 13th ed. Canberra, Department of the Senate, 2012, 2-4.
[40] See G. SAWER, *Federation under Strain*, Melbourne, Melbourne University Press, 1977, 128.
[41] See L. CRISP, *Australian National Government*, Melbourne, Longmans, 1973.
[42] C. SHARMAN, *The Representation of Small Parties and Independents in the Senate*, in *Australian Journal of Political Science* 34(3), 1999, 353; B. COSTAR – J. CURTIN, *Rebels with a Cause: Independents in Australian Politics*, Sydney, UNSW Press, 2004, ch. 3.
[43] C. SHARMAN, *The Australian Senate as a States House*, in *Politics* 12(2), 1977, 68-69.

State interests are rarely if ever expressed in votes on the floor of the house, there is amble opportunity for them to be of influence within the parliamentary caucus of each party[44].

The second point is that although, as noted, some of the framers continued to talk as if they expected the Senate to represent the interests of the States in an institutional sense, there were several who recognised that direct election of the Senate meant that its rationale must lie, rather, in the idea that structuring the Parliament in this way would enable it to be means of integrating the diverse 'peoples' of the Australian colonies into 'one people' in a manner that would nonetheless continue to respect the distinct identity of the people of each constituent State. John Downer of South Australia put this most clearly when he pointed out that so long as the Parliament was constructed 'fairly', meaning with equal representation of the States in the Senate and representation in proportion to population in the House of Representatives, then 'state rights will come very little into these matters, and the results will be highly satisfactory, because we shall know that we really have become so much one people that these smaller considerations never occur to anybody at all'[45]. The observation of John Winthrop Hackett, a Western Australian delegate to the Convention of 1891, had been similar. He said:

«[T]he main function of the Senate … [is] to cement these isolated communities together, to make a dismembered Australia into a single nation, … to convert the popular will into the federal will … to give full voice to the wishes of the populace, but, at the same time, to take care before that voice issues forth as the voice of Australia that it shall be clothed with all the rights and duties of the federal will (*Convention Debates, Sydney* 1891, 280)»

The idea was that a successful Senate would be marked by a sense of unity and national purpose which would mean that senators from particular States need not always or even usually vote in blocs but would, rather, be involved individually in national policy debate, and might even be aligned with political parties. Equality of representation would ensure that the people of each State would be given the security of knowing that, having voluntarily entered the federation as 'equal partners', they would continue to be represented equally as 'a people' in at least one house of the federal Parliament[46]. This security of tenure would free them to engage in national debate in a non-sectarian manner, knowing that they would continue to be entitled to that equal share of representation which befits an independent political community, and would remain free to use this 'voice' if ever their sectional interests were seriously or unambiguously in jeopardy. In this sense, equal representation in the Senate would serve to unify rather than divide the nation.

[44] See P. JOSKE, *Australian Federal Government*, Sydney, Butterworths, 1976, 75-77, and P. HOWELL, *The Strongest Delegation, The South Australians at the Constitutional Convention of 1897-98*, in *The New Federalist* 1-44, 1988.

[45] *Convention Debates, Sydney* 1897, 269; see also *Convention Debates, Adelaide* 1897, 539, 646, 665.

[46] Similarly to the United States, the equal representation of an Original State in the Parliament cannot be altered unless the people of that State approve of it: Australian Constitution, s 128, para 5.

The third point is that although it may have been naïve for the framers to have expected that the Senate would not be dominated by party politics revolving mostly around national issues and national policy debate, it is clear that a sizable number of the framers were distrustful of parties and would have preferred to construct a constitutional system in which the operation of political parties would be muted and constrained, if it could not be eliminated altogether[47]. In their view, party government was closely associated with parliamentary responsible government in its Westminster form, and many of them believed that responsible government of this kind was simply incompatible with federalism[48]. Accordingly, their opposition to party government and their opposition to responsible government tended to coalesce[49] They wanted a federal system in which the states' house would be just about as powerful as the lower house and they did not necessarily want a Federal Executive Government that would be chosen only by the lower house. However, as will be seen, while the United States offered a model of how an alternative system might be constructed, Australian opponents of Westminster-style responsible government did not look to the United States, but rather to Switzerland, for inspiration.

3. Responsible Government

In the lead up to federation, five of the six Australian colonies had been governed for almost half a century under local systems of parliamentary responsible government modelled broadly on the Westminster system as it operated in the United Kingdom[50]. Under such systems, while the executive power of government is vested in the Queen and exercised by a Governor appointed by the Queen, in the ordinary course of events the practical exercise of governing power occurs strictly on the advice of a Premier and other Ministers of State who collectively have the confidence of the lower house of the Parliament and are able to

[47] Eg, *Convention Debates, Sydney* 1897, 185 (Henry Dobson), 584, 677-8 (John Cockburn).
[48] Eg, *Convention Debates, Sydney* 1891 (John Hackett).
[49] See J.A. COCKBURN, *'Should the Cabinet System be Changed?'*, in *Review of Reviews* 6, 1895, 399, and H. WILLOUGHBY, *Australian Federation: Its Aims and Its Possibilities: With a Digest of the Proposed Constitution, Official Statistics, and a Review of the National Convention*, Melbourne, Sands and McDougall Ltd, 1891, 64; 74. Already by the 1890s, organised parties (indeed, a two-party system) and party discipline had begun to emerge: see T. MOORE – S. BOURKE – G. MADDOX, *'Australia and the Emergence of the Modern Two-Party System'*, in *Australian Journal of Politics and History* 44(1), 1998, 7.
[50] The exception was the colony of Western Australia, which did not secure local parliamentary responsible government until 1890. On these aspects, see B. SAUNDERS, *Responsible Government and the Australian Constitution: A Government for a Sovereign People*, Oxford, Hart Publishing, 2023, ch. 3; R.D. LUMB, *The Constitutions of the Australian States*, 5th ed., Brisbane, University of Queensland Press, 1992, ch. 4; A.C.V. MELBOURNE, *Early Constitutional Development in Australia,* Brisbane, University of Queensland Press, 1963; W.G. MCMINN, *A Constitutional History of Australia*, Oxford University Press, 1979; J. QUICK – R. GARRAN, *The Annotated Constitution*, cit., 38-47.

guarantee financial supply to the Crown in the form of taxation revenues and the appropriation of moneys from consolidated revenue to be expended by the Government[51].

Responsible government in this general form was what the Australians were used to and, as one might expect, there were many who wished to adopt such a system for the new Federal Government in Australia, as had occurred in Canada[52]. However, remarkably, there was also a significant number who disagreed. These delegates, such as Samuel Griffith, Richard Baker and John Cockburn, believed that genuine federalism requires not only a Senate in which the States are equally represented, but also a states' house which has powers equal, or near-equal, to those of the House of Representatives—no matter what consequences this might have for the traditional British idea that only the lower house should have significant financial powers[53]. As one delegate from Queensland put it, a Senate designed along these lines would be necessary to prevent 'the tyrannic exercise of the power of temporary majorities' formed within the House of Representatives[54].

To propose such an idea was to depart substantially from Westminster. But because they saw value in ensuring that the Executive remained continually responsible to the Parliament, most of the Australians did not wish to create a presidential republican system along the lines of the American separation of powers as applied to the Executive and the Legislature (eg, *Convention Debates, Sydney* 1891: 323 (Henry Parkes)). So the key question became one of how a powerful Senate might be combined with a form of responsible government. It was here that Switzerland provided an attractive model, as it suggested that a Federal Executive Council might be composed of members chosen by both houses of the Legislature. Adapting the idea to Australian circumstances, Richard Baker, with the support of several others (e.g., *Convention Debates, Sydney* 1891: 102 (Downer), 122 (Bird), 135 (Smith), 162 (Kingston), 277-80 (Hackett); *Convention Debates, Adelaide* 1897: 193 (Dobson), 211-4 (Downer), proposed that the Federal Executive should be conciliar in form, and that it should consist of three members chosen by the House of Representatives and three by the Senate. The idea was that the Federal Executive Council would be drawn from both houses of Parliament, a system that would combine the strengths and avoid the weaknesses of the American and the British systems respectively. In particular, because it would be

[51] See J. QUICK – R. GARRAN, *op. ult. cit.*, 702; G. LINDELL, *Responsible Government*, in P. D. FINN (ed), *Essays on Law and Government, Vol 1*, Sydney, Law Book Co, 1995; N. ARONEY – P. GERANGELOS – J. STELLIOS – S. MURRAY, *The Constitution of the Commonwealth of Australia: History, Principle and Interpretation*, Melbourne, Cambridge University Press, 2015, 422-425.

[52] See C. MOORE, *1897: How the Fathers Made a Deal*, Toronto, McClelland & Stewart Inc., 1997, and J. AJZENSTAT – P. ROMNEY – I. GENTLES, *Canada's Founding Debates*, Toronto, University of Toronto Press, 2003.

[53] See B. GALLIGAN – J. WARDEN, *The Design of the Senate*, in *The Convention Debates 1891-1898*, edited by Gregory J. Craven. Sydney, Legal Books, 1986; B. GALLIGAN, *A Federal Republic: Australia's Constitutional*, in *System of Government*, Melbourne, Cambridge University Press, 1995; J. UHR, *Deliberative Democracy in Australia: The Changing Place of Parliament*, Cambridge, Cambridge University Press, 77-81, 1998; N. ARONEY, *The Constitution of a Federal Commonwealth*, cit.

[54] *Convention Debates, Sydney* 1891, 106 (Andrew Thynne).

unlikely that one party perspective would control both houses, the Executive Council would usually consist of members of more than one party. In other words, coalition government would be encouraged, and the tendency to strict party discipline ordinarily generated by Westminster systems would be greatly moderated if not eliminated altogether (*Convention Debates, Sydney* 1891: 439-40, 465-6; *Convention Debates, Sydney* 1897: 728-9)[55].

Thus, although the debate in Australia can fairly be characterised as a battle between those who favoured parliamentary responsible government and those who favoured a powerful federal Senate[56], there is a real sense in which it was actually a debate between two competing conceptions of both federalism and responsible government. On one hand, there was the view that federalism is exhausted by a constitutional division of powers between the Commonwealth and the States adjudicated by independent courts, and does not require equality of representation of the States in a co-equal Senate[57]. This was a view which combined easily with the belief that the federal government ought to be responsible to the House of Representatives alone, conceived as the chamber in which the people of the Commonwealth as a whole would be represented in proportion to their respective populations in each State[58]. On the other hand, there was the view that federalism required not only the equal representation of the States in the Senate, but also a powerful Senate which played a co-equal role in the formation and accountability of governments, as Baker and others had argued. Given that control over finance is the key tool used by Parliaments to hold Governments to account, the point of difference between these two positions quickly became focussed on the respective powers of the two houses of the Parliament, especially over financial bills[59].

This debate largely concerned the respective powers of the two houses to initiate, to amend and to reject bills imposing taxation or appropriating government funds for expenditure. The compromise at which the Australians eventually arrived was that the House of Representatives would have sole responsibility for the initiation of such bills, and that while the Senate would have no power to make amendments to such bills it would otherwise have the same powers as the House, including power to reject or refuse to pass such bills.[60] In the terms of this compromise, proponents of a Westminster-style government were able to

[55] See R. BAKER, *The Executive in a Federation*, Adelaide: C. E. Bristow, Government Printer, 1897
[56] Eg. B. GALLIGAN, *A Federal Republic: Australia's Constitutional. System of Government*, Melbourne, Cambridge University Press, 1995, 75-90; J.M. WARD, *The State and the People: Australian Federation and Nation-Making 1870-1901*, Sydney, Federation Press, 2001, 95-99.
[57] See AV. DICEY, *Introduction to the Study of the Law of the Constitution*, 5th ed. London, Macmillan, 1897, 131-141. See also see *Convention Debates, Sydney* 1891: 79, 82 (Alfred Deakin); *Convention Debates, Adelaide* 1897: 171-8, 660 (Isaac Isaacs); *Convention Debates, Sydney* 1897: 303-313 (Isaac Isaacs).
[58] See *Convention Debates, Adelaide* 1897: 641-9 (Henry Higgins); *Convention Debates, Sydney* 1897: 259-65, 345-51 (Henry Higgins).
[59] See G. WINTERTON, *Parliament, the Executive and the Governor-General: A Constitutional Analysis*, Melbourne, Melbourne University Press, 1983, 1-17 and 71-75; B. GALLIGAN – J. WARDEN, *The Design of the Senate*, cit.; N. ARONEY, *The Constitution of a Federal Commonwealth*, cit., 237-239.
[60] Australian Constitution, s. 53.

secure the principle that the House would have control over the initiation of financial bills and would not have to deal with attempts by the Senate to interfere with the details of the budget. Reflecting on this result, some argue that the proponents of the traditional conception of responsible government prevailed[61]. However, this is to overlook the fact that the framers were acutely aware that the power proposed to be given to the Senate to refuse to pass the supply bills was a highly significant one, for it could be used to bring down a Government. While no one could know exactly how the system would operate in practice, the framers plainly understood that they had created a system which had this potential[62]. Within these parameters the practices of parliamentary responsible government were left to develop, however they might. What actually developed was a system of responsible government based on the lower house which has been punctuated from time to time by threats of the Senate to refuse to pass supply. These threats became a reality in 1975, setting in train a course of events that culminated in the highly controversial dismissal of the Government by the Governor-General[63].

The events of 1975 – the Senate's refusal to pass the supply bills and the Governor-General's dismissal of the Prime Minister – are seen by critics as a betrayal of parliamentary responsible government. An array of changes to the system were proposed at the time to ensure that the same course of events could not happen again. Some argued that the Constitution should be amended to remove the Senate's power to refuse to pass supply (Constitutional Commission 1998, 9). Others have proposed constitutional or legislative provisions that would authorise the government to continue to spend money at the same level as previously approved until the stand-off between the upper house and the government is resolved[64]. Others suggest that the real problem was the capacity of the Senate to force an election for the House of Representatives without necessarily facing a full election itself, and they propose constitutional amendments that would either establish fixed terms for the lower house or provide that an upper house which refuses supply and forces an election must also face the voters itself[65].

Significantly, the Senate has never again exercised the power, nor even threatened to do so, and minor parties who hold the balance of power in the Senate have foresworn it. It may turn out, therefore, that the events of 1975 were a momentary aberration. For the truly significant function of the Senate in recent times has arguably been more constructive, and has turned on a quite different Antipodean innovation, namely the adoption of a single

[61] Eg., J.M. WARD, *The State and the People*, cit., 98.
[62] J. QUICK – R. GARRAN, *The Annotated Constitution*, cit., 214 and 216-217; H.B. HIGGINS, *Essays and Addresses on the Australian Commonwealth Bill*, Melbourne, Atlas Press, 1900, 16; A. PIDDINGTON, *Popular Government and Federalism*, Sydney, Angus and Robertson, 1898, 6-8.
[63] See G. SAWER, *Federation under Strain*, cit., and L.J.M. COORAY, *Conventions, the Australian Constitution and the Future*, Sydney, Legal Books, 1979.
[64] See S. BACH, *Platypus and Parliament: The Australian Senate in Theory and Practice*, Department of the Senate, 2003, 303-305.
[65] See H. EVANS, *Constitutionalism and Party Government in Australia*, Occasional Paper No. 1, in *Australasian Study of Parliament Group*, 1988, 58-59.

transferable vote system in the Senate and the flourishing committee system that has developed as a result. In this context, there remain strong arguments in favour of preserving the powers of the Senate in relation to financial bills because the capacity to refuse supply is the ultimate means by which governments can be held to account[66].

4. Proportional Voting

The first federal election in Australia, held in 1901, was conducted on the basis of the electoral rules of each of the constituent States[67]. The first Commonwealth Parliament, exercising powers conferred upon it by the Constitution[68], enacted the *Commonwealth Electoral Act 1902*, which established a comprehensive federal electoral system. In relation to the Senate, the Act originally provided for a multiple-member plurality 'block-vote' system in which voters were presented with a list of candidates and were required to cast a ballot for as many candidates as there were seats to be filled[69]. The required number of candidates who obtained the most votes in each State were elected as senators. With the development of disciplined political parties early in the twentieth century, this method of election tended to encourage a two-party system which often produced landslide victories for one party and frequently enabled the winning party to gain majorities in both the House of Representatives and the Senate, weakening the role of the Senate as an effective House of Review[70]. This tendency became even more marked when 'preferential block Voting' was instituted for the Senate in 1919[71], with one party sometimes securing virtually all the Senate seats in one election, only to lose most of them in the next[72].

As early as 1902, the Government of the first Prime Minister of Australia, Edmund Barton, proposed adoption of a proportional electoral system based on a 'single transferrable vote'[73]. Such a system had been advocated by figures such as Catherine Helen Spence, Andrew Inglis Clark and Edward Nanson, who drew on the earlier work of Thomas Hare and John Stuart Mill. At the second Federal Convention in 1898, Patrick Glynn presented a petition for the adoption of the 'Hare-Spence' system to be adopted especially for the election of senators, and Alfred Deakin, Edmund Barton and Richard O'Connor went to

[66] See S. BACH, *Platypus and Parliament*, cit., 306, and B. STONE, *The Australian Senate: Strong Bicameralism Resurgent*., in J. LUTHER – P. PASSAGLIA – R. TARCHI (ed.), *A World of Second Chambers*, Milano, Giuffrè, 2006, 578-579.
[67] See Australian Constitution, ss 8-10, 29-31.
[68] *Ibid*.
[69] The Senate originally consisted of six senators for every Original State: Australian Constitution, s 7.
[70] For example, as a result of the 1910 election the Labor Party secured 43 of 75 House of Representatives seats and 22 of 36 Senate seats, and as a result of the 1914 election the Labor Party secured 42 of 75 House of Representatives seats and 31 of 36 Senate seats.
[71] For example, as a result of the 1919 the Nationalist Party secured 37 of 75 House of Representatives and 35 of 36 Senate seats, and as a result of the 1946 the Labor Party secured 43 of 74 House of Representatives and 33 of 36 Senate seats.
[72] See D. FARRELL – I. MCALLISTER, *The Australian Electoral System: Origins, Variations and Consequences*, Sydney, UNSW Press, 2006, 41.
[73] D. FARRELL – I. MCALLISTER, *op. ult. cit.*, 29-36.

some effort to ensure that the Constitution would allow a system of proportional representation to be implemented[74]. However, when under Barton's government a proposal for proportionate representation was introduced into the Senate in 1902 it was rejected. The arguments recapitulated much of the debate that had occurred at the Federal Conventions of the 1890s when the composition and powers of the Senate were being considered. Richard O'Connor argued that a 'block voting system' would enable a particular political party to secure control of the Senate by attracting the highest number of votes relative to all other parties even though a majority of voters actually voted against that party, and he pointed out that this would give the successful party a kind of 'absolute power', while 'a large number of the electors [would] go unrepresented altogether'. While 'the majority decision must rule', he argued that the minority has 'a right to be heard', so that the Parliament can be 'a true reflex of the opinion of the people'[75]. O'Connor was conscious that this was contrary to the British system, in which 'first past the post' voting enabled responsible governments to be formed on the basis of decisive majorities in the House of Commons. Opponents of proportional voting for the Senate, such as Josiah Symon and John Downer, argued that it would undermine the operation of the Westminster system of parliamentary responsible government in Australia because it would enable the Senate to compete with the House of Representatives as the chamber to which the government would be responsible[76]. The fear that proportional representation might 'altogether paralyze responsible government modelled upon the British system' seemed to convince a majority in the Senate to reject the proposal[77].

While dissenting views continued to be expressed, especially by backbenchers from both sides of politics and representatives of the smaller States[78], proportional representation in the Senate was successfully resisted by the leaders of the major parties for almost half a century. It was not until 1948 that this changed, when members of the government of Prime Minister Ben Chifley, foreseeing they would lose the next election, concluded that proportional representation in the Senate would enable them to place a check on the incoming government of Prime Minister Robert Menzies[79]. As John Uhr has observed, the changes 'were not designed to encourage minor parties but to redress the imbalance between the major parties'[80].

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[74] *Convention Debates, Adelaide* (1897) 673 (Deakin, O'Connor); *Convention Debates, Melbourne* (1898) 1-2 (Glynn), 1927 (Barton).
[75] J. UHR, *Why We Chose Proportional Representation*, in M. SAWER – S. MISKIN (eds), *Representation and Institutional Change: 50 Years of Proportional Representation in the Senate*, Papers on Parliament No. 34, Canberra, Department of the Senate, 1999, 18-19.
[76] J. UHR, *op. ult. cit.*, 19-20.
[77] J. UHR, *op. ult. cit.*, 20.
[78] J. UHR, *op. ult. cit.*, 23.
[79] See G.S. REID – M. FORREST, *Australia's Commonwealth Parliament, 1901-1988: Ten Perspectives*, Melbourne, Melbourne University Press, 1989, 99.
[80] J. UHR, *Why We Chose Proportional Representation*, cit., 7.

The change in voting system, first implemented in the federal election of 1949, had a pronounced effect, with the number of seats won by each party thereafter much more closely reflecting the popular vote received by that party. At the 1949 election, the available senate seats were shared between the major parties (the Labor Party and the Liberal-Country Party coalition)[81]. Over time, several minor parties secured seats: the break-away Democratic Labor Party in the 1950s, 60s and 70s, the Australian Democrats in the 1970s, 80s, 90s and 2000s, and the Greens since the 1990s, along with a host of other minor parties and independents. Given that today each State is currently represented by twelve Senators[82], half of which are re-elected every three years, a candidate for election must secure a quota of 14.3 percent of the total number of valid votes made in a State, either through primary votes received or the distribution of preferences. This ensures that candidates from each political party and independents secure representation in the Senate at a level which is reasonably proportionate to their popular preferential vote. In practice, neither of the two major political groupings, the Labor Party and the Liberal-National Party coalition, usually secures a majority in the Senate, leaving the 'balance of power' to minor party and independent senators[83]. Moreover, the total number of minor party and independent senators has increased. At present, the number of minor party and independent senators is a total of 19 (out of 76).

One of the principles of the single transferable vote system as it operates in Australia is that each voter has the opportunity to indicate his or her preferences among the full range of individual candidates for election. While this is an important means by which the system gives voters control over the effect of their vote, it places them under the burden of choosing among a very long list of candidates. Voting has been compulsory in Australia since 1924, and the electoral laws are framed to encourage voters to distribute their preferences among all the candidates[84]. This can be a very daunting task[85]. Given that this has the potential to result in a high proportion of informal votes, in 1984 a modified open party list system was adopted which enabled voters to choose between voting once for a particular party and accepting that party's pre-nominated preference flows or persevering with the virtual requirement of indicating a preference for every single candidate. Over 95 percent of voters now choose to vote by party rather than by indicating full preferences. However, this

[81] The Labor Party secured 45.24 per cent of Senate seats (19 of 42) with 44.89 per cent of the first preference vote, while the Liberal and Country Parties secured 54.76 per cent of Senate seats (23 of 42) with 50.41 per cent of the first preference vote.

[82] In 1948 the number of senators for each State was increased from six to ten, and in 1983 it was increased to twelve.

[83] See C. BEAN – M. WATTENBERG, *Attitudes Towards Divided Government and Ticket-splitting in Australia and the United States*, in *Australian Journal of Political Science* 33(1), 1998.

[84] The voting instructions state that voters must fill in every square, but the savings provisions of the Act only require that preferences among 90% of the candidates be expressed and allow a maximum of three sequencing errors: *Commonwealth Electoral Act 1918 (Aust), ss 239, 270.*

[85] At the most recent federal election in 2013, there were a total of 110 candidates for election to the Senate for the State of New South Wales.

change to the system has enabled registered political parties to shape the flow of voter preferences. This encourages the major, minor and micro parties to engage in strategic negotiations over preference flows prior to each federal election. The result is a fiendishly complex voting system, manipulated extensively by the parties, which 'herds voters into accepting arranged preference deals that voters have little hope of understanding'[86]. Further reforms are needed, but the system at least has the merit of producing Senates that that roughly reflect the voting preferences of the people.

The fact that Governments formed in the House of Representatives do not normally have majorities in the Senate has invigorated the role of the Senate both in reviewing proposed legislation and scrutinising Government policy and administration[87]. One of the prime means by which these functions have been pursued by the Senate has been through a vigorous committee system. The modern committee system in the Senate is usually dated from 1970, with the establishment of seven legislative and general purpose standing committees and five estimates committees to examine the annual estimates of departments in a more orderly and effective manner[88]. A further important step was taken in 1994, when committee chairs were regularly allocated to non-Government senators and the composition of the committees more closely reflected the composition of the Senate itself[89] The role of Senate committees in reviewing bills was further extended in 1989 when it was decided that proposed laws would systematically be referred to the relevant committee in the Senate[90]. Presently the Senate refers more than 60 percent of all bills— most of them initiated by the Government in the House of Representatives—to a committee for close consideration[91]. In addition, one of the oldest of the Senate's committees, the Standing Committee for the Scrutiny of Delegated Legislation (originally the Regulations and Ordinances Committee), has the task of scrutinising all delegated legislation[92]. There is also a statutory Joint Committee on Human Rights which was recently established to examine proposed laws, enacted laws and legislative instruments for compatibility with human rights[93]. Although the Australian Senate does not have quite the same standing and power

[86] A. GREEN, *By Accident Rather Than Design - a Brief History of the Senate's Electoral System*, in *Antony Green's Election Blog*, ABC Elections, 2015.
[87] See R. MULGAN, *The Australian Senate as a "House of Review"*, in *Australian Journal of Political Science* 31(2), 199; J. UHR, *Deliberative Democracy in Australia: The Changing Place of Parliament*, Cambridge, Cambridge University Press, 1998 and ID., *Generating Divided Government: The Australian Senate*, in S. PATTERSON – A. MULGAN (ed.) *Senates: Bicameralism in the Contemporary World*, Columbus, Ohio State University Press, 1999.
[88] See H. EVANS – R. LAING, *Odgers' Audtralian Senate Practice*, cit., 446.
[89] This was temporarily reversed between 2006 and 2009, coinciding with the usual event of the Government coalition parties securing a majority in the Senate. See S. ASHE, *Reform of the Senate Committee System: Evolving Back to the Past?*, in *Australasian Parliamentary Review* 21(2), 2007, 53-54; H. EVANS, *The Case for Bicameralism*, in N. ARONEY – S. PRASSER – J.R. NETHERCOTE (eds), *Restraining Elective Dictatorship: The Upper House Solution?,* Perth, University of Western Australia Press, 2008, 73-7.
[90] See H. EVANS – R. LAING, *Odgers' Audtralian Senate Practice*, cit., 446.
[91] H. EVANS – R. LAING, *op. ult. cit.,* 309.
[92] See H. EVANS – R. LAING, *op. ult. cit.,* 456.
[93] Human Rights (Parliamentary Scrutiny) Act 2011 (Cth).

of its American counterpart,[94] these developments have made the Australian Senate one of the most powerful and effective upper houses among Westminster-derived systems[95].

5. Conclusions

The framers of the Australian Constitution knew that once a constitution is enacted it operates in an ever-evolving political context that cannot be entirely anticipated or controlled[96]. Australia's system of parliamentary government is a good example. In the minds of the framers of the Constitution parliamentary responsible government was a relatively novel and evolving system of government. The fundamental settings they laid down in the Constitution were intended to set the parameters of what might be lawfully possible, but within these broad parameters, they knew that the system of government would evolve in unpredictable ways. Responsible government consisted of a set of practices that were inherently changeable no matter how much they might seem to have coalesced into a set of firmly established conventions and expectations. It was therefore both unwise, and a category mistake, they thought, to try to spell out the system in excessive detail. What was important was to get the constitutional basics right and let the system evolve as it would.

Did they get the fundamentals basically right? More than a century of relatively stable, peaceful democratic government suggests they certainly could have done much worse. Did they anticipate how the system would evolve? Not entirely. Although they knew that Westminster-style responsible government would mean 'party government', they did not quite foresee the development of two highly disciplined sets of political parties that would dominate Australian politics through their control of the House of Representatives. Those among the Constitution's framers who expected the Senate to represent the political interests of the States were largely mistaken. Nonetheless, a majority clearly intended the Senate to be a powerful institution—almost as powerful as the House—and in achieving this outcome they were undoubtedly successful, even if the power and influence of the Senate today is premised not only on its constitutional powers but also on its proportional electoral system and its vibrant committee system. In this respect the Senate has made the Australian system of parliamentary government more consensus-oriented than it would otherwise have been. Speaking generally, it is fair to say that the system today exhibits the advantages of Westminster responsible government by enabling Governments to be formed in the House of Representatives which are collectively responsible for reasonably coherent and fiscally responsible sets of policies, while it also ensures that Government performance and specific legislative proposals are subjected to close scrutiny by multi-partisan

[94] The American Senate, unlike the Australian, has the very important function of ratifying international treaties and confirming executive and judicial appointments: United States Constitution, Art II, Sec 2, para 2.

[95] See S. BACH, *Platypus and Parliament*, cit., chs. 6 and 7, and B. STONE, *The Australian Senate*, cit.

[96] See R. BAKER, *Federation*, cit., 1897, and A.I. CLARK, *Studies in Australian Constitutional Law*, Melbourne, Charles F Maxwell, 1901, 21.

committees in the Senate. Although Richard Baker was not able to convince a majority of his colleagues that the Federal Executive Government should be elected by both houses of Parliament, he found them willing to grant the Senate near-equal powers with the House of Representatives, even though this posed a challenge to the traditional conception of the Westminster system of parliamentary responsible government. The net effect of this was to make the Australian system more like the Swiss system, at least as far as the Parliament was concerned. The Executive Government is still formed on the basis of support in the House of Representatives, but the Senate plays an important role, not only in reviewing proposed legislation, but also in holding the Government to account. As a consequence, it seems, not only the waters of the Thames and the Potomac, but also those of the Aare, flow into Lake Burley Griffin.