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Time, Chance and Parliament: Lessons From Forty Years*

Harry Evans

One of my predecessors, Rupert Loof, having retired in 1965 at the age of 65, lived to the age of 102 years. When he was in his nineties he was pursued by the National Library for their oral history program. He kept telling them that he would grant them an interview 'in the fullness of time'. I thought that this displayed a lack of regard for posterity. Eventually he did give an interview, and it was extremely fruitful. I intend to show more respect for posterity, and certainly not wait for another 35 or so years. I thought that it would be useful at this stage to set down some reflections on the changes in the parliamentary institution over the forty years of my association with it.

With that perspective, it is possible to identify long-term trends which have an appearance of inevitability about them. It is also impressive, however, how many significant events were determined by pure chance, particularly the presence at crucial times of somewhat peculiar individuals. I am constantly reminded of the biblical quotation: 'the race is not to the swift, nor the battle to the strong, neither yet bread to the wise, nor yet riches to men of understanding, nor yet favour to men of skill; but time and chance happeneth to them all'.

The most significant change over that period has been the end of the Westminster hegemony. When I first came here, every constitutional, parliamentary and procedural issue launched a bevy of appeals to the Westminster model. Whatever was allegedly done at Westminster was thought to be our infallible guide. Fortunately, those appeals often produced contradictory results. On one occasion, Gough Whitlam, no less, referred to the Australian Parliament as a British Parliament. He appealed to Westminster in two memorable situations, once to tell us that the Gorton Government should resign if its budget was defeated in the Senate when the Labor Party voted against it, and once to assure us that budgets should never be defeated in the Senate. Regardless of the dispute, both sides invoked Westminster. How this situation came about is an interesting story. It was obvious to the framers of the Australian Constitution that they had chosen a very un-British system of government. One of the framers, Richard Baker, later first President of the Senate, was very insistent that Australian governance should not be thought of as British, and that it should develop its own practices and conventions under the Constitution. While he remained in office he was quite successful in doing so, but by about 1920 the Westminster hegemony was well established. There were many historical

* This paper was presented as a lecture in the Senate Occasional Lecture Series at Parliament House, Canberra, on 24 July 2009.

and cultural factors that brought this about, which may be analysed in more detail at another time.
Nowadays invocations of Westminster are only occasionally made, and lack the air of authority they once had. We now appeal to general principles of governance and our own practices.

The most significant shift from the Westminster hegemony occurred in 1970 with the establishment of the Senate committee system. It is difficult to appreciate this now, because virtually every house of parliament has a system of standing committees. In many cases they are largely fake systems, Potemkin village systems, in that they do not assist the legislature to scrutinise and hold accountable the executive government, but are firmly under the control of government, principally through ministers determining the subjects of inquiry. Until 1979, Westminster itself did not have a comprehensive committee system, and that system is still criticised for the degree of control exercised by the government. The Senate committee system was and is different because it enables the Senate to conduct inquiries into matters independently of the executive government. A sage former senator, who will be mentioned again later, used to say that the subjects most worthy of parliamentary inquiry are in the areas where the executive government wishes to avoid any inquiry and would prevent if it had the power. The establishment of the Senate system equipped one half of our legislature with the ability to uncover information other than the information the government wished it to know.

How radical the establishment of the Senate committee system was may be gauged from the resistance to it. In 1955, another of my predecessors, the great J.R. Odgers, who was definitely one of those peculiar people in the right place at crucial times, won a scholarship to travel to Washington to examine the congressional committee system. He chose to go there, rather than to make the compulsory pilgrimage to Westminster, because he was aware of the non-British foundations of the Australian Constitution. On his return he composed a report, which was tabled in the Senate, recommending a comprehensive congressional-style committee system for the Australian Senate. He was tolerantly patted on the head by the powers that be, and told that his desire for reform was very commendable, but that he should be patient and prepared to hasten slowly. In reality, the powers that be had no intention of making any such change. They were content with the executive-dominated Westminster system, in which they were very comfortable, and in which the nuisance role of the Senate was seen as an historical anomaly. Odgers did not give up, and after becoming Clerk in 1965 prepared another paper on the subject which was provided to the President of the Senate and the government. It was referred to the Cabinet, as the supreme decision-making body of the Parliament, the approval of which was necessary for any innovation. Thanks to the 30 year rule, we know the reaction of the real powers that be to Odgers' subversive efforts. The Secretary of the Department of Prime Minister and Cabinet, Sir John Bunting,

advised that Odgers' proposal would be 'errosive of government authority', and would undermine sacred tenets of responsible government. I like to quote this memo because the illustrious secretary could not spell the word 'erosive'. While he could not spell, he knew best how to preserve the Westminster system. His correspondence subtly suggested that some sort of action should be taken against Odgers for exceeding his clerkly role. Reading it, you wonder that Odgers remained in his job, given that the appointment was made at that time by the Governor-General on the recommendation of the government. Odgers was skating on thin ice.

In 1969, however, the time had come. It is well known that this was partly because of the presence of another of those peculiar characters, Lionel Murphy. He succeeded in convincing his party that the establishment of a committee system in the Senate was in the party's best interests and a desirable reform for it to pursue. This was an amazing achievement, given that the Labor Party was traditionally hostile to upper houses and comfortable with Westminster and the total power it tended to deliver to the executive of the day. It is not generally appreciated that Murphy, who was regarded as a member of the extreme left and a militant opponent of western foreign policy of the time, was actually an Americophile, if that is the right term. He was a great admirer of all things American, apart from their foreign policy, and particularly of the congressional system. He would have been quite at home on the left wing of the Democratic Party in Washington. Paradoxically, this tendency was only reinforced by the great foreign policy issue of the time, the Vietnam War. When I worked in the Parliamentary Library Murphy was a regular customer. He was always seeking transcripts of the latest hearings of congressional committees. In the absence of email and the Internet, considerable lengths were gone to to get these transcripts at the earliest possible time. What he was looking for were the latest exposés in those hearings of the failings of the conduct of the war. In a long series of hearings, those failings were relentlessly exposed. It was a great object lesson in the virtues of the congressional system. More importantly, it was extremely valuable for an Australian Opposition leader. No sooner had the Australian Government taken up some position or loudly proclaimed some facts about the war than a congressional hearing exposed the position as fallacious and the facts as false. It was extremely embarrassing to be de facto part of a great empire when the legislature of the imperial government had more open processes of scrutiny than our own Parliament.

So Murphy promoted a committee system for the Senate. Odgers was asked to do a paper on the subject. He had learned the lesson of his experience in the 1950s and 1960s. He devised very modest proposals for committees on neglected and relatively non-contentious subjects. He avoided all references to the congressional model. In fact, he instructed his colleagues not to refer to his 1956 report and his 1965 paper, lest the powers that be were alarmed and aroused by the radical step they were being asked to take. Murphy was not satisfied. He told Odgers to 'go for the big one'. So a second paper

was prepared outlining a comprehensive system of standing committees able to inquire into any subject. Still the pretence was maintained that it would not be a radical departure from Westminster, and innocuous Westminster models, such as New Zealand and Canada, were cited. In effect, the whole proposal rested upon a mild deception.

The government, however, was under pressure from its own backbenchers in the Senate to enhance the chamber's committee role. They had been given a taste for committee work by a series of select committees appointed in the 1950s and 1960s, and at the same time were looking for a better method of dealing with the Budget than asking questions of ministers in the chamber. The government put forward a proposal for estimates committees to conduct hearings into the estimates as an alternative to the committee of the whole. This proposal also involved going down the congressional road, because once public servants were brought before committees and directly questioned about government expenditure, there was no limit to the information that might be gathered.

Due to the presence of yet another of those peculiar characters, Liberal Senator Ian Wood of Queensland, who was famous for voting against his own government whenever he disagreed with its decisions, a very un-Westminster habit, both reform proposals were adopted by one vote, and so the Senate gained its committee system.

It is not generally known that this Senate committee system came close to being rendered ineffective in 1987. In that year, the Labor government, in office since 1983, was returned in a general election. There was an unexplained delay in the government putting forward the necessary motions to reappoint the committees. By this time enthusiasm for the free-range committee system had waned. The powers that be had come to the conclusion that committees should be feedlot animals, kept under close control and supervision. Ironically, this may have come about partly because of the inquiries in 1984 of two Senate committees into the conduct of Mr Justice Murphy, as he had become, the first inquiries into the possible removal of a federal judge under section 72 of the Constitution. That again is another story. There were rumours that the government intended to nobble the committee system, and that some plot was afoot. When the necessary motions were finally put forward, the plot was revealed. The government had recently established a standing committee system in the House of Representatives, a system of course under the control of government through the medium of references to committees of subjects of inquiry by ministers. The motions for the reappointment of the Senate committees provided that their names and responsibilities would be changed so as to exactly reflect the House committees, and that the committees of the two houses could meet together and perform their functions as joint committees. It was clear that the intention of this change was to replace the Senate committee system with a structure of joint committees under government control. Fortunately, there were some more of those peculiar characters who could see the plot and were ready to foil it. David Hamer, a Liberal senator from Victoria, and the source

of those sage words about inquiries that governments would rather not have, rallied the majority of the Senate against the government's proposal. He was supported by Michael Macklin, a Democrat from Queensland with a keen interest in accountability of the executive, an interest which, he told me, won him no support whatsoever in the electorate. When the motions were moved Macklin moved an amendment to the effect that the Senate committees could meet with their House counterparts as joint committees with the approval of the Senate. This would have meant that every joint meeting would require a motion moved in the Senate, with the possibility of debate about the merits of whatever subject of inquiry a minister had put forward. In the event, the joint meetings did not occur. Nobody had the energy or the perseverance to pursue the plot, and the Senate committee system resumed its former independence.

Committee scrutiny was greatly enhanced by the adoption in 1988 of procedures for the regular referral of bills to committees. It is now accepted that all significant bills will be subjected to committee hearings. This reform, by the way, was promoted by that same David Hamer.

Since that reform there have been many smaller accountability measures adopted, such as the procedure to allow senators to pursue in the chamber unanswered questions on notice.

The continuance of the Senate committee system has meant that one house of the Parliament has been able to perform the legislative role that the theorists of parliamentary government and the framers of the Constitution envisaged, and has been able to hold the executive government more accountable than would otherwise have been the case. The committee system has also reinforced a culture of independence in the Senate which goes back to the days of Richard Baker and which has been nurtured by long periods of non-government majorities and lack of government control of the chamber. A recent curious incident illustrates that culture. The New South Wales Legislative Council has had non-government majorities for many years, and has been very successful in imposing accountability on successive governments, in some respects more successful than the Senate. Recently, however, the Council was effectively closed down because ministers refused to attend, and by a good old Westminster custom, the House cannot function in the absence of a minister. The Council has previously been hobbled by the government exercising its power of prorogation to prevent both houses meeting. The Senate does not have any such Westminster custom, and has guarded against the prorogation dodge by regularly empowering its committees to continue to meet after a prorogation. These curiosities are all part of the culture of independence laboriously built up since 1901.

More than ever before, independence in the legislature depends on the ability to obtain information that governments would rather conceal. Knowledge has always been power, but the management of information has become the key to government. The executive wants the public to receive only the information favourable to it, and strives to manage the release and the presentation of unfavourable information, and to keep much secret. A functioning legislature is essentially an instrument for breaking down that information management in the interest of the public's ability to judge governments. It is in this role, however imperfectly, that the Senate, with its committee system and its culture of independence, has performed.

At the 2020 Summit I suggested 20 parliamentary reforms, none of which was adopted by the government. Perhaps the most significant was for an independent body to finally determine government claims to keep information concealed from Parliament. It was the proposal most decisively rejected.

Unfortunately, independence in the legislature is not as appreciated as it should be among the public. We do not have, as they have in some of the countries we like to compare ourselves with, a public appreciation of the distinction between Parliament and government, legislature and executive. Australians still think of government and parliament as one and the same thing, as well they might given the rigidity of executive control of lower houses, and independent upper houses are still seen as something of an anomaly. Again, a recent but largely unnoticed development illustrates this. In our two great role models, the United Kingdom and the United States, there has been since 2003 a great deal of soul-searching about the failure of their legislatures on the occasion of the commencement of the Iraq war. It is lamented that Parliament and Congress so readily went along with the war plans of their respective executives, and did not ask the questions that should have been asked and insist on the answers. In the United Kingdom this has led the Brown Government to commit itself to comprehensive constitutional reform designed to strengthen the Parliament against the executive, including a partial surrender of the war-making power. In the United States the perceived legislative failure had a great deal to do with the Democratic Party capturing both houses of Congress and the subsequent change of administration. There have been doleful cries that never again must the Congress allow itself to be so led astray. The interesting point is that there has been very little such soul-searching in Australia. Apart from the Australian Democrats, succeeded by the Greens, reintroducing their old bill to provide for parliamentary approval of warlike actions overseas, there has been very little attention given to whether the Parliament should be looked to to provide a solution to the perceived policy failure. Paradoxically, the Australian Parliament performed rather better on the occasion than its great counterparts, as I have pointed out to visitors from those countries: one house of our Parliament wanted other steps taken before agreeing to the commencement of the war, but was ignored.

While very positive changes have overcome the institution in those forty years, there have been significant failures to change or changes for the worse. Party discipline, which is the foundation of executive control of lower houses, is stronger than ever. If anything, it has been strengthened by the new techniques of spin doctoring and news management that governments have perfected. It is now the case, which it was not in the past, that a government party majority in the Senate means government control of the Parliament. It is an historically accurate statement that the Howard Government, with its Senate majority in 2005 to 2007, was the first government to control the Senate. Previous governments, especially non-Labor governments, lacked that control because they could not control their senators. During the time of the Fraser Government's majority in the Senate, from 1976 to 1981, there were up to twelve coalition senators willing to vote against the government, particularly on accountability issues. Due to their votes, the Senate's accountability role survived during that period. For all those years up to that time, we managed to get along with a Parliament that was half-functional, one house not functioning as a legislature but as a compliant tool of the executive, but the other house performing some traditional parliamentary roles because of that culture of independence. That independence is now entirely dependent upon a non-government party majority in the Senate, because in the future a government majority, even of one, will probably mean government control.

Apart from party discipline, the trends of modern politics have greatly strengthened the central power within parties in government. The Prime Minister's Office, not the Cabinet, is now the supreme governing authority of the country, and seems to have greater power than some ministers.

We still have one of the weakest legislatures of the democratic world, especially compared with our great and powerful friends. The Parliament here is under a degree of executive domination that would not be tolerated elsewhere, even at Westminster. Perhaps the ultimate stage in the degradation of the House occurred last September, when the government wanted to reject a non-government bill passed by the Senate. The Speaker made a statement supporting the government's position, and then a minister moved a motion to declare the bill 'unconstitutional', and immediately gagged the debate. The House was not permitted to debate a matter supposedly relating to its own constitutional powers. This sort of thing is regarded as normal House proceedings. The only barrier to total parliamentary irrelevance is the system of proportional representation for Senate elections.

We have to be ever on our guard against so-called reform proposals that would simply exalt the concentration of power and make government less accountable. At the same time, we have to be aware that reforms that strengthen accountability are not likely to be easy. Criticism is always heaped on Queensland because of failures of governance there,

criticisms recently stirred up again by the conviction of a minister for receiving large sums of money from various benevolent persons and the network of mateships again exposed by that incident. There is again a movement to establish an upper house in Queensland, now adopted as policy by the official Opposition. An upper house, however, would be useless if it were to be dominated by the same party as the government, with the same party discipline and centralised control that have now become normal. Before embarking on an upper house, it would be necessary to ensure that it contained members with an interest in accountability and not simply in rotating in and out of office. It would be difficult to bring about that situation by any constitutional design. Reform of political parties, a topic dear to the heart of one of our departed senators, Senator Andrew Murray, would be more likely to lead to a better functioning Parliament. That, however, would be a really difficult reform.

We are now told that we live in an age of crises, economic and environmental. In crises the greatest danger comes from those who claim to know all the solutions and who demand immediate implementation of them. Such people are likely to be found holding executive office. The greater the crisis, the more likely it is that mistakes will be made in attempting to deal with it, and the greater the need for scrutiny of proposals based on sound information. The legislature should provide that scrutiny. The Australian Parliament cannot be well equipped to provide that scrutiny when one house is not permitted to make its own inquiries into significant issues and proposals, and the other struggles to make up the deficiency against executive resistance. Parliamentary reform is never more necessary than in this age of crisis, and further subordination of Parliament never more perilous. The proponents of openness and scrutiny should be more militant than ever before.

Question — How did New South Wales get an independent arbiter?

Harry Evans — That's a good story because they threw the Treasurer out of the Council. Funny situation in New South Wales for the last few years: the Treasurer has been a member of the Council and the Council demanded information from the Treasurer about various things and the government refused to cough up the information so they threw him out of the Council. In fact the Usher of the Black Rod grabbed him by the scruff of the neck and escorted him out onto the pavement. They said this is what we will do to you every time you unjustifiably refuse to give us information. The government, very unwisely, advised by its crown law office, took the Council to court and lost the case. The Supreme Court said, well actually, houses of Parliament do have the power to demand information from government and they do

have the power to take remedies against governments who refuse to cough up information. We looked at all our old documents about parliaments going back years and years and years and actually they do have that power. So the government lost the case and then it was virtually forced to agree to this system whereby if they want to refuse documents to the Council they have to refer it to this independent arbiter.

Question — Who was the premier at that time?

Harry Evans — Mr Egan was the Treasurer who was thrown out onto the street, I think it was Bob Carr at the time. But it was not an arrangement that governments would have willingly adopted.

Question — In America they have independent agencies like the office of congressional budget. I think one option instead of reforming political parties might be to sit down and bring in new independent agencies that are independent watchdogs against crime, corruption and provide impartial economic forecasting and analysis. I was wondering what you thought of that?

Harry Evans — That's a very interesting suggestion. There are actually proposals about at the moment for something like a Congressional Budget Office. There is a proposal like that in the ACT Assembly at the moment. That is something that has been suggested from time to time and of course in these times of budget crises it would be something very useful to have. Again, I am not going to wait around to see if a federal government adopts it. It would be the sort of thing that governments would only be forced into. A point I would like to make is that these sort of bodies only can be effective if they have political support and ultimately you depend on the political institutions to provide that political support. Some years ago, Mr Kennett was premier of Victoria and he succeeded in getting both houses of the Victorian Parliament to pass legislation which people widely regarded as nobbling the Auditor-General, rendering the Auditor-General, one of those independent offices, ineffective. That simply illustrated that sort of body, that sort of office, relies on political support to continue and to flourish and if the political support is not there, they can't be effective. Fortunately the Victorian Auditor-General has been restored. That might tempt some people to think that the system works, these things will be corrected, but I wouldn't count on that either. You have to have political support for those bodies.

Question — You mentioned the 2020 summit, that you have this list of proposals, the first of which you did specify which was rejected, all of them rejected I believe. Could you give us some idea of what the others were?

Harry Evans — Well I can't go through all twenty of them, and the fact is that I can't even remember them so I will have to refer to my notes. Number two on the list was

that the houses should adopt minimum time and process standards for legislation. So in other words, they should say we will not deal with legislation any more urgently than this. These are our minimum standards: the time limits could only be imposed on consideration of bills by agreement with the various parties in the chamber; that governments should fully respond to any amendments proposed by committees to government bills; that the appropriation bills should be re-framed to show us what the money is actually being spent on. Something that has been controversial in recent times, and if I could give you an idea of the flavour of the list anyway by mentioning those few. About five of them were adopted by the committee of the summit that prepared their report to government but none of them has been adopted.

Question — You will recall that Civil Liberties Australia are one of the few groups still beating our heads up against the wall on the war party issue. The question is, the executive is this amorphous body that always overrules things. Exactly what is the executive and does it change because we never quite clearly know who it is? We know who the Prime Minister's Office is, and we know what the Cabinet is, but exactly what do you understand is the executive?

Harry Evans — It's the combination of ministers, ministerial staff and the upper echelons of the public service. Sometimes we talk about the political executives meaning ministers and their staff and sometimes we talk about executives and the wider meaning: the upper echelons of the public service. Ministers' staff have changed radically in recent times. Ministers' staff now consist of great collections of political operatives who have their eyes firmly fixed on that information management role. They are highly political animals, and the public service has changed in recent years to be more responsive to government, as we are constantly told, which means less capacity or intention to tell governments things that they don't want to hear. I have always said that when people become ministers, a strange transformation of their character takes place and they suddenly come to love power. It's like the old film title, *How I Learned to Stop Worrying and Love the Bomb*, they suddenly become convinced that power is a lovely thing and if only they were allowed to exercise it unhindered, things would be much better, and that's just a fact of human nature, and constitutions and legislatures have got to impose safeguards on that unfortunate effect of power and we have to try and develop those safeguards.

Question — We talk about power and government and all that sort of thing, and as you know power does corrupt. I think this is called the lucky country because we do have the Westminster tradition and really, everybody does have the power they need in this country and they don't really need to have that president. You have the Queen there and she doesn't interfere, this is just the point, she is just a figure here and I don't see how having a president is really going to help Australia at all. I like it the way it is run at the moment.

Harry Evans — Did I say it was?

Question — Well you did bring up Westminster tradition quite a bit. I believe that if it's not broke, don't fix it. I really think it is a lucky country and we don't need a president here. It's running all quite well.

Harry Evans — The problem is that the Westminster system changed radically. In the middle of the nineteenth century you had a very militant House of Commons which wouldn't allow governments to get away with anything. It conducted inquiries into the conduct of a war while the war was still going on and some of the generals and some of the secretaries of war and grilled them about their conduct of a war which was still going on. That's how effective the Parliament was in those days. Due to party discipline, government controls ratcheted up over the years until it got to a stage where it was not worth inquiring into anything without government approval and lots of people in Britain who will say that 'our Parliament is a rubber stamp, it's totally under the thumb of the government' and I say to them, 'you should see ours'. A member of the British Government said he had voted against his government 120 times, and I said 'how did you get away with that?' He said, 'my people in the constituency are right behind me and I had fifty or a hundred colleagues who were doing the same thing. They can't punish fifty or a hundred of us all at once. And my constituency is right behind me, all 1500 people in my local party branch are behind me'. Fifteen hundred people in a local party branch! We do not have a Westminster system, we have something that is rather worse unfortunately.

Question — We the people would like to thank you for not only giving us the series of lectures of which this is one, but also for the contribution you have made over the long years and I move a vote of thanks.

Harry Evans — There are two things I would like to say. Firstly, that was not a question sir, and secondly, I am going to be around for a little while longer. December is my departing time. And if I go to something else, this is not a representative body of the Australian public.

Commonwealth–State Financial Relations: The Case for Competitive Federalism*

Jonathan Pincus

Introduction

In a publication for the Committee for Economic Development of Australia,[1] I have argued that Australian federalism is in rough good health. It could be improved, and there are serious threats to its fruitful operation. But by and large, the Australian federal system of government has worked well. Along the way, it has achieved a reasonable balance between centralisation of government functions and decentralisation of them and a reasonable balance between cooperation and competition between governments. It is concern about the maintenance of that balance that motivates me today.

The distinctive characteristic of federation is that it introduces a new form of intergovernmental competition, and not a new form of cooperation. We do not need political federation in order to achieve intergovernmental cooperation. For example, an intergovernmental agreement enables a letter with an Australian stamp to be delivered in any country in the world, by that country's postal workers. NATO involves cooperation between sovereign nations, not all of them members of a single political federation. So today I will focus on the competitive angle of Australian federalism, because I believe that there is a danger that this could be lost, if there is an insufficient appreciation of its value.

All governments are subject to competition. Some forms of intergovernmental competition, like war, are horrid; but some are conducive to good social and economic outcomes. The best arrangement is to have a formal constitution and informal political traditions that encourage good competition.

'Vertical competition' is the top level of competition within a federation, and is unique to federations. In Australia, it is competition between the Commonwealth Government, on the one hand, and the governments of the states and territories on the other. It is an intergovernmental competition for the affiliation and support of citizens and voters, and it is manifest in the competitive offerings promised and fulfilled. It is unique because the two levels of sovereign government simultaneously rule over the same pieces of geography. That's what a federated nation is.

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* This paper was presented as a lecture in the Senate Occasional Lecture Series at Parliament House, Canberra, on 14 August 2009.

1 Jonathan Pincus, '6 myths about federal–state financial relations', *Australian Chief Executive*, February 2008, pp. 36–47, <http://ceda.com.au/email/noindex/docs/pincus_2008.pdf>.

Today I will argue that Australians should welcome and approve competition between governments in a range of matters. However, many politicians and political commentators want to limit intergovernmental competition within Australia, and especially to eliminate vertical competition between the states and the Commonwealth. The goal is to reduce or eliminate what Mr Rudd calls 'the blame game' that can occur when more than one government is responsible for a role or function. The 'blame game' will only end when the Commonwealth does everything. Australians would then face a monopoly form of government, and citizens would have fewer avenues through which to encourage government to perform well.

A final introductory remark: neither today nor elsewhere, do I call upon 'states' rights'. Lawyers tell me that states have rights, and I believe them. But I prefer to regard governments as means to ends, and not as ends in themselves. Any rights that states may have should derive from the rights and responsibilities of citizens concerned.

Competition or monopoly

Government is a means of getting done collectively some important things that otherwise would get done badly, like external defence and domestic law and order, or maybe otherwise wouldn't get done at all.

What level of government should be given the task of, say, running public hospitals, or running TAFEs—should it be the Australian Government, the state or territory governments, or local governments? I can make a strong argument that only one level of government, the Commonwealth, should be providing our national defence: for the money, seven state navies will be much less effective than one national navy. But what is it about public hospitals, or TAFE colleges, that make them a case suitable for control by a single government? When should one level of government have a monopoly?

The opposite of monopoly is competition. It took six or seven decades for the idea to be accepted by Australian opinion leaders and politicians, that vigorous competition among businesses and regulated competition in the professions, by and large, are forces for the social good.

The Secretary of Treasury, Ken Henry, has called attention to 'a community sensitivity to market-determined prices, and also quantities; that is, a sensitivity to market-determined patterns of resource allocation'. This sensitivity, Secretary Henry

said, was a 'barrier to the development of efficient markets [that] is at least as old as government'.[2]

So, although the Australian opinion leaders and politicians mostly now accept that regulated market competition is a force for the social good, there is still some scepticism among the general public. And even more scepticism that intergovernmental competition can deliver net social benefits. I have a tough assignment today.

Vertical competition

As recently as 2008, Treasury Secretary Henry wondered at what he called 'a startlingly new concept of vertical competitive federalism—that is, competition between the Commonwealth on the one hand and the States and Territories on the other'.[3]

Actually, the concept is hardly new; and the practice has been going on since Federation. Let me give one recent example.

The Rudd Labor government has moved to implement its electoral promises, including a reduction in the waiting lists for elective surgery. The states had not succeeded in delivering waiting lists that are acceptable to many voters, and so Mr Rudd made an election promise to do better. This is a clear example of vertical competition between the Commonwealth and the states and territories. It is competition for the support of voters, in an area of service delivery traditionally regarded as the responsibility of the states—the states own and run public hospitals.

Vertical competition leads to blurring of responsibilities. Who will be responsible for the public hospital waiting lists or for public hospitals generally: the state or the feds? Who is responsible for the supply of supermarket groceries, Coles or Woolies?

Very few people would argue that Australia would be better served by a monopoly grocery chain, than by competition. However, many believe that Australia would be better served by a clear and unassailable assignment of governmental responsibilities within the federation. Such a clear assignment means the end of vertical competitive federalism, an end to the blurring of responsibilities, and an end to overlap of their domains, with its duplication.

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[2] Ken Henry, 'Time to "get real" on national productivity reform', Productive Reform in a Federal System: Roundtable Proceedings, Canberra, 27–28 October 2005, <http://www.pc.gov.au/research/confproc/productivereform>, p. 344.

[3] Ken Henry, 'Realising the vision', Ian Little Memorial Lecture, Melbourne, 4 March 2008, <http://www.treasury.gov.au/documents/1351/PDF/Ian_Little_Speech.pdf>, p. 4.

Just as competition among private companies and firms safeguards consumers against high prices and shoddy goods and services, so competition among governments can safeguard citizens against bad government and encourage good government.

Democratic government exists to serve its people, with their common as well as their diverse interests and perspectives. In democracies, competition is required to ensure high quality of service by government.

Intergovernmental competition requires governments with capacity for uncooperative and independent action. The formal abolition of the states is unlikely to occur any time soon. However, what started many decades ago is an effective sidelining of the states. If this continues to gather pace, the states will end up no more independent of the Commonwealth, than are local governments independent of their own state and territory governments.

However, if the states and territories become mere service agencies of the Commonwealth, this will not put an end to the blame game. The blame game will end only when the Commonwealth does everything. Otherwise, when things go wrong, the states will say 'Don't blame us, blame the Commonwealth. The Commonwealth refuses to pay us enough to do the job properly. And besides, the Commonwealth hamstrings us by regulating the working conditions in hospitals, or schools, or universities, or whatever'.

National goals

Federal government forays into areas of policy or services that were formerly occupied solely or largely by the states, are often described in terms of 'national' priorities and 'national' goals. However, I cannot believe that the hospital waiting lists in Western Australia, or the shopping hours in Western Australia, for that matter, are of great moment to residents of Queensland or New South Wales.

And, although the processes of the Council of Australian Governments (COAG) seem to me to be superior to those of the Premiers' Conferences and the Loan Council, which COAG has replaced, there is still a hint of strong-arm tactics from the Commonwealth: 'Agree to what we say are national priorities and goals, or else'. Anne Twomey and Glenn Withers call this 'coercive federalism'.[4]

Earlier I said that Mr Rudd's election promise to reduce hospital waiting lists is an example of vertical competition. But this kind of competition, if used more widely, is very unlikely to produce systematically good outcomes. In regulated markets, this

[4] Anne Twomey and Glenn Withers, *Australia's Federal Future*, Federalist Paper no. 1, Council for the Australian Federation, Melbourne, April 2007.

kind of competition is called 'cherry picking', which occurs when a supplier enters into a regulated market very selectively, supplying only those things with high payoffs and low costs. The task of supplying everything else that the regulations require to be supplied is left to the established suppliers. It is a kind of behaviour that public schools complain about: namely, that a private school can find ways not to accept students who are costly to teach, knowing that the public schools must take them.

If it is a national goal to have better hospitals generally, then this kind of selective intervention seems a poor way to achieve it. The states have arrangements, maybe good, maybe bad, for managing hospitals. As I look around, I see many public institutions with more than one government master: universities with state charters but within the Commonwealth's Unified National System; schools that report to state departments of education, but also to the Commonwealth; local governments that are the creatures of their states, but are partly funded by the Commonwealth and therefore 'responsible to' the Commonwealth; indigenous organisations, similarly. These arrangements mean that the managers of these institutions do not have a single 'line manager'. The deleterious consequences of overlap of government are magnified.

Possibly in response to that kind of thought, the Rudd Government has threatened to take over the public hospitals from the states, if the states do not shape up quickly enough. Say the federal government does take them over but, unfortunately, makes a hash of running the hospitals from Canberra? What then? Wouldn't you expect voters to reward a state government that turns around and establishes better public hospitals than those run by the Commonwealth? That would be vertical competitive federalism in action.

Similarly, business has decried the performance of TAFE colleges in some states and territories. Vertical competition in a federation would see the Commonwealth establishing its own TAFE colleges, in competition with those of the states. Then let business and TAFE students choose between the public providers.

Vertical competition is not confined to government providers. It is in action when the Commonwealth directly funds independent schools, and lets parent decide between a public provider and a private provider. And it would be vertical competition if the Commonwealth followed Norway, and issued student vouchers to fund independent schools.

The main advantage that the Commonwealth has over the states, in running things like hospitals or colleges, is its dominant financial power.

Otherwise, what is it about public hospitals that make it likely that the central government will do a better job than the states? Superior understanding of patient needs? Superior ability to change how hospitals are run? Superior capacity to change hospital workforce practices?

The Commonwealth has had unchallenged control of a number of matters, including defence. No doubt defence is one of the most complicated and difficult areas but, that granted, it can hardly be said that the administration of defence has always been a brilliant success.

My point is that we do not know, in advance, whether the Commonwealth is likely to turn out to be better than the states in running public hospitals. Why not experiment with vertical competitive federalism, and let the Commonwealth try its hand at public hospitals, before moving to take all of them over. Best if it was a fair competition, with all Commonwealth hospitals and all state hospitals funded through the same formula (for example, case-mix funding, begun in Victoria, and recently suggested by the National Health and Hospitals Reform Commission).

Even better: let the Commonwealth be the funder and not a provider, and adopt that Commission's suggested new scheme, dubbed Medicare Select, the 'next gen' Medicare—a voucher proposal that dare not speak its name—in which the patient has more choices about how to secure the medical and hospital services that they want, and could choose freely between private and public providers.

Competitive outcomes

I will briefly discuss the nature of competition and competitive outcomes.

Some of you may have been exposed to undergraduate economic textbooks, which tend to emphasise what is called 'perfectly competitive markets', with each business producing exactly the same product as each other business. In these circumstances, competition enforces uniformity in prices, in qualities, and in conditions of sale.

But it is mighty unusual in consumer markets for competition to result in many firms producing identical products. Standard specifications are less rare in markets selling intermediate products, like screws. In contrast, the struggle for the consumer dollar induces businesses to differentiate their products, to try variations that appeal to different types of customers. That is, competitors tailor their products to what consumers want and are willing to pay for. The more readily consumers shift their custom in response to different offerings, the greater the rewards to businesses for getting it right—even if the rewards are temporary.

Putting the issue more generally, economists say that the relative uniformity or diversity of the products offered for sale in competitive markets is an *emergent* outcome: the actual outcome that emerges depends on the process that produces the outcome. Change the process: change the outcome. Competitive processes produce different outcomes from other processes. There is no way for a wise person to predict accurately and systematically what the outcomes of the competitive processes will be. A metaphorical way to put it is to say that the competitive process 'discovers' the outcome.

The point of this short excursion into economics of ordinary markets is that its lessons apply to any competitive process. When the various state governments compete with each other, the outcomes are a changing mix of uniformity and diversity. The more readily families and firms move across state lines in response the social and economic environment offered by the various states, then the larger the rewards to the state that 'get it right'.

The notion that the outcomes emerge from competitive processes, gives a warning to those who, observing similar but slightly different policies or offerings in the various states, jump to the dangerous conclusion that there may as well be one national policy (or one national regulation, or one national service provider, or whatever) and that the one national policy will be at least as good as the average of the slightly diverse state policies. Without competition, the outcome may in fact be less than 'fair average quality'.

Moreover, in competitive environments, when someone discovers a better way of doing things, or when the tastes of consumer change, or a new class of products hits the market, then the old offerings disappear, under the pressure of competition. Contrast the uniformity that can arise from deliberative processes of a single rational government, or of a set of governments that have foresworn competition in favour of cooperation, or have retired in favour of the Commonwealth. This uniformity is often the result of experts scanning the horizon for 'Best Practice', which the government adopts, and then gets stuck with it. (Those of you familiar with ministerial councils will appreciate my point.)

I am not pretending that differences across states in public schooling arrangements, in tax rules, in occupational health and safety laws, and so on, do not impose considerable costs on families who move between states, and businesses that operate in more than one state. But I insist that they also bring considerable benefits, especially the important benefit of being able to move to where things are different.

Subsidiarity

Today my main target is the claim that vertical competition is strange and always undesirable and should be eliminated. However, I am not claiming that no areas of public action should be set aside exclusively for one level of government.

Here, I should explain why I do not invest much in the European Union's principle of federal subsidiarity. This principle is that a specific governmental role or function should be left with the lower level of government, unless the higher level of government can handle it more effectively.[5] For a devotee of federalism, the subsidiarity principle is something, but not much. The very idea of subsidiarity is at right angles to the idea of vertical competition. The subsidiarity principle carries with it the notion that all governmental roles and functions should be assigned unambiguously and exclusively to one level of government or the other. So let me state some conditions under which there should be an exclusive, unambiguous assignment of a governmental power, role or responsibility, and so vertical competition is undesirable.

The fundamental consideration, expressed in the language of economics, is that there should be substantial economies of scale and scope (or synergies) that cannot be secured through contract or agreement. National defence is archetypical. To repeat—for the money, seven state navies will be much less effective than one Australian navy. An allied condition is that the advantages of standardisation outweigh the disadvantages. Standardisation of weights and measures, for example, may be best achieved through government and, in a federation, by the central government with exclusive powers.

The second fundamental consideration is that intergovernmental competition can sometimes lead to a disastrous race to one extreme or the other: a race to the undesirable and miserable bottom, or a race to the undesirable and extravagant top. An example of the race to the top is the nuclear arms race. Tax illustrates the possibility of a race to the bottom. Under Premier Joh Bjelke-Petersen, Queensland sought to attract retired folk by abolishing its death duties. Other states followed suit, and now Australia has no death duties. Death is unpopular, and so are death duties. However, most tax economists think that death duties are a relatively efficient form of taxation, and should be in the tax mix.

[5] 'The principle of subsidiarity is defined in Article 5 of the Treaty establishing the European Community. It is intended to ensure that decisions are taken as closely as possible to the citizen and that constant checks are made as to whether action at Community level is justified in the light of the possibilities available at national, regional or local level. Specifically, it is the principle whereby the European Union does not take action (except in the areas which fall within its exclusive competence) unless it is more effective than action taken at national, regional or local level' <http://europa.eu/scadplus/glossary/subsidiarity_en.htm>.

On a less dramatic scale, state governments have competed to attract or retain specific businesses in their states, often by the granting of special exemptions or reductions of payroll or land taxes. The states are, as it were, fishing in the same pond, and whoever casts the most bait, gets the most fish. The tax revenues of state governments are, collectively, worsened by this kind of competition and the efficiency of the tax system, damaged. Possibly spurred by a strong criticism of this kind of competition from Gary Banks, the head of the Productivity Commission, all states except Queensland agreed to limit or cease this kind of interstate 'bidding wars'.[6]

Concern about the tax race toward the bottom leads me to lend some support to the arrangement under which the Commonwealth collects more tax revenues than it spends, and the states, vice versa. (The argument is detailed in my CEDA piece.) In particular, the Commonwealth has control of taxation of personal and company income and the GST, and has the main responsibility for social security payments; but the states retain their own significant tax sources and spending responsibilities.

However, to signal what is coming, the benefits of assigning the income taxes to the Commonwealth come with significant costs. Thus there is a third consideration: that exclusive assignment in one area does not cause too severe damage in other areas of governance.

Other forms of competition

I say that Australians should think carefully before abolishing vertical competition from the federation. But don't governments feel considerable competitive pressures of other kinds? I will argue that these are not enough and, in addition, the very same people who are sceptical about vertical competition in our federation are at least as sceptical of other forms of intergovernmental competition. In fact, more effort has been made to reduce or eliminate horizontal competition between the states, than has been made to prevent vertical competition between the states and the central government. If both vertical and horizontal forms of intergovernmental competition are eliminated, then that leaves electoral competition alone to do the job (supported, of course, by a free press).

Whenever there is government, there will be *competition to become the government*. This is true for all kinds of government, including tyranny, hereditary monarchy, and rule by theocrats, or by philosopher kings. As any reader of history knows, all of these involve competition, often bloody, to be tyrant or king, or to represent truth or the word of god on earth.

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[6] Gary Banks, 'Inter-state bidding wars: calling a truce', speech to the Committee for Economic Development of Australia, Brisbane, 6 November 2002, <http://www.pc.gov.au/speeches/cs20021106>.

Undoubtedly, fair electoral competition is the foundation upon which decent democratic government is based. And because Australia has no tradition of 'winner takes all' after a change of government, this nation has an enviable record of peaceful transfers of power. Federalism is a way to commit not to have 'winner takes all'. Combined with short electoral cycles and party stability, this is one reason Australians have such confidence in government.[7]

Associated with these occasions for transfer of democratic power, is party-political competition, with which we are all familiar. There is competition to be preselected for your party, and then there is the competition to be elected as one of the temporary rulers. But there are many other forms of competition, even when there is only one government involved. For instance, there is competition to influence party platforms, competition to influence voter attitudes, competition to influence government decisions, and so on and on.

But is this all the competition that we need: electoral competition to gain temporary control of the one-and-only government? Imagine a periodic election for the right to be the monopoly supplier of groceries to all Australians. One year, Woolies wins. Next time around, Coles wins, maybe in alliance with IGA. And so on, through a series of temporarily monopolistic suppliers of groceries. Most Australians would be uncomfortable with this arrangement, fearing, correctly, that periodical competition to become the temporary grocery monopoly is not enough to ensure good outcomes, is not enough to discipline the supplier, is not enough to prevent price gouging and poor service.

If you agree about groceries, then surely the argument applies more strongly to competition among governments? Surely the services of government are at least as important to Australians, as are the services of grocery stores. Why be content with monopoly control of public hospitals, or school curricula, or tax rates, or industrial relations, or business regulation and so on? Why work to make the states completely subservient to the Commonwealth, or abolish them altogether, and thereby abolish intergovernmental competition within Australia?

Australia is a federation, comprising sovereign states and a sovereign central government. An Australian is simultaneously a citizen of a state or territory, and a citizen of Australia. Only in a federation can a citizen look to two sovereign governments, each operating over the same piece of geography. If one level of government fails in some way, then the Australian citizen can stay at home and push the other level of government to provide what he or she wants.

[7] See the international comparisons of perceived state legitimacy, in chapter 4 of D. Denemark et al. (eds), *Australian Social Attitudes 2: Citizenship, Work and Aspirations*. Sydney, UNSW Press, 2007.

Voting with the feet

Or, there is another option. If one Australian state offers what a person or family or business wants, and wants it badly enough, then they can move interstate. For people, examples are education, and laws relating to personal choices—drugs, abortion, and euthanasia. For businesses, examples tend to be financial, like taxes and charges, or the quality of infrastructure, or the nature of business regulation.

This is the basis for horizontal competition. Until there is only one government in the world, horizontal competition between governments will occur. All Australian governments are competing with governments in other countries for population. Similarly, Woolies and Coles and IGA are competing for customers.

I would rather live in a country into which many people wish to immigrate, like Australia, than to live in a country from which many people want to leave, like Zimbabwe and the former East Germany. Bad government is the major problem for a long list of countries. Good government is one of the major sources of the attraction of Australia.

Economists say that people and business who emigrate in search of better lives are 'voting with their feet'. There are many reasons for such migrations, but sometimes an element of attraction is a better fiscal deal: better government services or lower taxes; or the consequences of a long series of government policies have made that state more attractive to some people and businesses. It undoubtedly helps puts competitive pressure on states to perform better.

Competition has its own costs, and I am not arguing that competition always delivers the best of all possible worlds. But I am arguing against the opposite extreme position, that interstate competition is always detrimental to good government.

On this question, I will again quote Secretary of Treasury Ken Henry:

> Competitive federalism asserts that there is a national interest in fostering sub-national decision making in respect of things that are of national importance. The proposition is that while competition among sub-national governments will initially produce a number of different policy models, that same competition will eventually produce convergence on a model better than what any national government would likely be able to design and/or implement.
>
> So, is competitive federalism the reason why nationally operated trains have to be equipped with eight different radios? Does competitive

> federalism explain why we have such a plethora of inconsistent state-based regulatory requirements for occupational licensing, occupational health and safety, road transport, water trading, and so on? Possibly. But there is a more likely explanation: a stubborn parochial interest in putting the welfare of the State or Territory ahead of that of the nation.
>
> Parochialism is understandable. But a proper accounting of its national economic consequences would be weighted heavily in the negative.[8]

There may be something in the claim state politicians and bureaucrats are too parochial, too captured by state and local interests; whereas federal politicians and bureaucrats have a broader, national point of view. But to me, there is a rather anti-democratic tone here: the feds can more easily run roughshod over various inconvenient interests, be they local or regional, or industrial, or occupational, or passionate supporters of a particular parrot, possum or wombat.

And in fact the states have not always stubbornly put the parochial ahead of national interests. In the 1980s, far-ranging reforms of competition policy offered prospects of significant nationwide advantages from coordinated action. The states pushed for cooperative reform and then came to the party, in the form of the intergovernmental agreements on National Competition Policy. More recently, the initial impetus for the New Reform Agenda, of coordinated efforts to improve the long-term economic and social prospects of Australians by reforms in health and education, came from Victoria.

Tax powers and competition

Competition works for the best when there is a close relationship between the costs and rewards of action; and competition is unlikely to further the social good when the relationship between costs and rewards is vague or broken. In ordinary markets, prices should reflect full social costs and benefits. For example, businesses should pay for environmental damage they cause, and should pass those costs onto their customers.

Similarly, for intergovernmental competition to be most beneficial, there should be a close relationship between the costs and the rewards of the government action. In particular, it improves electoral accountability if, when a state wants to increase its spending, the state Treasury can go to only one source of funding, namely, the states' own taxes and charges. Conversely, every time a state reduces its taxes and charges, then it should reduce its spending; every time it reduces its spending, then it can give tax relief.

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[8] Henry, 2005, op. cit., p. 343.

This does not happen in Australia; and I am not sure that it can happen, unless the Commonwealth distributes all revenue grants to the states by a general formula, like that used to distribute the GST monies. The states raise taxes and charges to cover about half of their spending, and receive the other half from the Commonwealth Government. But these payments by the Commonwealth are not independent of the actions of each state. Instead, the Commonwealth enters into arrangements with individual states that blur state incentives and accountability. Recently, these arrangements have been partly codified into a system of National Partnership Payments. But this codification does not make it clear to the electors as to who is paying for what, and weakens fiscal discipline on the states. The evidence is that state governments are by and large content with the situation in which the Commonwealth collects much more tax revenue than it spends, and sends the surplus to the states.

However, all this presents a bit of a puzzle: what is the political payoff for the Commonwealth, from taxing too much? If the Commonwealth were only interested in the national interest, then maybe it should be content with the realisation that the assignment of taxes types is roughly in accord with good economic design—namely, assign to the states those taxes that are costly to escape by moving interstate and assign the other kinds to the Commonwealth.

Rather, it is in the political interests of the Commonwealth to claim credit for services or facilities that it has funded. This has deleterious effects, the chief of which are that voters are confused as to who is funding what; and that states have many ways to seek extra Commonwealth funding. And it has more subtle effects, mentioned earlier: that too many public institutions and agencies have more than one government master, which makes for confused lines of accounting and responsibility.

Final remarks

Today I have argued that intergovernmental competition, vertical and horizontal, brings benefits as well as costs. Critics easily see the costs, but tend to ignore or dismiss the benefits.

I have stressed, maybe stretched, the analogy between competition among businesses in ordinary markets, and intergovernmental competition in the ‘political market’. In that context, I suggested that some forms of vertical competition, especially selective intervention, are unlikely to be socially beneficial. More beneficial is competing using structurally different ways of doing things, with the institutions or instrumentalities fully controlled by and responsible to one government.

There is a case for limiting tax competition, by assigning personal or company income tax exclusively to the Commonwealth, in order to improve the efficiency of the tax

system. But the methods by which surplus Commonwealth funds are distributed to the states reduce the independence, autonomy, responsibility and capacity of the states. Partly or mainly in consequence, the states have not performed well, and this has opened up scope for the Commonwealth. What one must fear is that the nature and form of Commonwealth interventions will cause the states to become less competent and accountable, and less able to provide effective and productive intergovernmental competition.

Question — A couple of centuries ago a textbook came across my bows which suggested that politics purges the system. It was an American textbook on federalism and it also made the observation that politics went well beyond the art of a possible to frankly who gets what, when and how. Can you give us your definition of politics please?

Jonathan Pincus — When I went to the University of Queensland, I was told that politics would be the authoritative distribution of goodies among people—exactly who gets what, when and how. I probably can't give you a useful definition of politics; I can give you a useful definition of economics if that will do. Economics is a social science which studies the exchange of things in all its various manifestations. And I suppose in that sense I don't see a sharp distinction between studying politics and studying economics because although politics has behind it the notion of authoritarianism, that is, the state is allegedly in control of the ultimate force and can go out and arrest you and have you put in jail or even in some places shot, my reading of politics is that a lot of economics seems to apply to it too. That is, there is a lot of bargaining in exchange going on. So yes, it may be the case as you say that it's about who gets what and where which is an authoritative kind of way of distributing things rather than the exchange way, a way of bargaining, which is the way that economics prefers. I think that a lot of politics still has tremendous amounts of bargaining. Mention the national competition policy which was very beneficial on average to Australians. There is a lot of bargaining that went on there. The Commonwealth didn't sit down and say, for the national good you will do this, so my answer is no. But there are some people who know who are in the audience who could give you a good answer.

Question — I don't want to hog the floor but didn't Menzies talk unceremoniously about economists: God bless them we need them, if only for the variety of their opinions?

Jonathan Pincus — Which is exactly right, economics is not a religion or an insight into truth, economics is a way of arguing and if all economists came to the same answer I think something would be mad.

Question — I think I could understand your argument on horizontal competition between the states. After all, different states could establish different priorities: some could give more emphasis to health, others to education, different levels of taxation and so on and voters can decide which they prefer. I have difficulty in understanding your concept of vertical competition and in particular your analogy with a market. After all, where the central government is largely responsible for funding the state governments, how can you see this as a market with competition between the two?

Jonathan Pincus — It's a very good question. Let me just go over a little bit again the example I gave of vertical competition where the states might compete with the federals. I don't know what the federal government is going to do about public hospitals and if I read in the newspaper this morning what Tony Abbott said, he was health minister for seven years so I suppose he must have thought about it, he says that when Mr Howard talked about how bad the state hospitals were, then said, 'but people, you wouldn't want all the hospitals run from Canberra', to which Mr Abbott says, unfortunately Mr Howard neglected to observe that Canberra bureaucrats would no more try to run public hospitals than they run nursing homes, which are Commonwealth funded, completely funded by the Commonwealth, and regulated by the Commonwealth but are privately run. I suppose this must be Mr Abbott's latest hospital plan, privately run public hospitals.

My point is that just because the Commonwealth funds something, it doesn't mean it has to run it. Just because the Commonwealth funds the states to a substantial extent, doesn't mean it has to run them. You can have a capacity for independent action even if you're funded by somebody else. If the Commonwealth (let's hope it doesn't) takes over all the public hospitals and runs them all from Canberra, which I don't think it will do, but if it did, then my argument is that vertical competitive federalism would be that voters may say to the states, 'why don't you try some different system, why don't you try the system that used to be run, which was local public hospital boards with broad guidelines from the state running reasonably independently'. They're not private institutions but they are semi-autonomous institutions. The fact that the Commonwealth funds the states I think does have deleterious effects but the deleterious effects are on both sides. That is, that the Commonwealth feels free to interfere selectively, as I called it 'cherry picking', into what the states are responsible; and the states, instead of saying, where in effect we have to go to our voters and ask them for more money, run off to Canberra and say, 'oh, you have this program why don't you give us this money and we will report to you rather than to our voters'.

Vertical competition is certainly harder to arrive at in a situation where the Commonwealth has the big stick, but let's take the GST. Up until now, I'm not saying now, but up until now, GST has been distributed to the states and they can do what they like with it. Now some time ago in putting in a submission to the Senate about how GST money should be redistributed, I suggested that the Commonwealth should hive off that portion of the GST moneys that the Commonwealth Grants Commission allocates differentially at this stage on account of remote Indigenous Aboriginal population and just deal with that. I'm not a lawyer but I suspect under the 1967 constitutional amendment the Commonwealth could deal with that money itself, but it has been the case that the huge amount of money goes to the states and up until now by and large the states have had capacity to make a decision about how they deal with that. You may say they have done it badly, you may say they have done it well, but it is possible to have central funding and to still have untied money, as we call it in economics, not tied to specific performance. It's not easy, but it's possible.

Question — Your market analogy, which I think you have difficulty in persuading people.

Jonathan Pincus — Sure, the market there is the customer. Customer markets are the thing that I am interested in. The customers are the people who want a public hospital and instead of having a single supplier of public hospitals, whether they do it by providing it themselves or whether they do it by funding it all and setting a single regulation of a single form of public hospitals, that's a monopoly form. The market analogy is, there other suppliers of public hospital regulations, public hospital arrangements, the states—we do have those. Most private hospitals are not-for-profit type hospitals, at least most hospital patients in non-government hospitals I think are in those. There are other ways of doing it, it's just avoid if you can, unless you have a really good reason for having a single supplier of something; and vertical competition is to enable the state to do something the Commonwealth is doing, but maybe not catering to a certain range of population, just like a business will carve out a niche in the market by saying, 'there's a group over there who aren't really being well looked after, we will look after them'.

Question — Kerry Packer broke up a monopoly, a world monopoly: cricket. Using Kerry Packer's attack on a monopoly, how could we use his example to get out of the mess we are in?

Jonathan Pincus — I regard that as a friendly question. In this house it would be called a Dorothy Dixer, but I didn't set it up. Let me say one thing first, which is that competition sometimes leads to awful results. Results that any sensible person wouldn't want to have. I'm not saying that always competition is a terrific idea. Sometimes it's a terrible idea. It does depend on the conditions under which

competition takes place, and all good forms of competition are regulated competition and Australia by and large has done a pretty good job in that respect. I'm really doing myself an easy job; I'm trying to avoid either extreme. The extreme which says that competition between governments is always bad, competition that Kerry Packer introduced may or may not be good, I'm sorry, I haven't studied the matter well enough to know whether there are more people annoyed by the fact that the ABC doesn't show it, thank goodness for SBS, maybe more people annoyed by what Packer did than you are, you seem to like it. I don't know what the outcome of competition is going to be. It may sometimes be terrible, but the notion that it's always terrible, and therefore it should always be gotten rid of, that is what I am attacking. I'm trying to avoid both extremes, so I am happy to take the analogy of Mr Packer. He is dead, so we couldn't get him to do anything for us any longer, but he broke up a cosy set of arrangements. Monopolies in markets are of two kinds. There is a temporary monopoly which results from a competitive process where somebody is so much better than everybody else that they dominate the market, and it may be that what I mentioned in the talk, that economies of scale can do mass things so cheaply that nobody else can get in. We call those natural monopolies. They're real. Most monopolies in private business are artificial monopolies. They're monopolies that have been generated by various means, sometimes illicit private action, sometimes licit government action. My plea is, think about the conditions under which monopolies tend to be good. Monopolies tend to be good when they become monopolies because a single supplier can do it much better than anybody else and has proven that in competition, not proven it by mere assertion to say, we can do it better.

Media Decadence and Democracy*

John Keane

We live in an age of communicative abundance. As in every previous communication revolution, new products and processes—satellite broadcasting, iPhones, electronic books, tweets, cloud computing—have spawned fascination, fear and trembling, excitement, bold talk of online publics, cybercitizens, e-democracy and even wiki-government. In the spirit of the revolution, many people presume that there's a 'natural' affinity between communicative abundance and democracy, understood as a type of government and a way of life in which power is subject to permanent public scrutiny, chastening and control by citizens and their representatives. Communicative abundance and democracy are thought to be conjoined twins: the stunning process and product innovations happening in the field of communication media drive the process of dispersal and public accountability of power, or so it is supposed.

In this lecture I'd like to examine this presumption, and to do so by exploring a conjecture first broached by the Canadian political economist Harold Innis: the idea that communication media fundamentally shape the sense of time and space and power relations of any society. It is true that Innis (and his more famous pupil Marshall McLuhan) was not much interested in the subject of democracy and media, so I'd like to put my boots on and go it alone, initially to offer a rough working formula: the first historical phase of democracy, assembly-based democracy, belonged to an era dominated by the *spoken word*, backed up by laws written on papyrus and stone, and by messages dispatched by foot, or by donkey and horse. Democracy and speech were twins. The next historical phase, representative democracy, sprang up in the era of *print culture*—the book, pamphlet and newspaper, and telegraphed and mailed messages; its demise and near-terminal crisis coincided with the advent of early mass broadcasting media, led by radio and cinema and (in its infancy) television. By contrast, monitory democracy, a new historical form of democracy born of the post-1945 era, is tied closely to the growth of *multimedia-saturated societies*; in contrast to the two previous ages of democracy, parliamentary and extra-parliamentary mechanisms heavily depend upon a new galaxy of media defined by the spirit of *communicative abundance*.

How much mileage is there in this rough working formula, the claim that there's a tight link between communicative abundance and the democracy of our times, a new historical form of democracy that I have christened 'monitory democracy'? The era of limited spectrum broadcasting, mass entertainment and representative democracy is certainly over, along with (I recall) the days when children were compulsorily flung

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into the bath and scrubbed behind the ears, sat down in their dressing gowns and told to listen in silence to ABC radio and (later) television. But have we (for instance) left behind the days when millions of people, huddled together as masses, were captivated by demagogues and their skilfully orchestrated radio and film performances? And are we—by contrast—entering times in which the public chastening and public control of power by citizens and representatives is underwritten by a mode of communication that has intrinsically democratic effects? I am genuinely in two minds, and so in this lecture I'd like to explain my ambivalence by standing back from the day-to-day rough-and-tumble of media politics, to develop some conjectures that—with a bit of luck—help us find our bearings, or at least provoke discussion and disagreement.

Communicative abundance

Let me begin with the positive, exciting, intoxicating trends.

Compared with the now-distant era of representative democracy, when print culture and limited spectrum audiovisual media were closely aligned with political parties, elections and governments, and flows of communication took the form of broadcasting confined within state borders, our times are different. Global communication has become a reality. So have global publics, and global politics. Choice of how and when to communicate with others has become well entrenched. Established patterns of broadcasting have been interrupted by dispersed communications and narrowcasting. New, wide divisions have opened up between parties, parliaments, politicians and the available means of communication. Oiled by communicative abundance, we live in times in which there are constant power spats over who gets what, when and how. It seems as if no organisation or leader within the fields of government or social life is ever immune from political trouble. These changes have been shaped by a variety of forces, including the decline of journalism proud of its commitment to fact-based 'objectivity' (an ideal born of the age of representative democracy) and the rise of adversarial and 'gotcha' styles of commercial journalism driven by ratings, sales and hits. Technical factors, such as electronic memory, tighter channel spacing, new frequency allocation, direct satellite broadcasting, digital tuning, and advanced compression techniques, have also been important. But chief among these technical factors is the advent of cable- and satellite-linked, computerised communications, which from the end of the 1960s triggered both product and process innovations in virtually every field of an increasingly commercialised media. This new galaxy of communication has no historical precedent. Gone is the tyranny of distance and its slow-time connections (I remind you that in the colony of New South Wales it took the astonishing news of Governor Bligh's arrest on 26 January 1808 until September of that year to reach London). Gone too are the days of spectrum scarcity, of mass broadcasting, and of prime-time national audiences. Symbolised by the Internet (figure 1), the age of

communicative abundance is a whole new world system of overlapping and interlinked media devices that for the first time in history integrate texts, sounds and images and enable communication to take place through multiple user points, in chosen time, either real or delayed, within modularised and ultimately global networks that are affordable and accessible to many hundreds of millions of people scattered across the globe.

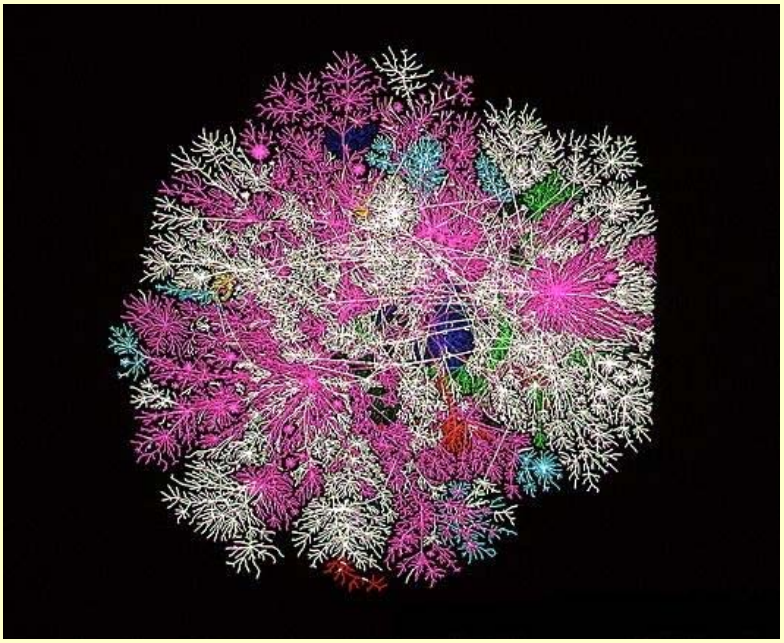

Figure 1: Computer graphic of global Internet traffic. Each line represents the path of sample data sent out to one of 20 000 pre-selected locations using a system called *Skitter*. The lines are colour-coded to show the 'nationality' of that part of the Internet, for example: USA (pink), UK (dark blue), Italy (light blue), Sweden (light green) and white (China and other many other countries). From an image prepared by the Cooperative Association for Internet Data Analysis, University of California, USA. © Science Photo Library.

All monitory institutions in the business of scrutinising power—parliaments, courts, human rights and professional organisations, civic initiatives, blogs and other web-based monitors—rely heavily on these media innovations. If the new galaxy of communicative abundance suddenly imploded, monitory democracy would not last long. Monitory democracy and computerised media networks behave as if they are an inseparable pair. True, the new age of communicative abundance produces widening power gaps between communication rich and poor, who seem almost unneeded as communicators, or as consumers of media products. A majority of the world's people is still too poor to make a telephone call; only a small minority has access to the Internet. The divide between media rich and media poor citizens blights all monitory

democracies; it contradicts their basic principle that all citizens equally are entitled to communicate their opinions, and periodically to give elected and unelected representatives a rough ride. Yet despite such contradictions and disappointments—I'll return to them shortly—there are new and important things happening inside the swirling galaxy of communicative abundance.

Especially striking is the way every nook and cranny of power becomes the potential target of 'publicity' and 'public exposure'; monitory democracy threatens to expose the quiet discriminations and injustices that happen behind closed doors and in the world of everyday life. Not much is sacrosanct. Our (great) grandparents would find the whole process astonishing in its democratic intensity and global scale. 'Bad news' accounts of contemporary media—the belief that everything is going to the dogs, or being 'dumbed down'—typically miss this brawling, rowdy quality (essentially because they rely upon 'freeze frame' pictures of particular moments or aspects of media effects that can only be captured properly using dynamic terms, concepts and methods that have 'Cubist' qualities). So, with the click of a camera, or the flick of a switch, the world of the private can suddenly be made public. Everything from the bedroom to the boardroom, the bureaucracy and the battlefield, seems to be up for media grabs. This is an age in which private text messages rebound publicly, to reveal the duplicity and force the resignation of a government minister (as happened in Finland in April 2008 after foreign minister Ilkka Kanerva was discovered by a tabloid newspaper to have sent several hundred text messages, some of them raunchy, to an erotic dancer. He tried unsuccessfully to defend himself by saying: 'I would not present them in Sunday School, but they are not totally out of line either'). It is an era in which a citizens' initiative, for instance the Space Hijackers, wins publicity by driving a tank to an arms fair in London's Docklands (ostensibly to test its 'roadworthiness') and more publicity for frequenting wine bars where bankers and stockbrokers hang out then convincing them after a few drinks to play midnight cricket in the City of London (an action to highlight the privatisation of space by corporations). These are times in which during elections Sony hand-held cameras are used by off-air reporters, known as 'embeds', to file ongoing videos and blogs featuring candidates live, unplugged and unscripted. This is the age in which a French Interior Minister (Brice Hortefeux) agrees to be photographed with a young Arab supporter and (according to video footage quickly uploaded onto LeMonde.fr) responds to an onlooker's joke about 'our little Arab' as a symbol of integration with the words: 'There always has to be one. When there's one, it's ok. It's when there are a lot of them that there are problems'. And this is also the age in which video footage proves that soldiers in war zones raped women, terrorised children, and tortured innocent civilians. Communicative abundance cuts like a knife into the power relations of government and civil society. Little wonder that public objections to wrongdoing and corruption become commonplace. In the era of monitory democracy,

there seems to be no end of scandals; and there are even times when so-called '-gate' scandals, like earthquakes, rumble beneath the feet of whole governments.

Viral politics

Media controversies and '-gate' scandals remind us of a perennial problem facing monitory democracy: there is no shortage of organised efforts by the powerful to manipulate people beneath them. That is why the political dirty business of dragging power from the shadows and flinging it into the blazing halogen of publicity remains fundamentally important. Nobody should be kidded into thinking that the world of monitory democracy, with its many power-scrutinising institutions, is a level playing field—a paradise of equality of opportunity among all its citizens and their elected and unelected representatives. And yet historical comparisons show that the combination of monitory democracy and communicative abundance is without precedent. It produces permanent flux, an unending restlessness driven by complex combinations of different interacting players and institutions, permanently pushing and pulling, heaving and straining, sometimes working together, at other times in opposition to one another. Elected and unelected representatives routinely strive to define and to determine who gets what, when and how; but the represented, taking advantage of various power-scrutinising devices, keep tabs on their representatives—sometimes with surprising success. Monitory processes of various kinds have the effect, thanks to communicative abundance, of continuously stirring up questions about who gets what, when and how, as well as holding publicly responsible those who exercise power, wherever they are situated. Monitory democracies are richly conflicted. Politics does not wither away.

There is in fact something utterly novel about the whole trend. From its origins in the ancient assemblies of Syria–Mesopotamia, democracy has always cut through habit and prejudice and hierarchies of power. It has stirred up the sense that people can shape and reshape their lives as equals; not surprisingly, it has often brought commotion into the world. Monitory democracy is special: it is the most energetic, most dynamic form of democracy ever. Politics comes to have a definite 'viral' quality. Power disputes follow surprising paths and have unexpected outcomes. Governments at all levels are grilled on a wide range of matters, from their human rights records, their energy production plans to the quality of the drinking water of their cities. Private companies are given stick about their services and products, their investment plans, how they treat their employees, and the size of their impact upon the biosphere. Power-monitoring bodies like Human Rights Watch and Amnesty International join in. There are even bodies (like the Democratic Audit network, the Global Accountability Project and Transparency International) that specialise in providing public assessments of the quality of existing power-scrutinising mechanisms and the degree to which they fairly represent citizens' interests.

When various watchdogs and guide dogs and barking dogs are constantly on the job, pressing for greater public accountability of those who exercise power, the powerful come to feel the constant pinch of the powerless. When they do their job well, monitory mechanisms have many positive effects, ranging from greater openness and justice within markets and blowing the whistle on foolish government decisions to the general enrichment of public deliberation and the empowerment of citizens and their chosen representatives through meaningful schemes of participation. Power monitoring can be ineffective, or counterproductive, of course. Campaigns misfire or are poorly targeted; the powerful cleverly find loopholes and ways of rebutting or simply ignoring or waiting out their opponents. And there are times when large numbers of citizens find the monitory strategies of organisations too timid, or confused, or simply irrelevant to their lives as consumers, workers, parents, community residents, or as young and elderly citizens.

Despite such weaknesses, the political dynamics and overall 'feel' of monitory democracies are very different from the era of representative democracy. Politics in the age of monitory democracy has a definite 'viral' quality about it. The power controversies stirred up by monitory mechanisms follow unexpected paths and reach surprising destinations. Groups using mobile phones, bulletin boards, news groups, wikkies and blogs sometimes manage, against considerable odds, to embarrass publicly politicians, parties and parliaments, or even whole governments. Power-monitoring bodies like Greenpeace or Amnesty International regularly do the same, usually with help from networks of supporters. Think for a moment about any current public controversy that attracts widespread attention: news about its contours and commentaries and disputes about its significance are typically relayed by many power-monitoring organisations, large, medium and small. In the world of monitory democracy, that kind of latticed—viral, networked—pattern is typical, not exceptional. It has profound implications for the state-framed institutions of the old representative democracy, which find themselves more and more enmeshed in 'sticky' webs of power-scrutinising institutions that often hit their target, sometimes from long distances, often by means of boomerang effects.

In the age of monitory democracy, bossy power can no longer hide comfortably behind private masks; power relations everywhere are subjected to organised efforts by some, with the help of media, to tell others—publics of various sizes—about matters that previously had been hidden away, 'in private'. This denaturing of power is usually messy business, and it often comes wrapped in hype, certainly. But the unmasking of power resonates strongly with the power-scrutinising spirit of monitory democracy. The whole process is reinforced by the growing availability of cheap tools of communication (multi-purpose mobile phones, digital cameras, video recorders, the Internet) to individuals and groups and organisations; and communicative abundance multiplies the genres of programming, information, and storytelling that are available

to audiences and publics. News, chat shows, political oratory, bitter legal spats, comedy, infotainment, drama, music, advertising, blogs—all of this, and much more, constantly clamour and jostle for public attention.

Some people complain about effects like 'information overload', but from the point of view of monitory democracy, communicative abundance on balance has positive consequences. In spite of all its hype and spin, the new media galaxy nudges and broadens people's horizons. It tutors their sense of pluralism and prods them into taking greater responsibility for how, when and why they communicate. Message-saturated democracies encourage people's suspicions of unaccountable power. All of the king's horses and all the king's men are unlikely to reverse the trend—or so there are good reasons for thinking. Within the age of communicative abundance and monitory democracy, people are coming to learn that they must keep an eye on power and its representatives; they see that prevailing power relationships are not 'natural', but contingent. Communicative abundance and monitory institutions combine to promote something of a 'Gestalt switch' in the perception of power. The metaphysical idea of an objective, out-there-at-a-distance 'reality' is weakened; so too is the presumption that stubborn 'factual truth' is superior to power. The fabled distinction between what people can see with their eyes and what they are told about the emperor's clothes breaks down. 'Reality', including the 'reality' promoted by the powerful, comes to be understood as always 'produced reality', a matter of interpretation—and the power to force particular interpretations of the world down others' throats.

Media decadence

In recent decades, as the British–American political scientist Pippa Norris has shown, there is an accumulating body of survey evidence that suggests that citizens in many established democracies, although they strongly identify with democratic ideals, have grown more distrustful of politicians, doubtful about governing institutions, and disillusioned with leaders in the public sector. There is little doubt that the older inherited institutions of representative democracy—parties, parliaments, politicians—are for the moment suffering under the pressures of the trends towards communicative abundance. It is as if these institutions have been caught with their pants down. Parliaments have a limited media presence. Parties neither own nor control their media outlets. Journalists hand politicians a hard time. I submit that public disaffection with politicians, political parties, parliaments and official 'politics' in general are symptoms of a long-term, double historical transition that is taking place: a transition fuelled by the growth of communicative abundance and the invention of scores of monitory institutions that have wrong-footed the institutions of parliamentary democracy—and are doing so irreversibly, in my view.

Some observers say that the 2008 election victory of Barack Obama proves otherwise, but I find that unconvincing, simply because Mr Obama is the first great elected representative to get the hang of the entirely new dynamics, to grasp that politicians, parties, legislatures and whole governments have to adopt new tactics and rhetorical styles that work with, and not against, the kaleidoscopic or 'viral' qualities of politics in the age of monitory democracy. Mr Obama may also be the first great elected representative to be skewered by these dynamics. The difficulties he is currently experiencing in matters of war and health care reform suggest that in the era of monitory democracy—here I begin to examine the decline, blight, atrophy—political communication is constantly the subject of dissembling, negotiation, compromise, power conflicts, in a phrase, a matter of political battling. Communicative abundance does not somehow automatically ensure the triumph of either the spirit or institutions of monitory democracy.

Message-saturated societies can and do have effects that are harmful for democracy. Some of them are easily spotted. In some quarters, most obviously, media saturation triggers citizens' inattention to events. While they are expected as good citizens to keep their eyes on public affairs, to take an interest in the world beyond their immediate household and neighbourhood, more than a few find it ever harder to pay attention to the media's vast outpourings. Profusion breeds confusion. Monitory democracy certainly feeds upon communicative abundance, but one of its more perverse effects is to encourage individuals to escape the great complexity of the world by sticking their heads, like Don Quixote, into the sands of wilful ignorance, or to float cynically upon the swirling tides and waves and eddies of fashion—to change their minds, to speak and act flippantly, to embrace or even celebrate opposites, to bid farewell to veracity, to slip into the arms of what one of the best and most careful contemporary philosophers, Harry Frankfurt, and Australians in general, call 'bullshit'.

Foolish illusions, cynicism and disaffection are among the leading temptations of our times. Their corrosiveness suggests that all of the king's horses and all the king's men might after all succeed in undoing democratic accountability, especially when the current-day growth of *media decadence* is taken into consideration. As a rule, new historical forms or galaxies of media typically generate cycles of clarification and confusion, excitement and disaffection fuelled by negative trends. The rule applies to the effects of the printing press, the telegraph, radio and television. Our age is no different. Surprisingly, little attention has so far been paid to the decadent media developments that weaken and potentially reverse the growth of monitory democracy. So what is *media decadence*? And exactly which decadent trends are today threatening the growth of monitory democracy?

When I speak of media decadence I refer to the wide gaps between the rosy ideals of free and fair public contestation of power, the openness and plurality of opinions and public commitment of representatives to the inclusion and treatment of all citizens as equals—the ideals of monitory democracy—and a tarnished, rougher reality in which communication media promote intolerance of opinions, the restriction of public scrutiny of power and the blind acceptance of the way things are heading. Decadence is of course a word with harshly negative connotations of luxurious self-indulgence. I choose it deliberately. Decay amidst abundance is what I have in mind; but I do not suppose that the manifestations of decline are permanent, or irreversible. Fatalism, the belief that the world has its own ways, and that everything rises before falling into decay, is not what I have in mind. Whether the decadent trends I'm about to discuss prove fatal for the democratic energies within the galaxy of communicative abundance I treat as an open question. Time and circumstance, creative inventions, new institution building, good fortune and political courage of citizens and representatives, journalists and owners of media capital will decide what happens. For the moment, there are nevertheless several overlapping types of media decadence that are becoming plain for all to see, and which ought to furrow the brows of every thinking democrat.

Gated communities

Media-saturated societies are visibly suffering the growth of a communication landscape with distinctively 'medieval' qualities. To understand the trend we need to see that whole subsystems of web-based communication can be immobilised by clever new forms of interference. A recent court case in Adelaide centred on a young man charged with infecting more than 3000 computers around the world with a virus designed to capture banking and credit card data and—a quite unrelated local example—the current protest tactic of immobilising Australian government sites through 'flooding' or denial of service attacks (they are known as DDOS in the trade), remind us of the bigger picture, the utter fragility of open communication systems in the age of communicative abundance—their vulnerability to acts of unauthorised interference, otherwise known as hacking.

A spicy example comes from France, whose political scene is currently heaving with controversy about a legal investigation of an alleged large-scale case of hacking featuring the world's largest operator of nuclear power plants, Électricité de France. The controversy has all the trappings of a breathtaking media event, with 'viral' qualities typical of the age of communicative abundance—a thrilling drama featuring a cast of extraordinary characters that includes a disgraced testosterone-doped American cycling champion (Floyd Landis), laboratory officials, former French spies and military men operating in the shadows of corporate power, Greenpeace activists, the media and telecommunications conglomerate Vivendi, and a top judge (Thomas

Cassuto) whose untiring investigations resemble an odyssey or (better) a textbook case of monitory democracy in action.

Cassuto's enquiry began after the Tour de France in 2006 in a sports doping laboratory (whose records had been hacked by a Trojan horse program that enabled outsiders to remotely download files of records that were then altered and passed to news media and other labs, apparently in support of the disgraced cyclist and with the aim of discrediting the handling of test samples). The investigation quickly moved on to target a computer specialist, Alain Quiros, who was tracked down in Morocco by a special cybercrime unit of the French Interior Ministry. Monsieur Quiros confessed to having been paid a modest sum (up to 3000 euros) for hacking the lab; but he also revealed that a shadowy corporate intelligence company, Kargus Consultants, had spearheaded the attack. Really interesting stuff then happened; things grew much more dramatic when the cybercrime police found on the computer of Quiros the hard drives of Yannick Jadot, the former campaign director of Greenpeace, and Frédérik-Karel Canoy, a French lawyer and shareholder rights activist seasoned by many campaigns against some of the largest French companies, including Vivendi and European Aeronautic Defence and Space, the parent company of the aircraft manufacturer Airbus. The corporate intelligence company Kargus Consultants subsequently alleged that it was employed by Électricité de France to spy on anti-nuclear campaigners, not only in France but also in Spain, Belgium and Britain, where EDF last year bought the largest nuclear power company, British Energy. Électricité de France officials vehemently deny any wrongdoing. Vivendi, raided by cyberpolice on suspicion of conducting 'corporate intelligence' raids, also remains silent. Suspicion grows that Trojan horse attacks are things of the past—that much more sophisticated, automated targeting of the 'cloud' of information that people and organisations generate through their online activities is quickly becoming the norm. The power-monitoring exercise continues.

France is not the only democracy experiencing political difficulties with hacking and spying. The days are over when we could suppose in comfort that we were safe from attacks if we kept away from the online porn circuit or never responded to messages from the widowed wife of the central bank governor of the Central African Republic itching to transfer a few million dollars into our account. Every monitory democracy knows routine online disruptions: the password to the personal email account of a Twitter employee was recently guessed by an American hacker, who thus managed to extract their Google password and so gain access to a bundle of Twitter's corporate documents stored in 'the cloud'. Websites testing positive for adware, spyware, spam, phishing, viruses and other noxious stuff are multiplying. Two years ago, Google engineers noted that about ten per cent of many millions of Web pages were engaged in 'drive-by downloads' of malware. Today the figure has jumped to 330 000 malicious websites, up from 150 000 a year ago. The injection of malice into complex

organisations and media systems and personal accounts is more than of news gossip value. For the plain fact is that it is driving a decadent trend: the rapid formation of 'gated communities' or 'private fiefdoms' that have medieval effects by weakening the principle and fact of freedom of movement, 'open grazing' and universal access to the 'public commons' of communication with others.

The American scholar Jonathan Zittrain has tackled this trend at length in his *The Future of the Internet and How to Stop It*. For my taste, Zittrain invests too much trust in an all-American 'can do' nativism, a twenty-first century version of a nineteenth-century Ralph Waldo Emerson faith in the ability of individuals to reach unfathomable places through moral force and creative intelligence, guided by the rule that the less government we have the better. Symptomatic of this Emersonian attitude is his remark that 'the Net is quite literally what we make it' (the identity of the subject 'we' is unclear) and his defence of what he calls 'the procrastination principle' ('create an infrastructure that is both simple and generative, stand back, and see what happens, fixing most major substantive problems only as they arise, rather than anticipating them from the start'). This is to say that his work puts too much trust in competitive market forces; and that it contains too little emphasis on the political need to strengthen the sense of public ownership of multimedia communications media—to institutionalise, preferably on a cross-border basis, a twenty-first century equivalent of the public service broadcasting principle that was invented during the 1920s.

But—surely—Zittrain is right about the market- and government security-driven enclosure movement that is going on under our noses. The iPhone is a symbol of the trend: launched in January 2007, it is a masterpiece of beauty, a brilliantly engineered device that combines three products into one: 'an iPod, with the highest quality screen Apple had ever produced; a phone, with cleverly integrated functionality, such as voice-mail that came wrapped as separately accessible messages; and a device to access the Internet, with a smart and elegant browser, and with built-in map, weather, stock, and e-mail capabilities'.[1] The trouble for Zittrain is that the device is 'sterile'. It has no 'generativity'. Unlike (say) Pledgebank, Wikipedia or Meetup, it does not invite or enable users to tinker with it, to improve upon it, to adapt it to their particular needs. 'Rather than a platform that invites innovation, the iPhone comes pre-programmed. You are not allowed to add programs to the all-in-one device … Its functionality is locked in, though Apple can change it through remote updates. Indeed, to those who managed to tinker with the code to enable the iPhone to support more or different applications, Apple threatened (and then delivered on the threat) to transform the iPhone into an iBrick'.[2]

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1 Jonathan Zittrain, *The Future of the Internet and How to Stop It*. New Haven, Yale University Press, 2008, p. 1.

2 ibid. p. 2.

The key point here is that hacking, identity theft, plus viruses, spam (from 'spiced ham', that wonderful neologism from the 1930s made famous by Monty Python), crashes and other dysfunctions are an unwelcome consequence of the freedom built into the generative PC. Zittrain puts this well: 'Today's viruses and spyware are not merely annoyances to be ignored as one might tune out loud conversations at nearby tables in a restaurant', he writes. 'They will not be fixed by some new round of patches to bug-filled PC operating systems, or by abandoning now-ubiquitous Windows for Mac. Rather, they pose a fundamental dilemma: as long as people control the code that runs on their machines, they can make mistakes and be tricked into running dangerous code. As more people use PCs and make them more accessible to the outside world through broadband, the value of corrupting these users' decisions is increasing. That value is derived from stealing people's attention, PC processing cycles, network bandwidth, or online preferences. And the fact that a Web page can be and often is rendered on the fly by drawing upon hundreds of different sources scattered across the Net—a page may pull in content from its owner, advertisements from a syndicate, and links from various other feeds—means that bad code can infect huge swaths of the Web in a heartbeat'.[3]

Exactly this bad code trend is now driving the invention and application of *sterile* or *tethered* tools and processes that are bound by rules of safety, central control and (typically) private ownership and control of the means of communication. The trend is understandable, especially under market conditions. For my taste, Zittrain understates the ways in which enclosure is fuelled by risk- and profit-propelled corporate strategies, whose power to privatise or 'medievalise' the galaxy of communicative abundance is evident in News Corporation's current plans to charge online readers of its various news sources, such as *The Times* in the UK, the Fox News website and the *Papua New Guinea Post-Courier*. Another example of the privatising effects of market power is the move by more than 500 commercial newspapers and magazines to band together through Journalism Online, a portfolio of news from various providers' websites and electronic platforms.

Driven by market forces and security and reliability considerations, the enclosure movement is lamentable, especially when seen from the point of view of monitory democracy and its future. Democracy is a form of self-government in which the means of deciding who gets what when and how are in public hands. The privatisation of the means of making decisions is antithetical to its spirit and substance. The same rule applies to the means of communication: when governments and/or monopoly or oligopoly businesses or private associations have exclusive control of media then the chances are high that democracy will suffer. The remarkable thing about the advent of the mass media-saturated galaxy of communicative abundance is that its generative

[3] ibid. p. 4.

rules—analogous to the generative rules of a grammar that enables speakers to utter infinite numbers of different sentences—encourage openness, dynamism, pluralism, experimentation, a strong sense of the contingency of things, all of them qualities that have a strong affinity with democracy. The counter-trend, the spread of regulatory surveillance and walled-off and locked-down areas where only the privileged can enter, wander and linger, represents a new form of 'medievalisation', the growth of a hotchpotch of closed, overlapping communities that are vertically arranged, and definitely skewed in favour of those who can afford access charges. That is why it is to be regarded as a decadent trend—and somehow to be resisted.

Government media management

In the era of communicative abundance, ownership of the means of communication remains crucial, and large corporate control of media remains a problem, as it did in the era of representative democracy. The thumbprints of giant conglomerates like Bertelsmann, News Corporation and Vivendi are all over monitory democracy and its media infrastructure. The American media researcher Ben Bagdikian has shown, for the case of the United States, that in 1984 some 50 large companies controlled all media; that by 1987 that number had dropped to 26; then dropped further to around ten in 1996; and that by 2004 there were only a Big Five—Time Warner, Disney, Bertelsmann, News Corporation and Viacom—that now control the lion's share of the media industry.

The growth of media oligopolies certainly makes parties, politicians, parliaments and whole governments vulnerable to media seduction; interference, nobbling, threats and vetoes become a constant possibility. We know well about the corrupting effects of big media business in Australia. An early example is documented in Bruce Page's *The Murdoch Archipelago*, which recalls how the mysterious disappearance in mid-December 1967 of Prime Minister Harold Holt triggered an intense struggle behind the scenes to determine his successor. Rupert Murdoch, still a young media empire builder in Adelaide, entered the fray and played a vital role in its resolution. In Canberra's Hotel Kurrajong, five days before the selection of John Gorton as prime minister, Murdoch agreed to meet in secret with the acting prime minister, 'Black Jack' McEwen. For quite different reasons both favoured Gorton (Murdoch did so because he judged, correctly, that he would be more pliable and sympathetic to allowing Murdoch to move capital out of Australia, in search of acquisitions in the United Kingdom). So together they decided that the best way of achieving their respective goals was to discredit a close associate of Billy McMahon, Gorton's main rival. They targeted a man named Max Newton, who was accused publicly of being a Japanese foreign agent. Just several days before the vital selection of the new prime minister, Murdoch's *Australian* carried the crude headline: 'Why McEwen Vetoes McMahon: Foreign Agent Is The Man Between The Leaders'. Crudity worked. The

allegation was utterly false, but within the governing parties it tipped the balance in favour of John Gorton.

Vulgar political interference is neither typical of how large media firms operate nor of Rupert Murdoch's behaviour when it comes to government policies (he has a habit of using politicians and shaping governments from the near distance, rather than from close range). Far more worrying, in my assessment, is the present-day tendency of corporate media and government control methods to merge, especially in those contexts where for constitutional and political reasons mergers and alliances effectively blur the division between state and market. China, Russia and Iran, authoritarian states with functioning markets, are three cases at one end of a spectrum that now includes (for instance) Italy, an unhappy country where Mr Berlusconi controls far too much media for anybody's good and happens to be a prime minister who has not only conned and connived his way into legal immunity from prosecution but has built a power base of supporters, not merely through favours and crude deals but (as Umberto Eco and Paul Ginsborg have so well explained) by using state-of-the-art rhetorical methods—oiled by the instincts of a salesman whose sales pitches contain something for nearly everybody because their aim is to convince people that his interests are identical with theirs, so turning them into the satisfied and admiring people that he says they are.

I should like to emphasise that this second decadent trend, the merger of government and corporate media and the will of incumbent governments and states to control communication flows—to invent and 'arrest' audiences—is not a repeat of the 1920s and 1930s, the decades which witnessed the crystallisation of the fascist and Bolshevik models of state-controlled broadcasting media. Shaped by communicative abundance and monitory democracy, our times are different. Less obvious is the point that the second trend is not just a Chinese, Iranian or Russian problem. It's a dangerous and decadent trend that has taken root *within the most advanced monitory democracies*. The reasons are not as obvious as they might appear; they are not simply or primarily to do with corporate control of government, or with government 'spin', as is commonly thought. The process is more complicated, and it requires some fresh thinking. It has two sides. Let me try, briefly, to explain them in turn.

In the era of monitory democracy, government media management is partly a 'top down' process. Governments hack in to the system of communicative abundance using various instruments, blunt and sharp. In recent years, John Howard did this to a worryingly unconventional degree. The formula of his governments' media strategy is clearer in retrospect: build a team of tough-minded public relations people who are good at spinning everything. Get them to cultivate the image of the prime minister as a dedicated, hard-working, self-made man, a leader in whom everyone can recognise something of themselves, and what they want to be. Grant access of journalists to

government plans in return for favourable coverage. Put senior bureaucrats on notice that they are required to report all contacts with journalists to the Prime Minister's Office. Stop leaks from retired or serving bureaucrats (Howard called it 'democratic sabotage', and explained that leaking is bad because it wrecks the tradition of fidelity and confidentiality upon which the provision of frank and fearless advice by civil servants to politicians depends). If necessary, get the police to turn up on doorsteps to ask questions of suspected infidels. Pass legislation to slap bans on reporting high-priority matters, detention without trial of suspects and witnesses, for instance. Pursue journalists who are troublemakers, especially those who refuse to divulge their sources. Threaten them with prosecution for libel, or contempt of court. Cultivate deaf ears for requests for disclosure of information. Keep trusted commentators at the ready, on duty at all times. Ignore calls by lawyers' groups, NGOs and the press for new freedom of information laws, or their reform. Say often that you favour 'freedom of communication', but make it clear that there are strong grounds for withholding information, such as security, public order, fair play, the rights of business, the protection of the vulnerable, the needs of government.

Lest you think this formula is a party-political matter, it is sobering to remember that Tony Blair did much the same in Britain, though he liked to justify it using the alibi of a 'feral beast' media. In his widely publicised farewell speech at Reuters (12 June 2007), Blair rounded on journalists for their aggression, for their degradation of public life. He accused the media of hunting in packs, obliterating the vital distinction between 'opinion' and 'fact', sensationalising everything. It was the usual thing, but for the unusual purpose of portraying governments as under siege from a media that is both 'overwhelming' and hungry for the kill. 'When I fought the 1997 election', said Blair, 'we could take an issue a day. At the last election in 2005, we had to have one for the morning, another for the afternoon and by the evening the agenda had already moved on entirely. You have to respond to stories also in real time'. He added: 'Frequently the problem is as much assembling the facts as giving them. Make a mistake and you quickly transfer from drama into crisis. In the 1960s the government would sometimes, on a serious issue, have a Cabinet that would last two days. It would be laughable to think you could do that now without the heavens falling in before lunch on the first day. Things also harden within minutes. I mean, you can't let speculation stay out there for longer than an instant'. None of this is good for democracy and that is why, Blair concluded, governments have to put their armour on: 'not to have a proper press operation nowadays is like asking a batsman to face bodyline bowling without pads or headgear'.

I'm sure Mr Blair had a point. But one trouble with his diagnosis is the way it covers up the alarming extent to which all democratically elected governments are proactively involved in a clever, cunning struggle to kidnap their citizens mentally. These governments are not simply victims of communicative abundance. They are

perpetrators of anti-democratic trends. Their deepening involvement in the business of manipulation of appearances—the tendency that leads us into 'the age of contrivance' (a phrase coined by the American historian Daniel Boorstin in *The Image* [1962])—is perfectly obvious from just a cursory examination of the Blair governments' media management tactics. They took the art to new heights. They fed 'leaks' as exclusives ('you can have this, but only if you put it on page 1'). When embarrassing stories broke, they put out decoys. They tried to master the art of releasing bad news on busy days (they called it 'throwing out the bodies'). They denied. They lied. Several juicy stories confirm that the Blair governments certainly knew what they were doing. Alastair Campbell, Blair's chief tactician, regularly practiced the art of deception, and did so with cunning and finesse. His deputy (Lance Price) recalls that Campbell, testing the waters, deliberately told a *News of the World* journalist that Blair had stayed on the eighth floor of a hotel that in fact was only six storeys tall (the journalist never bothered to check); and that Campbell went to a Britney Spears concert and managed to get her autograph, then bet somebody £200 he could get the *Evening Standard* to splash a story that she supported Labour. He won the bet that very day.

These anecdotes are no doubt trivial, but they nevertheless reveal a bigger picture that naturally raises the question: how exactly do governments manage to get their way in a world of communicative abundance?

What I want to say is that a basic—more troubling—difficulty with Blair's image of a 'feral beast' media is that it ignores its habitual docility. The word 'spin' doesn't accurately capture what is going on, for the problem is not just government top-down manipulation of media. There is an equally serious problem: the connivance of journalists and their 'churnalism' with the whole trend towards government media management. *Flat Earth News* by the English journalist Nick Davies presents in my view a fairly compelling picture of the roots of this docility.

Davies is aware that in an age of communicative abundance there are widespread complaints about the way 'media', and journalists in particular, behave badly. They often stand accused of hunting in packs, their eyes on bad news, egged on by the newsroom saying that facts must never be allowed to get in the way of stories. Journalism loves titillation, draws upon unattributed sources, fills news holes—in the age of communicative abundance news never sleeps—spins sensations, and concentrates too much on personalities, rather than time-bound contexts. It is said, especially by bookish types, that journalism is formulaic, that it gets bored too quickly and that it likes to bow down to corporate power and government press briefings.

Such generalisations are undoubtedly exaggerated. There are many hardworking, honest and ethically open-minded journalists; and besides, as Michael Schudson has recently pointed out in *Why Democracies Need an Unlovable Press*, bellyaching

against journalists is on balance not such a bad thing for monitory democracy, especially if it sharpens the wits of citizens and encourages their healthy sense of scepticism about power, even the power of journalists to represent and define the world in which we live. The bellyaching nevertheless has had damaging effects; judging by their low popularity ratings, journalists are struggling to hold their own against politicians, real estate agents, car salesmen and bankers. Yet the problem is worse than this, Davies shows, for such complaints are in fact symptomatic of a deeper problem, one that he grasps well. For reasons having to do with market pressures and top-down managerial control, most journalists no longer work 'off diary'. They have no time in which to go out and find their own stories and carefully check the material that they are handling. The consequence is that journalists become highly vulnerable to ingesting and reproducing the packages of information that are supplied to them by the public relations industry and governments. Like a human body lacking a properly functioning immune system, the media produce lots of distorted or pseudo-news, or pseudo-coverage about pseudo-events—lots of flat earth news. Equally worrying is the fact that 'churnalism' tends to produce and organise public silence. It could be called no earth news since it takes the form of important stories which journalists around the world simply fail to take an interest in, in no small measure because such subjects as the global surge in poverty, the arms trade and leveraging in the banking and credit sectors are complicated and perforce require intensive concentration and in-depth research to cover thoroughly, or to cover well.

Groupthink and democracy

No earth news, flat earth news, cyber-attacks, moves to restrict freedom of information through online gatekeeping, mushrooming media oligopolies, Berlusconi-style mass media populism and organised media subservience in the face of unaccountable power: these are just some of the trends that bode ill for democracy in the age of communicative abundance. This lecture prompts some key questions about these trends—admittedly more questions than I can table, or sensibly address. But I ask: why do we have no comprehensive account of this media decadence and its worrying power to induce rigor mortis in the democratic body politic? To what extent is the decadence exacerbated by the collapse of newspaper business models, and by the new phenomenon of cost- and profit-conscious red-blooded journalism, which hunts in packs, its eyes on bad news, horned on by newsroom rules that include eye-catching titillation, reliance on official sources ('avoiding the electric fence'), give-'em-what-they want/what-they-want-to-believe, 'if we can sell it, we'll tell it' stories, and by the excessive concentration on personalities, rather than stories and analyses that are sensitive to time- and space-bound contexts? I could go on to ask what (if anything) can be done about media decadence? And some disturbing questions: does the age of communicative abundance on balance proffer more risk than promise? Are there developing parallels with the early twentieth century, when print journalism and

radio and film broadcasting hastened the widespread collapse of parliamentary democracy? Are the media failures of our age the harbingers of profoundly authoritarian trends that might ultimately result in the birth of 'post-democracy'—polities in which governments claim to represent majorities that are artefacts of media, money, organisation and force of arms?

A sceptic might reply by pointing out that every historical form of communication has prompted intellectual bellyaching and resistance. After all, Plato objected to the deluded speech of the pnyx; in the age of representative democracy, John Stuart Mill worried about threats to liberty posed not by kings and tyrants but by the burgeoning 'public opinion' nurtured by newspapers, pamphlets, books and petitions; and during the 1920s and 1930s there were widespread complaints that Hollywood, radio and television were agents of mass deception. The failures of journalism and communication media, their propensity to let down citizens under democratic conditions, are surely a very old problem, the sceptic might add. After all, to pluck a random example out of thin air, global media carried nonsense stories at the end of the Second World War that Hitler was not dead, that he was a hermit in Italy, working as a waiter in Grenoble, as a shepherd in Switzerland, a fisherman in Ireland, and that he had fled to South America by submarine and plane. So—the sceptic might conclude—nothing much is new under the sun, which has ever managed to shine on democracy, allowing it to flourish into our times, helped along by brave journalists and independent media.

There is truth in these objections. But could it be that media decadence nowadays matters much more than during the past few decades? I believe it does, partly because (as I've tried to explain in *The Life and Death of Democracy*) we are living in times when most old arguments for democracy have worn thin and when as well there is a noticeable jump in the level of support for the view that democracy is a second-rate way of handling power because it seduces governments into pandering to piffle and public confusion, traps them in conflict and, hence, hinders governments from getting things done efficiently and effectively. There is another, equally important reason why media decadence matters: we face a growing number of interconnected, cross-border, life-or-death problems whose definition, analysis and resolution require communication media that counter 'groupthink', folly and hubris by being on the ball, vigilant before the powerful, responsive and responsible to citizens and representatives alike.

These two reasons why media decadence should be worrying to democrats are tightly connected by the problem of hubris. Political arrogance tinged with blind mistakes bordering on stupidity—the problem of hubris—is arguably the greatest ultimate challenge that faces any system of concentrated and uncontested power. Those who wield power freed from the 'burden' of comment and criticism and negotiated

compromise or compulsory veto may consider themselves lucky, as living on top of the world, or in heaven. They may believe absolutely in the harmonious effects of annually rising GDP; or that God blesses their power; or that a majority of people can be seduced by turning politics into B-movie show business. Consider the case of contemporary China, whose rulers have little or no political sympathy for democracy in monitory form. While they often praise 'the people' as the foundation of their own form of self-government with putative 'Chinese' characteristics, they reject democracy understood as the ongoing public scrutiny, chastening and humbling of power. Monitory democracy—detailed in the initiative called Charter 08—is accused of speaking in tongues. It is said to produce far too many conflicting points of view that are in any case not of equal worth. Open public scrutiny of the Party and the state breeds confusion, dissension and disorder. It violates the principles of the Harmonious Society. It threatens the proven ability of the state to raise standards of material wellbeing and so to improve the quality of people's lives. China's rulers thus accuse their opponents of plotting chaos, resistance and 'counter-revolution'. Social harmony is said to require forceful leadership and intelligent government unconstrained by the vices of party competition, useless parliaments and querulous civil society organisations that represent nobody save their own interests, or the designs of 'foreign' powers.

Measured in terms of the history of democracy, many of these claims are of course well-worn tropes designed to distract attention from the brute fact that in practice they can have crippling effects, especially in circumstances in which the powerful fall narcissistically in love with their own judgements. The radius of their circle of advisors shrinks. They denigrate, push aside or disappear their critics, and generally become dismissive of all opinions and evidence that run counter to their own views. They talk hot air; what they are doing and why they are doing this or that comes clothed in phantasms, to the point where problems, policy failures and enforced retreats either go unrecognised or are interpreted, falsely, as triumphs.

Four decades ago, the American psychologist Irving Janis (1918–1990) labelled such hubristic behaviour as 'groupthink', the tendency of decision makers operating in group settings to ignore counter-evidence in the interests of towing the line and getting things done. He showed (in *Victims of Groupthink* [1972]) how groupthink played a fundamental shaping role in the fiasco of the American invasion of Cuba at the Bay of Pigs. More recent examples of political decisions or non-decisions protected by groupthink spring to mind, among them the invasion and occupation of Iraq and Afghanistan and the negligence of many democratic governments in allowing banking and credit institutions to regulate their own affairs, unhindered by objections and fears that the large-scale 'leveraging' of risk in money markets would result eventually in giant market bubbles, whose bursting would produce a global great recession.

Policy bungles of this kind are no laughing matter. They damage the lives of growing numbers of people; for a variety of reasons to do with technological scale, mobility of capital and communicative abundance, their sensed global footprint is widening. Worldwide policy failures drive home the painful truth of the old proverb that fools never differ—that unchallenged power is dangerous, ultimately because it is blind to its dependence upon a universe of great complexity, great unknowns and great unintended consequences. Hubris nurtured by groupthink is the Achilles heel of publicly unaccountable power. The only known human cure for its toxic effects is the free circulation of differing viewpoints, courageous conjectures, corrective judgements, checks and balances, the institutional humbling of power. The robust public scrutiny of power is the wisest way of handling complexity, coping with uncertainty and anticipating, recognising and avoiding mistakes, or of acting to prevent the Big Mistake. That is why media decadence is a problem for monitory democracy—and why remedies for its undesirable effects need urgently to be found.

Question — I was very stimulated by your lecture, and in particular your point at the end about groupthink and the dangers that that causes and how that might best be addressed. It reminded me that addressing that very question of groupthink a fellow called Barack Obama, who you mentioned earlier, now the President, wrote in *Audacity of Hope* quite extensively about his solution, if you like, to groupthink and he wasn't raising a new idea, but he talked at some length about the concept of deliberative democracy by which he explained that that was going way beyond representative democracy and was rather a form of democracy that we should be moving towards rapidly—a form of consultation, of reaching out. He actually said that there should be no absolute truth, we should no longer have any certainty that anything is truly correct. We should rather create mechanisms of government and so on whereby every proposition is able to be tested out, debated, looked at at some length. His mentioning of deliberative democracy was referring to an intellectual concept which I'm sure you know has been around for decades, or at least ten years, and it struck me as you were speaking: how does that concept, which seems to have some similarities with your monitory democracy, how do those two fit together and do you approve or support one rather than the other or do you think they are complementary?

John Keane — It's good for democracy that there is public deliberation about who gets what, when and how. The advocates of deliberative democracy have a point: without citizens' deliberation democracy withers away. Public, non-violent, open commentaries on power, bargaining, tussling and deciding things by means of public

reasoning, helped along by parliaments and often with the assistance of elected and unelected citizens' representatives, must always be an important component of democracy. But in *The Life and Death of Democracy* I point out that the theory of deliberative democracy, despite claims to the contrary, has an unfortunate 'seminar' bias. It's an intellectual rationalisation of what we as academics spend half our time doing, that is, acting as good chaps and good women who speak well and reasonably in public about things that matter. There are of course nasty moments in politics, for instance when there are rumours and bullshit circulated through the media, when people understandably crave deliberation. But to expect that citizens should behave as if they are participating in an unending university seminar is a mistake. I also think that deliberative democrats have a poor sense of history. They haven't grasped that their emphasis on deliberation is symptomatic of a wider shift that is taking place in the real world: the shift towards monitory democracy. This historic redefinition of democracy, so that it comes to mean not just free and clean elections but the continuous public monitoring of power, certainly has plenty of room for reasonable deliberation. But the whole process of monitory democracy is in reality a much more rough-and-tumble affair. A small example, one of my favourites: in February 2008, on the day that Gordon Brown fielded questions in Prime Minister's question time in the House of Commons, a group called Plane Stupid, protesting the expansion of runway space at Heathrow airport, on the ground that it's already big enough, already an environmental cesspool, managed, with the help of some unnamed MPs, to get inside the House of Commons and up onto the roof of the Palace of Westminster, from where they unfurled their banners, and for around two hours conducted their own press conference with the pack a couple of hundred feet down below, using mobile phones. As all this is going on the Prime Minister is informed that there is a demonstration happening on top of the House of Commons. So he says, in a dour manner: 'I remind the honourable members that policy in this country is made in the chamber of this House and not on the roof of the House'. In fact, that's no longer true. And is this deliberative democracy? Hardly. It's a kind of staged media event where Plane Stupid knows that the journalists it contacted will come because they love the drama of it all. They're not there for reasonable deliberation. The event, needless to say, was widely reported, replete with mention of the double-meaning Plane Stupid initiative and their key demands. Such rough-and-tumble monitoring of power is what politicians, parties and governments must get used to. It's part of the new political landscape and on balance it's good for democracy, even if you don't like Plane Stupid.

Question — Do you believe the use of media, of comedy, and I'm thinking of episodes like *Yes Minister* which I do enjoy, conditions our collective consciousness to excepting mediocrity?

John Keane — We could have a good discussion about this genre of programs, some of which are of very high quality. My current favourite is Armando Ianucci's *In the Thick of It*, a biting comedy featuring Malcolm Tucker, a foul-mouthed spin doctor in the corridors of government power. It has attracted large audiences and politically educates many more people than, say, the 10 o'clock news. I have an open mind about the role of satire and comedy. Democracies need them. Here we come back to the deliberative democracy thing for I don't have a straight-jacketed purist view of what counts as public educational citizens' involvement or citizens learning about power and politics, which can certainly be done through these non-deliberative genres, including music and theatre and other parts of the mediascape in which we live our lives. The point is to have a plurality of these genres, not just one, so that there is choice, not only for producers and directors but also for audiences. There's certainly great scope in the age of communicative abundance for experimenting with the way media can communicate with audiences. Another example from Britain is the way that the rescue of the NHS from full privatisation was bound up with the success of *Casualty*, a television drama series set within the NHS. It did much more than any politician's speeches or white papers or documents to make people realise that actually life in the NHS is quite interesting, that it's also literally a life and death matter, and that it's worth rescuing in the sense of not going down the path of the United States and private medicine.

Question — You said that you were going to depress us. You have done that very well, for me anyway. I was a little surprised, actually, because I would have thought that more was essentially better. Are you saying, effectively, that less media is more back in the good old days or do you think that things like Twitter, Facebook, citizen journalism, blogs, those sorts of things actually have an active role to play, and are doing that now, which tends to override those people who are ambivalent and checking out, that you mentioned before? I think there is something valid in those forms of media. Where is the glimmer of hope in your assessment for media and democracy?

John Keane — There were two sides to my argument but it's true that there is no returning to a supposed golden age of broadcasting. Even if we wanted to turn the clock back to the era of ABC radio and to obedient children in dressing gowns well, forget it, it's over. The age of demi-gods like Mussolini doing stand-up performances before adoring masses is also over, simply because of the different structures and dynamics of this new galaxy of communication, which I am calling communicative abundance. But from my point of view it is very hard to conceive in a new way what public service media might mean in the twenty-first century. To make it clear, democracies thrive when there is a strong sense of public ownership of the means of decision making. I don't know if you have ever thought about democracy in this way

but to put things very simply when some people, elites for instance, privatise the means of decision making then that's bad for democracy. An election is a publicly owned act. It's a publicly owned spectacle, a publicly owned experience. No private company runs it, or should be allowed to run it on an outsourced basis, and no particular group should control its mechanisms. Democratic procedures belong to everybody and when they don't that's called oligarchy or corruption, of the kind that plagued politics during the eighteenth and nineteenth centuries. But analogously, if democracy is understood in this way as the public ownership of the means of decision making, then one of its vital complements is the public ownership of communication media. The reality of that ideal is perhaps slipping away. Yes, it's true there are lots of counter trends, as in the blogosphere. Lots of good things are happening. But the question is whether citizen journalists and Twitter and blogs can somehow result in a strengthening of the principle of public ownership and access of media? Answers to this question are very underdeveloped yet they are vital for the future of democracy. Take the recent American example of ProPublica. It's an online initiative that aims to increase the sense of public ownership of media. Let's take another, more fraught example of the unfinished business we face: the whole question of scanning and electronically developing a global library of books. As you know, at the moment in the American courts Google and its opponents are caught up in a huge dispute about who will own this information and who will control access to it. Watch this particular court case because it's really important for deciding who will own and control the world's literature and whether there should be a privately controlled monopoly or oligopoly, or whether instead there can or will be some twenty-first century equivalent of the BBC public service principle. The matter is vital for the future of democracy.

Question — You used the discussion about war for a number of your case examples in the talk and at the end mentioned Iraq and Afghanistan. There has been a lot of debate about the Iraqi war but how does your theory of superabundant media explain the almost complete absence of any debate about the Afghan war? Australia has been at war there for seven years now and I just don't really understand how there can be so little debate on it. I look to your views on that.

John Keane — I think the answer lies partly in the lethal combination of public fatigue with war and the nearly decade-long history of government-led information and structuring of public perception and justification of the invasion, despite the fact that operations there are all pretty much a mess at the moment. Governments have tremendous powers of public deception. As you know, the invasion and occupation of Afghanistan was officially said to be part of the so-called war on terror. We had to go to Afghanistan to knock out our opponents. Then that was followed by a phase of talking about the democratisation of the country. The war is not about that at all and actually in military terms it's a failure as well. So why are we there? For geopolitical

reasons. Yet thanks to government policy and what I earlier called flat earth journalism we're told stories that don't seem to arouse the sense of danger and complexity and probable failures of military interventions of this kind. When we read headline coverage of the recent election in Afghanistan it seems as if we are reading about elections in Britain or Australia. Until we realise, if we delve into things more deeply, that turnout is in some areas less than a third of eligible voters, or that there are hundreds of major bomb blasts, or that a lot of people have been killed; an election in which one of the mates of Hamid Karzai is called 'The Butcher', or in which there is a bounty of many thousands of US dollars on a dead or alive member of parliament. What kind of so-called democracy is this? In mainstream media coverage none of this comes through very well. I'm sorry to be a party spoiler but it does seem to me that you are right to raise the question of Afghanistan exactly because it is a test case of the kinds of political lying and media silence that typically develop during wars. They are not good for democracy. Its history is full of examples where the spirit and institutions of democracy are ruined because of military attack or violence, or because democracies fling or drag themselves into war.

Question — I was interested in the aspect of information rich/information poor. It seems to me that you have addressed the information rich or even with censored societies like China. What of the vast majorities of the population of the world that have no access at all to telecommunications?

John Keane — There was a section in my original draft lecture covering this topic that had to be cut for reasons of time. I think you are right to raise this point. Information poverty is another decadent trend. Most of the world's population is too poor to make a telephone call. Only a small minority still has access to the Internet. There are more mobile telephones in the city of Tokyo than in the whole of sub-Saharan Africa, and so on. The figures are no doubt debatable. But for me the question is what to do about such gaps, for it turns out that we, the information rich, have a direct interest in what is happening in information poor zones, which are often zones of war and environmental destruction and therefore directly impinge on our own lives. That's why information poverty is vital—and why initiatives, such as the One Laptop per Child campaign begun by Nicholas Negroponte and others, is an interesting and potentially important example of how to overcome the abyss between the information rich and the information poor. It has a long way to go, obviously. And it's not just a north/south problem. Take a rich monitory democracy like Britain. According to government figures nearly 30 per cent of its young people under the age of 18 are living in poverty. That's really astonishing—and disturbing when it comes to considering information inequality. Such figures are very bad for the future of democracy, for if the next generation has been steeped in the experience of information poverty then the principle and fact of citizenship will be ruined.

Andrew Fisher: Triumph and Tragedy*

David Day

Next month is a landmark moment in Australia's political history—the centenary of Andrew Fisher's election as prime minister. He was one Australia's longest serving prime ministers, enjoying three separate terms in office comprising nearly five years in total. Only nine prime ministers served longer than Fisher, and only one of those, Bob Hawke, was a Labor prime minister. Fisher was in power for longer than John Curtin, Ben Chifley, Gough Whitlam and Paul Keating and just a few weeks short of the Liberal, Alfred Deakin. Yet he is little known and his achievements are little celebrated.

Fisher has long deserved better. After all, he was the first Labor prime minister, indeed the first prime minister of any party, to be elected to power with majorities in both houses of Parliament. This was a dramatic political change that ended the era of minority governments and forced non-Labor MPs to coalesce in a single party, thereby ushering in the basically two-party system that Australia has had, for better or worse, ever since. Fisher's landmark election in 1910 is important for another reason. It marked the first time that an avowedly socialist leader had ever been elected to lead a nation anywhere in the world.

The Labor Party might have been expected to include Fisher within its pantheon of political heroes, but until fairly recently had not done so. It may have believed that Fisher was somehow tainted by association with his successor, the Labor 'rat' Billy Hughes, or that his apparently enthusiastic commitment of Australian forces to the First World War was too jingoistic for modern Labor to celebrate; or his embrace of 'white Australia' was too controversial for our multicultural times.

Fisher did not help his own cause by retiring and dying in Britain, where his papers remained until the 1970s. This obstacle made it difficult for historians and potential biographers to get to grips with Fisher. Indeed, in the century that has elapsed since Fisher's historic electoral victory in 1910, there was no serious biography written about him. Tragically, two biographers who began books on Fisher in recent years died before they could complete their work.

In the absence of a biography, Australians have had to rely for their assessment of Fisher largely on the jaundiced views of his political opponents, particularly Deakin and Hughes, and their biographers, who were loath to credit Fisher with anything. Yet Fisher's life was marked by great political triumphs.

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It was triumphant enough for Fisher to rise from his humble beginnings as a youthful Scottish coal miner of limited education to lead his local union branch at the age of just seventeen, and to organise a popular campaign in his Ayrshire village to broaden the franchise in Britain. But even the extended franchise left Fisher and most of his coalmining colleagues without the vote, while his work with the union left him without a job after the mine owners blacklisted him.

Emigration to Australia in 1885 held out the prospect of something better. It was a chance for economic advancement in a political environment where working people enjoyed greater rights and freedoms than in Britain, although there was still no political party in the Australian colonies that represented the interests of working people. With his limited work experience, Fisher naturally gravitated to the coalmines near Harvey Bay, where he soon built himself a house. However, after being thwarted in his attempt to become a mine manager, Fisher shifted to the goldmining town of Gympie, which thereafter became his political base.

Fisher might have been content to advance himself in the goldmines, where he worked as an engine driver on the surface, controlling the machinery that lowered the men into the shaft and lifted them and the gold-bearing rock to the surface. It was a position of great responsibility where the lives of his fellow workers depended upon his steady hand. It was this sense of responsibility for his fellow man that saw Fisher devote himself to representing their interests, firstly within the increasingly assertive union movement and then within the growing Labor Party ranks of the Queensland Parliament, where Fisher was briefly a minister in the minority Labor government of 1899.

Unlike many Labor activists in Queensland, Fisher was a keen federationist. Although the proposed Constitution was drafted in ways to thwart the popular will and prevent the adoption of a socialist agenda, Fisher believed that the interests of working people would be best served by embracing Federation. He argued that when the Labor Party gained power in the federal Parliament, as it surely would, the Constitution could be changed to reflect their interests rather than the interests of the people of property. Fisher also supported Federation because it would also allow for a stronger Australia in an increasingly dangerous world, where the British Empire was facing challenges from the rising empires of Europe, Asia and North America.

Fisher was right about the inexorable rise of the Labor Party, although it would take ten years before it would win sufficient support to control both houses of Parliament. Prior to then, there were two minority Labor governments, led by Chris Watson in 1904 and by Fisher in 1908–09. Watson’s government was too brief, less than four months, and too weak to achieve anything, other than to establish Labor’s right to

govern. Fisher's minority government lasted nearly twice as long, but only because Fisher kept the doors of Parliament firmly shut for most of that period.

During that time, he decided on the site for the national capital and laid the basis for an Australian navy that would be dedicated to the defence of Australia, rather than create a unit of an imperial fleet. In Fisher's view, defence self-reliance was a sign of national maturity and a necessary precondition for creating a 'national spirit'. The core of his proposed navy was a flotilla of twenty-three fast torpedo destroyers that would guard against invasion. The Japanese navy had used the same ships with great effect when it had swooped without warning on the Russian Pacific fleet at Port Arthur in Manchuria in 1904. The torpedo destroyers were used again the following year, when the Japanese decisively defeated a second Russian fleet which had been sent all the way from the Baltic Sea.

Although far distant from Australia, the Japanese success confirmed the worst fears of Fisher and other Australian politicians about the threat of an Asian invasion. More importantly, it showed that such an invasion could come without warning; that beachside residents of Melbourne or Sydney might wake up one morning to find hostile Japanese battleships offshore. The failure of the Russian reinforcements to reach Port Arthur in time to prevent its surrender also confirmed the fears of those who worried that Britain's Royal Navy might be unable to reach Australia in time to prevent a Japanese fleet forcing the surrender of its main cities. For Fisher and his colleagues, the remote possibility of a Japanese invasion became an obsession.

The lessons of the Russian defeat made it more important than ever for Australia to boost its local naval defences and not rely on the Royal Navy. But Fisher's announcement in February 1909 of the torpedo destroyers coincided with a naval scare in Britain, where it was claimed that the German navy would soon have more battleships than Britain. It prompted New Zealand to offer to buy a battleship for the Royal Navy, which provoked a public campaign in Australia to pressure Fisher into doing likewise. Mass meetings in major cities, and feverish editorials in the conservative press, called for Fisher to abandon his naval scheme and buy a battleship for Britain.

This was Fisher's 'John Curtin moment', a test of his political courage and principles. And he was not found wanting. With the Melbourne *Age* calling Fisher 'feeble' and the *Argus* describing him as 'deaf', Fisher stood firm, noting that it took 'a stronger man to stand against an hysterical wave than it does to go with the current'. While the Liberal leader Alfred Deakin buckled under the pressure and joined the conservative clarion calls, and a worried Billy Hughes urged Fisher to offer a battleship if Britain declared it to be essential, Fisher refused to budge, telling Hughes to 'be steady' in the

face of the clamour. In doing so, Fisher showed great political courage and a far-seeing appreciation of Australia's real needs.

As for the army, Fisher was likewise committed to putting the defence of the continent before the demands of the fading empire. Rather than a standing army that could be deployed at short notice at Britain's behest in far-off conflicts, Fisher and his colleagues wanted to create an Australian militia composed of all able-bodied men, who would be trained in infantry skills and stand ready to defend their communities from invasion. Fisher had no qualms about conscripting Australians to defend their own country, but he was steadfastly opposed to conscripting them for wars overseas. Again, he had to face down opposition to his training scheme, with some critics arguing that military training could make war more likely.

Providing Australia with the means to defend itself, after more than a century of dependence upon Britain, was one part of Fisher's vision for Australia. Fearful of an expansionist Japan, and conscious of Australia's relative 'emptiness', Fisher wanted to build up a strong Australia, not only by boosting its defence forces but also by boosting its population. He introduced a number of measures to encourage people to have more children and to reduce infant mortality, including a maternity allowance which was paid to women, whether married or not, upon the birth of their child. Despite concerns by the labour movement about immigration threatening Australian jobs, Fisher also worked hard to encourage immigration from Britain while ensuring that jobs could be found for the new arrivals.

Having travelled extensively throughout Australia, including crossing the Nullarbor by car and camel, Fisher was acutely conscious of Australia's 'empty spaces', which left the nation vulnerable to taunts about not having the right to possess a continent that was not being developed and peopled. One of Fisher's answers to the problem was to impose a land tax on the undeveloped estates of the squatters, hoping that it would force them to sell off their land and make it available for newly arrived immigrants and aspiring farmers. Like many Australians, Fisher did not recognise the limitations of the Australian landscape and envisaged a time when a million sheep might be grazing on the Nullarbor.

With this optimistic mindset, Fisher also took over the administration of the Northern Territory and sent a trio of high-powered officials to develop its pastoral and mineral potential. He pushed ahead with the transcontinental railway linking Adelaide to Perth, planned another railway from Adelaide to Darwin, and wanted to create another inland railway from Adelaide to Brisbane. On a more controversial note, he expelled many of the Pacific Islanders working in the sugar industry, ensuring that white sugar would be grown, cut and processed only by white men. And he alarmed some of the men of money by establishing the Commonwealth Bank, which he hoped would

reduce the power of the overseas-controlled private banks and mobilise more capital for national development.

All these measures were part of a massive legislative program that exceeded by far anything that had been done by previous governments. It was one of the great benefits of leading a majority government which also had control of the Senate. Fisher could actually do things that Watson and Deakin could only talk about doing. But there was a limit to what was possible. The Constitution, and the three judges of the High Court, constrained Fisher's power to implement Labor's socialist agenda.

Of course, Fisher's notion of socialism was not the socialism of Marx or Lenin. How could it be? Australia was not the land of Russian serfs or even the land of unenfranchised British workers. It was a land where white people had enjoyed the franchise for half a century and where they mostly enjoyed the economic bounties that the continent had to offer. As a result, Fisher's socialism was one of incremental improvement rather than revolutionary overthrow. It was about the State making capitalism fairer and providing a safety net for those who had fallen on hard times.

As Fisher explained, the aim of the Labor Party was 'to see that every child born into the world should have a fair start in life; if a wife lost her husband, to see that she was not overburdened in bringing up her children …' As for socialism, it was about providing 'social justice to every person who acted justly', which would include employers, and ensuring that 'every man should have his just due, and every woman also'.

It was vaguely defined, and smacked somewhat of Ben Chifley's later 'light on the hill' speech. Just as with Chifley, it was not empty rhetoric for Fisher. He truly believed that Labor was destined to enjoy the support of the great majority of Australian voters and therefore to enjoy long-term control of the Parliament. With this control, and his steady hand at the helm, Fisher was confident that Australians would gradually become the happiest and most prosperous people in the world, as he promised them they would be after his historic election win in 1910. But there were limits to what Labor could do.

Labor was restricted by its limited revenue and taxing power. Fisher could have borrowed funds to implement his agenda but he was opposed to governments living beyond their means and believed that public borrowing should be used only for expenditure on capital items that boosted the nation's productivity, and not on social welfare measures or even on defence. Labor was also limited by the Constitution. In June 1908, the High Court had already tossed out the deal that Labor had done with Deakin to introduce New Protection, which required employers to pay fair wages to

workers in industries that enjoyed the benefits of Australia's system of tariff protection.

Fisher had argued prior to Federation that Labor should accept the conservatively drafted Constitution, believing that it would be a relatively simple matter to change it later so that the powers of the Commonwealth Government could be broadened in ways that would allow Labor's agenda to be implemented. Specifically, he wanted to take control of commerce and industrial relations from the states, so that consumers could be protected from price-gouging by monopolies and workers could be guaranteed a fair wage.

To Fisher, it was straightforward: voters would recognise that Labor's political program was in their interests and they would vote accordingly. He did not foresee the difficulties that referenda would face from voters who were suspicious of giving federal governments additional powers and susceptible to partisan fear campaigns, sometimes mounted by his state Labor colleagues.

When he lost the first referendum vote in 1911, Fisher blamed it on people being opposed to a proposal that combined all the measures into one vote, all of which had to be accepted or rejected. So he went back to the people with redrafted and separate proposals in 1913, confident that having the referendum coincide with the federal election would ensure it passing. Instead, he not only lost the referenda, but also narrowly lost the election.

Perhaps more important than Fisher's socialist agenda, was his nation-building agenda. There were many aspects to his coherent and overarching scheme. It was about building up the power of the Commonwealth Government over that of the states, at a time when state premiers complained about no longer being able to attend imperial conferences in London and the Queensland premier cheekily referred to himself as the prime minister of Queensland.

It was about building national institutions and the imposing edifices that went with them, such as post offices, customs houses and offices of the Commonwealth Bank. Fisher hoped that the Commonwealth Bank would absorb the existing state banks and become the national bank. The buildings were intended to engender a national spirit among Australians as they went about their business in cities and towns.

When they went to London, Australians would be similarly struck with the grandeur of Australia House on the Strand. Fisher had taken a close interest in all stages of its building, from the time when he walked the streets of London to decide on the most suitable site, setting it far from the other dominion buildings around Trafalgar Square, to its later decoration with Australian materials and motifs. Fisher hoped that the

states would close their separate offices in London and rent space in the new national building.

There was the national capital, with its clearly Australian name, and which Fisher had begun by laying its foundation stone in 1913 and appointing Walter Burley Griffin to execute his grand design. There were the national symbols that Fisher created, such as the postage stamps, which displayed a kangaroo instead of the king, with the animal set against the outline map of Australia, with the word Australia underneath. There were the Australian bank notes that Fisher introduced for the first time, which displayed scenes of development and progress, from the irrigation scheme on the Goulburn River to goldmining in Bendigo.

On the front of the bank notes was the new coat of arms, designed by Fisher's close friend, the artist Hugh Paterson. Instead of being dominated by the divisive Cross of St George, which was the central motif on the old coat of arms, Fisher's coat of arms had all the state shields, draped with sprays of wattle and topped with the Commonwealth star. Instead of the old slogan 'Advance Australia', which Fisher believed to be demeaning as it implied that Australia was backward, there was just the word 'Australia' beneath the shield.

To further engender an Australian spirit, Fisher established an Art Advisory Board and a Historic Memorials Committee to commission Australian artists to paint national scenes and portraits of historic Australian figures and events. The board was chaired by Paterson, who convinced Fisher to impose a punitive duty on imported paintings, as a way of lending further support to Australian artists.

Many of these measures were introduced in a flurry of activity just prior to the 1913 election. Although his government had introduced many popular and progressive measures, it had alienated some Australians by seeming to be more concerned with the nation than the empire of which it was a part. Fisher had also aroused fears about Labor's political program, with talk of nationalising industries if the referendum proposals were passed. As a result, Labor lost control of the House of Representatives while retaining control of the Senate.

Power passed from one former coalminer to another, the Liberal leader Joseph Cook. With Labor blocking Cook's legislation in the Senate, the new government was never going to last long. However, when Cook tried to break the logjam by calling an election in June 1914, the domestic focus of the campaign was overtaken by events in Europe. As the empires of Europe inched towards war, Fisher faced a repeat of the arguments that he had confronted so courageously in 1909. This time, in the context of an election campaign when loyalty to empire was paramount, Fisher's courage was found wanting.

Cook seized upon the looming conflict as an opportunity to paint Labor as disloyal to Britain. With many in the labour movement, including a young John Curtin, being opposed to any involvement in overseas wars, Cook tried to drive a wedge in Labor's ranks by committing the country to war before it had even begun. 'If the old country is at war, so are we', declared Cook, later offering to send 20 000 men 'to any destination desired by the home government'.

With election meetings turning into patriotic rallies, Fisher was swept up in the fervour. In 1909, he had told journalists that it takes 'a stronger man to stand against a hysterical wave than it does to go with the current'. But now he went with the current, and did so in a way that gave it added impetus. At an election meeting in Colac on 31 July 1914, Fisher told the crowd that, if Britain went to war, Australia would support Britain to 'our last man and our last shilling'.

There was nothing equivocal in Fisher's unfortunate commitment. There were no provisos about only committing the resources that were spare after Australia's defence had been secured, or supporting Britain with food and raw materials rather than with all its menfolk. And the commitment was made at a time when people cared more about their personal honour, with Fisher making it a matter of honour for able-bodied Australian men to fulfil his pledge by joining up. He would not be compelling them to go. Conscription would remain just for the militia. About that, Fisher stayed firm.

Both Cook and Fisher had made the same commitment about supporting Britain. But the terms of Fisher's statement were more resounding and swept away any doubts that people may have harboured about the Labor Party being ambivalent about the empire. The party may have won the election anyway, based on Fisher's successful record as prime minister. But his strong commitment to the war was probably instrumental in giving Labor an overwhelming victory on 5 September 1914, with 31 Labor senators to just five conservatives, and 42 Labor MPs to 33 conservative MPs in the House of Representatives.

The victory seemed to vindicate Fisher's conviction about Labor becoming the natural party of government. And he believed that he could simply resume where he had left off after his election loss of 1913, embarking on a new program of nation-building works that would take up the economic slack caused by the war. But the war that was expected to be over by Xmas dragged on into 1915, and increasingly consumed the attention of Fisher and the resources and manpower of Australia.

Cook had committed Australia to send an expeditionary force, with Fisher dispatching the first echelon of the Australian Imperial Force to Europe in November 1914. Soon after, he allowed the troops to be landed in Egypt for basic training in the expectation that they would then be sent on to Europe. Like many Australians, Fisher saw the

battlefield as a test of Australian manliness. It was about making 'Australia's name in the world what it ought to be', with Fisher confident that Australian troops would 'do credit to us all'.

When Britain then decided to send the Australians in Egypt to invade Turkey, Fisher was informed by the Governor-General, Munro Ferguson, who claimed in his diary that Fisher was 'pleased' by the news. Fisher was not asked for his approval by the British Government. It would not have occurred to British ministers to do so. Nor did it occur to Fisher to insist on proper consultations before Australian lives were committed to a particular campaign.

Neither did Fisher ask the Australian commander in Egypt, General Bridges, for details of the coming campaign and whether it was likely to be successful. Bridges certainly had some qualms, telling Munro Ferguson of the 'considerable risk in sending untried troops on a job of this sort'. But his warning did not reach Australia until after the battle had begun. Neither did Fisher ask for a report from Australian officials in London, where there were certainly serious doubts about the wisdom of the Dardanelles campaign. In the view of Fisher and the British Government, Australia had committed the troops and they were now Britain's to deploy.

Fisher welcomed news of the landing at Anzac Cove, using it to continue his campaign to imbue Australians with a national spirit. He told Parliament that their 'gallant soldiers' had 'made history that will inspire Australians in all ages to come'. And when General Bridges fell to the bullet of a Turkish sniper, Fisher declared that 'no greater honour can come to any man than to die fighting for his King and country'.

Too many would die fighting at Gallipoli for no good purpose. Indeed, this military sideshow had been foolish from the beginning and was unlikely to succeed with the limited forces and inadequate equipment that were committed to it. With the troops having barely secured a bridgehead on the peninsula, and little likelihood of them being able to break out, a search began in London for a political scapegoat. As the main proponent and architect of the campaign, Winston Churchill fitted the bill perfectly and paid with his political office. But there was little public questioning in Australia, where censorship was rigorously applied.

Fisher believed that it was inappropriate to voice criticism of the British handling of the campaign while the war was still going. Moreover, he was only dimly aware of the awful bind in which Australian troops were placed at Anzac Cove and was misled by the military censorship into believing, as Munro Ferguson confided to London, that the campaign was 'one of orderly and continuous progress'. It was only as the injured Australian troops began to trickle back to Australia, and their stories began to

circulate, that Fisher started to have doubts about British military leadership and to harbour dark premonitions about the campaign's eventual outcome, and what it might mean for his political career.

Still he pressed on, supporting an Australia Day pageant on 30 July which had a procession of patriotic floats showing glorious aspects of Australian history, cars carrying Fisher's daughter and other young girls dressed to represent the states and the Commonwealth, and culminating with cars carrying wounded soldiers. A few weeks later, he presided over a massive funeral for General Bridges, which brought the centre of Melbourne to a standstill. Although Fisher sent his young journalist friend, Keith Murdoch, to Gallipoli to provide a confidential report, he did not question the continuing campaign, as a new offensive in August sent thousands more Australians to their death without any advantage being gained.

All the patriotic outpouring, and the furious bloodletting at Gallipoli, increased the political pressure in Australia to introduce conscription. To his credit, Fisher remained vehemently opposed to it, not only on principle but because he rightly feared that it would tear the nation apart. He might have stayed on to fight this battle, but his health had worn away over the previous year and he was no longer up to the task. The years of working in the mines had damaged his lungs, and the dementia that would eventually kill him was affecting his mental faculties. There was also the lure of the lucrative position as High Commissioner in London, which guaranteed him a handsome income for five years to support his large family.

Fisher's resignation as prime minister in late October 1915 opened the door to Billy Hughes, who quickly abandoned Fisher's plan to introduce his referenda proposals again and compounded Australia's manpower problems by offering Britain 50 000 more troops. With voluntary enlistment declining, it could only be done by conscription.

Fisher had proved his potential for greatness in 1909, when he was leader of a minority government and stood against the tide of imperial jingoism. His leadership of the historic Labor government from 1910–13 had confirmed his greatness, as he combined his passion for social justice with a nation-building vision. They were triumphant years for Fisher, for the Labor Party and for Australia. He planned to do even more after the 1914 election, but his lofty ideals and ambitions were brought low by the demands of the war, the damage to his health and the seductions of material security.

It is a tragedy for Fisher that he is most known for his memorable statement about supporting Britain to 'our last man and our last shilling'. While the statement helped to ensure his election in 1914, it had lamentable consequences for Australia and the

hundreds of thousands who honoured his unequivocal commitment. It was a tragedy too that he lacked the courage to question the British management of the Gallipoli campaign even after its deficiencies were clear and before thousands more were sent to a senseless death. The final tragedy came with Fisher's resignation, which ushered in the divisive Billy Hughes and his madcap drive to win the war at any cost. After Fisher had done so much to build up Australia, he had handed power to a politician who would tear the country apart and ensure that the cost of the war to Australia was much heavier than it might otherwise have been.

Question — You've written biographies of three Australian prime ministers. Do you have a favourite?

David Day — I have a lot of time for them all because you spend so much time with them as you are doing the research that you really feel that you've got to know them and most of them were pretty likeable people. Fisher was the hardest to get to grips with partly because there are no people alive who have direct memories and associations with him whereas there were with both Curtin and Chifley. But if one had to nominate the one that I perhaps admired the most, it would probably be John Curtin who I've been interested in since I was an undergraduate when I did work on his role in the First World War.

Question — Your biography of Andrew Fisher seems to me to be much more literary than your other biographies because you use this device of trying to get inside Fisher's mind as he sinks into dementia. At the beginning of each chapter you have a little section in italics where you are imagining yourself inside that declining mind. Did you have a particular reason for adopting that approach?

David Day — In all the books I've tried to do a whole life and spend a lot of time on the childhood because I think childhood is very important. A lot of biographers tend to rush through the childhood, spend a cursory few pages on it. So I try and treat childhood seriously, but also the death and with Fisher one had the problem of him being seriously demented for perhaps the last ten years or so of his life. So how is one to deal with that? So I thought of actually starting the book also as a way of just introducing Fisher to people who had no knowledge of him by just having a paragraph imagining what it was like for Fisher being demented in the upper bedroom of his terrace house in Hampstead in London. So I went to the terrace house and had a look at the room which is now a living room and wrote this paragraph. I was in Japan teaching in Tokyo at the time and wrote this paragraph and thought 'that is fine, that

will start the book off' and as I got into it I realised that I actually wanted to start each chapter with a paragraph set in that room and tried to imagine myself in Fisher's mind at the time. So I went back to London and spent more time in the house and in that room and in the area walking around Hampstead. So it was a way really of making sense of and treating seriously all the parts of his life, not just the political parts of his life.

Question — I understand that Andrew Fisher worked with Keir Hardie on the Ayrshire mines and later Keir Hardie visited him in Australia and Fisher visited him in England. In your research for your book, did you see any of Keir Hardie's Christian Socialism views impact on Andrew Fisher's view of socialism?

David Day — It is a bit difficult to get a real handle on Fisher's view of socialism. The main bit of research that I got for his political ideas was in a very long interview he gave in 1910 but it was full of these very vague statements of what socialism meant to him. He believed that everybody was socialist. It wasn't just a small rump of the Australian population: everybody was naturally socialist. It was just that he saw society divided between the people and the speculators, the people who did labour, which would include employers, include bankers and all the rest of it. Then there were the speculators, just a tiny minority of people and it was these people that Labor was against rather than against employers per se. But he did tangle with Keir Hardie over conscription. Hardie couldn't understand how the Labor Party could introduce conscription for the militia and took Fisher to task when Fisher went back in 1911 and toured Ayrshire with Hardie. Hardie, who was anxious not to have conscription in Britain because he feared that it would lead to war with Germany, took Fisher to task for leading the labour movement of the world (at the time he was the only labour leader in the world) down a dangerous path. And Fisher said 'look you just don't understand Australia's situation', meaning, without saying so, that we live in a dangerous part of the world and we are susceptible to invasion in a way that Britain wasn't.

Question — In London did Fisher use his position at all to give more freedom to Australia's commanders? Did he do anything to separate control by Britain over Australia and if he did, would that have clashed at all with Billy Hughes?

David Day — Yes, it would have absolutely clashed with Billy Hughes, which is why Billy Hughes didn't allow it to happen. Billy Hughes followed Fisher, he was hot on his heels to London and spent several months there. Fisher made various statements on his arrival in London, relatively political statements for a High Commissioner, but he was soon made to shut up by Hughes, who spent so much time in London and sidelined Fisher. There was very little communication between the two during the war with Hughes using Keith Murdoch, who was the journalist in London at the time, as a

de facto High Commissioner, liaising with the generals in a way that Fisher didn't do. Fisher's role was more visiting hospitals, visiting the wounded troops.

Question — Fisher's resignation, was it purely for health or was there a sense of disillusionment and disappointment with politics? I am thinking particularly of his final speech to Parliament where he apologised and makes the comment that there are things you have to do for politics which sounded as though he wasn't very content with politics at that stage.

David Day — I think he felt very embattled at the time. He had Billy Hughes' hot breath on the back of his neck all year with Hughes spreading rumours that Fisher was about to take up this position as High Commissioner in London and Fisher having to continually deny it and say 'no, no, no, I intend to stay on as prime minister'. But he was certainly suffering from ill health. He had gone to New Zealand in December 1914 and spent six weeks or so there. That was partly official but partly touring around the place with Keith Murdoch and another member of Parliament and in the winter of 1915 he spent most of it working from bed in his great mansion in St Kilda. But he also I think felt that there would have to be a political price for Gallipoli. At the time the troops were still trapped there and there was talk of possible evacuation which it was expected would lead to casualties of a third of the force. Now of course that did not happen. Nobody was lost in the evacuation. It was a miracle really that it was pulled off so successfully. But Fisher had seen what happened in London with people paying a political price, people like Churchill, and he would have feared that there would be a political price to be paid in Australia and that he would be the one to pay it. He had just gone into debt to buy this huge house. He had six young children. If he lost his job as prime minister he would have great trouble surviving. So here he was being offered a job for five years at a salary that was at least twice as much as prime minister with a house thrown in and a chauffeur and the whole lot. He would be mad not to take it, really, if all that was to be considered was the security of his family. So it was health, it was politics, he felt that the movement for conscription would overwhelm him, that he would be forced to introduce it and he simply wouldn't. But there were a majority of voices now calling for it. So there were a range of reasons all pushing him in the one direction.

Question — Fisher was one of the very few prime ministers to also serve as Treasurer simultaneously with being prime minister. Why do you think he did that and do you think he had a particular deep understanding of and/or interest in economics?

David Day — It was sort of the Maggie Thatcher housekeeping theory of economics probably. He believed that budgets had to be balanced. So his principles were very simple really and I think that's why he took on the job. The job was relatively simple at the time. It is not something that a prime minister would do today. But Chifley of

course also did it. So he believed in balanced budgets he believed that the government shouldn't over borrow, except for productive purposes. So you could borrow to build the transcontinental railway that would increase the wealth of Australia but you couldn't borrow for current expenditure, for social welfare and even for defence. You should pay it out of your income. And he tried in fact at the beginning of the war to pay for the war out of income, to increase taxes and such forth, but soon found that the war had become much bigger than he had anticipated and then he had to borrow on the London market and also from the Australian people.

Thinking About Gender and Democracy*

Yvonne Galligan

What does putting the words 'gender' and 'democracy' together imply? It first of all highlights one of the fundamental principles on which democracy is based, that of political equality. This equality is not confined to voting rights. It is more substantive than that. Indeed, putting the word 'gender' alongside the word 'democracy' casts a light on democracy in action. It draws attention to the extent to which women, and women's representatives, are included in policy-making. It highlights the occasions when women's and men's life patterns, perspectives, and interests diverge. And it draws attention to the manner in which a political system chooses to tackle gender inequalities.

The study of politics in one way or another places a spotlight on democracy and its performance. The two basic principles of representative democracy—political equality and popular control—serve to assess the state of democracy around the world. The questions asked in various democratic audits relate to how well democracy is working, and what can be done to enhance and improve this form of public decision-making. In a paper for the Democratic Audit of Australia in 2007 entitled *Democratic Principles: Political Equality*? Professor Marian Sawer succinctly discusses Australian democracy with respect to the principle of political equality. In my work, along with colleagues in Northern Ireland and other European countries and regions, I bring the gender question to bear in assessing the quality of democracy by asking how democratic from the gender point of view is the political life of a region, country, or transnational body, and how well are the rights of women protected in these contexts.

I use the case of the European Union (EU) because this is a transnational political entity with an explicit commitment, in principle and in practice, to gender equality. At its founding, in 1957, the European Economic Community provided for equal pay between men and women for equal work (article 119). The principle of equal pay was finally given legal form in 1974. Since then, a further nine directives—laws binding on member states—have been enacted in the field of employment and social protection. These cover the equal treatment of men and women in social security, in self-employment, the protection of pregnant workers, and parental leave. Indeed, some of these issues, the debate on parental leave in particular, are topical in Australia at this time.

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An additional directive was introduced in 2004 covering women's and men's equal access to goods and services available to the public, such as housing and accommodation, banking, insurance, and transport. I will discuss this law in more detail in a moment. Other measures, too, support the principle of gender equality. Positive action, in the form of preferential treatment, is permitted to redress gender inequalities. Gender mainstreaming is a policy instrument used to incorporate the different situations and perspectives of women and men into all stages of policy-making. Multi-annual equal opportunities programs have given focus and direction to the principled commitments to gender equality found in successive EU treaties. The European Court of Justice has played a significant role in interpreting the gender equality provisions of EU treaties, and in enabling individuals to enforce their right to gender equality. In short, the commitment to gender equality has been visible and progressive over five decades of the European Union, bringing tangible improvements to the working lives of women across the now 27 member states.

Today, the situations of women and men in the EU and Australia are similar. The gender pay gap is similar to that of Australia, at 18 per cent, and the gender composition of the workforce is also similar: 59 per cent of women between 15 and 65 are in the workforce in Europe, compared with 57 per cent in Australia. Men's workforce participation is at 73 per cent in Europe, 71 per cent in Australia. Life expectancy is better in Australia: 79 years for men, 84 years for women,[1] while the average life expectancy in the EU is 75 years for men, 81 years for women.[2]

Getting back to the EU, though, the impressive record on supporting and advancing gender equity that I have previously mentioned leads many of my colleagues from other parts of the world to suffer from what one of them calls 'EU envy'! They can only dream of a regional transnational standardising authority with real clout that could, for instance, address the parental leave debate currently at issue in Australia in a woman-friendly way, or tackle sexual harassment in the workplace, or other employment and occupational discrimination issues that arise in all countries in one shape or form.

How gender democratic is the EU?

This strong principle-based and action-focused commitment to gender equality is nonetheless subject to stresses, bargaining, and limits. And this is where I want to go now in my talk today. I want to show, through one instance of gender equality policy-making, that even the EU's commitment to gender equity can be compromised when

1 Australian Institute of Health and Welfare, 'Life Expectancy: How Australia Compares', <http://www.aihw.gov.au/mortality/life_expectancy/compares.cfm>, consulted 21 April 2010.

2 Parliament of Denmark (Folketinget), 'What is life expectancy in the EU?', <http://www.eu-oplysningen.dk/euo_en/spsv/all/101/>, consulted 21 April 2010.

powerful economic interests override the equality commitment. And through an exploration of these limits I hope to be able to say something about the relationship between gender and democracy more generally. What does this story tell us about the EU's democratic decision-making processes when it comes to gender equality? What aspects of the gender equality agenda end up being included, and what pieces go by the wayside? To what extent can gender equality be at the core of the deliberations by the three key decision-making forums—the European Parliament (EP), the European Commission and the European Council? And what lessons can we learn from this story that can illuminate the study of democratic quality in general?

This is a relatively new set of questions in EU research that treats the European Union as a democratic entity in its own right, rather than as a regulatory regime, as some see it, or as a forum for intergovernmental bargaining and negotiation, as others say it is. Certainly, there are elements of regulation and intergovernmentalism present in all EU affairs. But neither of these concepts conveys the full picture of European transnational decision-making.

Against this backdrop, then, I want to take a closer look at the enactment of one directive, that of equal treatment and access to goods and services, passed by the European Council in 2004. It is a story that delves into the EU decision-making process, and illuminates the gendered nature of democracy. From this story, we will consider the lessons it holds for gender and democracy more generally. Because this research is still in its infancy, it is not possible to draw on extensive studies of this kind at this point in time. In the future, though, the gendered nature of democratic decision-making in other areas, such as humanitarian aid, security, and energy, will be studied to reveal its gendered imprint.

So now to the story. In June 2000 the European Commission made it known that for the first time it was going to draft legislation on gender equality for areas other than employment. This was an important move, as the European Council had just at that time assented to a race equality directive, banning discrimination on the basis of race or ethnic origin. The race equality law went beyond the fields of employment and social protection—the usual remit of EU social law—to include education and access to goods and services available to the public, including housing. It was a short step from this law to a plan that would extend gender equality to areas not already covered by the extensive equal opportunities employment and employment-related laws.

The proposal for a non-employment gender equality directive received the approval of the European Council in December 2000. It was evident around this time that the commission intended to bring education and goods and services into the new gender equality law to make it commensurate with the race equality law. The council's approval

mobilised women's civil society organisations and EU official advisory groups on gender equality to making their views known as to what the new law should contain. The European Women Lawyers' Association (EWLA) and the European Women's Lobby (EWL) began to develop positions on the content of this new directive. The EWLA sought a broad, proactive law covering all aspects of life. This group specifically wanted the rights of women and men to maternity and paternity provisions, and the right of all individuals to reconcile work and family responsibilities supported. In other words, they sought to make it illegal for landlords to refuse to take families with young children as tenants, or for airlines to refuse pregnant women as passengers, or for banks to refuse loans to businesswomen with young children. In addition, the EWLA wanted to see a ban on sex-discriminatory advertising, effective judicial sanctions for breaking the law, and a general requirement for positive action in all fields.[3]

The European Women's Lobby, after consultation with its members across the EU, sought to have ten areas of life included in the new law, including gender parity in decision-making, access to and supply of goods and services, and violence against women.[4] While drafting its proposals, the EWL cooperated closely with the Advisory Committee on Equal Opportunities between Women and Men, which was tasked with preparing an opinion on the proposed law for the commission. This opinion, issued in February 2002, was very much in keeping with the content of the EWL 'shadow' directive, as it cited eight areas to be addressed including decision-making, access to and supply of goods and services, and violence against women.[5]

Despite the creation of a consensus between women's civic and official advisory groups on the broad content of the proposed directive, the commission circulated an unofficial, internal draft proposal suggesting a more narrowly defined directive that addressed access to and supply of goods and services including education, taxation, advertising, and the media. It bore more relation to the women lawyers' submission, though, than to that of other women's civic and consultative groups. However, this early draft provoked a strong reaction from the insurance and media industries. Media representatives launched a hostile campaign in which they argued that the proposed directive—and more particularly its intention to ban gender stereotypes in media and advertising—

3 EWLA first position, September 2002.

4 The ten areas for inclusion advocated by the EWL were 1) parity participation of men and women in decision-making; 2) access to and supply of goods and services; 3) taxation; 4) right to reconcile family and working life; 5) social protection, social security, social benefits and non-occupational health care and the fight against social exclusion; 6) education, training and research; 7) family and society-based violence against women; 8) health; 9) the images of women and men portrayed in advertising and the media; 10) the surname.

5 The full range of areas for inclusion advocated in the advisory committee report were 1) decision-making; 2) access to and supply of goods, services and facilities (including taxation and social protection); 3) health; 4) education and training; 5) violence against women; 6) sexual harassment; 7) commercial advertising and the media; and 8) membership of associations.

represented 'an extraordinary move towards censorship' which would clash with the principle of freedom of expression.[6] This campaign involved attacks in the media directed against the Commissioner for Employment and Social Affairs, Anna Diamantopoulou. Some of the more moderate articles had titles such as 'Big Sister is Watching You: Feminist Eurocrat Who Wants to Ban "Sexist" TV Shows and Adverts'.

Similarly, the insurance industry argued that the proposal to eliminate sex differences as a factor in the calculation of insurance premiums and benefits would have serious repercussions for consumers, since it would result in an increase in prices in order to compensate for the loss of accuracy in prediction and risk.[7] In addition to the objections of these interest groups, some member states, as well as a number of commissioners,[8] also expressed their opposition to this proposal.

When it seemed that the process would not advance due to a strong polarisation of positions among the key actors involved, women's organisations (EWL, EWLA, and the Association of Women of Southern Europe) continued to lobby in favour of a directive that at least provided equal treatment in insurance premiums and benefits, taxation, education, and advertising and the media.[9] In addition to this, members of the European Parliament (MEPs) from different political groups involved in the work of the Women's Rights and Gender Equality Committee (FEMM) signed a declaration of solidarity with Commissioner Diamantopoulou, stating that the sexist attacks against her 'put into great danger the adoption of a new proposal for a directive aiming to eliminate sex discrimination'.[10]

Yet, despite this pressure by all parts of the women's sector for a broad directive, the proposal finally issued by the commission provided for equal access to and supply of goods and services, prohibited discrimination on pregnancy and maternity grounds, prohibited harassment and sexual harassment in the supply of goods and services, and

6 'EU plan for law against sexism draws fire', *Financial Times*, 24 June 2003.

7 The views of the insurance sector on the proposal are described in the commission's document SEC(2003) 1213, Commission Staff Working Paper: *Proposal for a Council Directive Implementing the Principle of Equal Treatment Between Women and Men in the Access to and Supply of Goods and Services—Extended Impact Assessment*.

8 'EU plan for law against sexism draws fire', *Financial Times*, 24 June 2003. A number of commissioners expressed deep concerns about the proposal, including the Internal Market Commissioner, Frits Bolkstein; the Trade Commissioner, Pascal Lamy; and the Competition Commissioner Mario Monti.

9 The commission received statements from the following women's organisations supporting a broad directive that included education, taxation and the media as well as goods and services: EWL (9 July 2003), EWLA (5 September 2003) and AFEM (7 September 2003).

10 Committee on Women's Rights and Equal Opportunity, Letter of support to Commissioner Anna Diamantopoulou, 10 July 2003, 02.COM.FEMM/03/D 30306/ES/ddl.

contained a positive action provision.[11] Thus, it went some way to meeting the requirements of the European Women Lawyers, and accommodated the demands of the insurance industry. However, it excluded education, taxation, the media and advertising. It included a provision giving the insurance sector an extended transitional period of six years to implement the directive, significantly beyond the more usual transposition period of two years.[12] The proposal also specified that the legal base of the directive was article 13 of the EU Treaty, which meant that its adoption required unanimity in the council, with the powers of the EP limited to issuing an opinion.

The narrow scope of the proposal was criticised not only by women's and equality advocates but also internally by other European institutions consulted on the draft. Thus, in its opinion of April 2004, the Committee of the Regions expressed disappointment at the scope of the proposal, regretted the concessions made to some powerful interest groups, and called for a more comprehensive directive that included at the very least the same grounds covered by the race directive.[13] Similarly, the Economic and Social Committee, in its opinion delivered on 28 September 2004, regretted the exclusion of education from the scope of the directive and deemed 'unwise' the provision which deferred the implementation of unisex rates in insurance for an extended period of six years.[14]

Despite the controversial character of the commission's proposal, the EP sought to strike a middle ground between the commission and those groups and institutions advocating a more comprehensive law. The European Parliament's Women's Rights Committee presented a total of 34 amendments when the issue was debated in the parliament. These amendments were supported by a 60 per cent majority in the EP that crossed political lines.[15]

However, during this debate the commission representative would not accept any of the substantive amendments tabled by the EP. When the draft law came to the council for deliberation, it needed a unanimous vote to pass. Seven of the 25 member states—Belgium, Finland, Luxembourg, Malta, The Netherlands, Portugal and Sweden—disagreed with the narrow scope of the draft law. Their concerns were outweighed by a second, more even, split among member state representatives. One group was concerned with the potential discrimination against women in the use of sex as a basis on which to

11 S. Prechal and S. Burri, *EU Rules on Gender Equality: How Are They Transposed Into National Law?* Luxembourg, European Commission, 2009, p. 22.

12 Commission of the European Communities, Proposal for a council directive implementing the principle of equal treatment between women and men in the access to and supply of goods and services, COM (2003) 657 final.

13 *Official Journal of the European Union*, vol. 47, 30 April 2004, notice no. 2004/C 121/06.

14 ibid. vol. 47, 28 September 2004, notice no. 2004/C 241/13.

15 European Women's Lobby, 'New European Directive on Gender Equality in the Area of Goods and Services Adopted in December 2004', available at: www.womenlobby.org.

calculate pension and other insurance contributions. This was also the view of the commission. The other countries argued that the potential costs of a gender-equal provision would harm the insurance industry. The disagreement was resolved with a decision that in principle, the use of sex as a factor in the calculation of premiums and benefits may not result in differences in individual premiums and benefits, unless 'objectively justified'. So, for example, insurance premiums could not load women for reasons of pregnancy or maternity. However, the fact that women live longer than men could be taken into account in calculating premiums and benefits. Although Germany did not accept this arrangement, it decided to abstain in order to avoid blocking the directive. The directive was finally adopted on 13 December 2004.

As a codicil: this directive is now in place across Europe. A recent assessment of its implementation indicates that most countries have amended existing legislation to take account of its provisions. Twelve countries have gone further, and provide for non-discrimination in education on gender grounds.[16] Six have banned discrimination in the media and advertising.[17] The sorts of issues being highlighted by the application of this directive include the advertising of 'children-free' spa hotels in Estonia, hospitals not allowing fathers to stay with their hospitalised children in Romania, and the free entry to night clubs for women, but not for men, as in Austria.

What does this tell us about gender and democracy?

First, it tells us that powerful sectional economic interests can sway policymakers more readily than a stated commitment to ensuring equality between women and men. This is not new, nor specific to the EU. But it is a stark reminder that the democratic process is one of contestation, and there is often little counterweight to the power of vested insiders (in this case the insurance and media industries). Democrats should be concerned about this imbalance, and particularly so when it directly affects one half of the population. The principle of political equality is clearly compromised in this case.

Second, it tells us that women's representatives, civic and institutional, took an active part in developing ideas as to what the proposed law should contain. But their efforts were largely in vain, apart from the contribution of the European Women Lawyers Association. The proposals of the EP were not taken on board, nor were those of the Committee of the Regions and the Economic and Social Committee. Thus the broad consensus on the content of the law, built around women's views, found little purchase in the council's discussions. Although the voice of parliament was procedurally restricted in the passage of this law, it was still open to the council to consider the views

[16] Belgium, France, Slovakia, Sweden, Greece, Hungary, Ireland, Lithuania, Malta, the Netherlands, Spain and Finland.

[17] Greece, Ireland, Spain, Malta, France and Belgium.

of the EP. This points to the limits of EU democratic decision-making in institutional terms in this case. It also illustrates the limits of influence by women's advocates (group and institutional) at EU level. And it also suggests, and this is open to further research, that the goods and services directive did not excite national representatives of women's views, in civil society and among elected representatives. There are issues of communication and accountability here. The question is, to what extent did European women's civil society organisations alert their national representatives as to the significance of this law? To what degree did MEPs raise it in their national contexts, either with parliamentarians, or women's NGOs, or both? The fact that some countries went beyond the EU law to include education, the media and advertising in their national arrangements suggests that there was a *post-hoc* national awareness of these issues and a commitment by some governments to extend the directive. On the more general point, though, the distance between what happens at European level and the concerns of national politics is emblematic of the democratic deficit that the representative elites in Europe—elected and civil society—need to answer for.

The third point in relation to democracy that this case makes is that the recognition of gender equality is a contingent matter. It tells us that, even with the extensively stated EU commitment to supporting equality between women and men, recognition of this equality in practice continues to be a struggle, a site of contestation. Although in this case the principle of non-discrimination was upheld, it was compromised by the narrow remit of the law and the exceptions afforded to the insurance industry.

In conclusion, and to return to my starting point: if gender is to form an integral part of democratic politics, this case suggests that three things are required:

1. The positions of gender and equality-seeking representatives must be included and accorded equal weight with the perspectives of powerful sectional groups (equality of access);

2. All representatives must be accountable for their positions to those whom they represent, and the decision-making processes must be open and transparent for the public to judge the basis on which decisions are arrived at. In other words, accountability goes hand in hand with popular control of government, at whatever level this may be. And the obligation on civil society and sectional interest representatives to be accountable to their members also facilitates popular/membership control on the leadership of these organisations (popular control, political accountability);

3. A recognition of women's legitimate claims to equality with men should infuse democratic decision-making processes. Realisation of this equality calls for a

recognition of ‘difference’ as well as according women the same rights as men (political equality).

Though my non-EU colleagues may suffer from EU envy, this case shows that improving the position of women to one of equality with men, even in the EU nirvana, is a project still in the making.

Appendix 1

European Union directives on equality between women and men[18]

Equal pay directive, 1975
Provides that sex discrimination in respect of all aspects of pay should be eliminated.

Equal treatment directive, 1976
Provides that there should be no sex discrimination, either direct or indirect, nor by reference to marital or family status, in access to employment, training, working conditions, promotion or dismissal.

Social security directive, 1979
Requires equal treatment between women and men in statutory schemes for protection against sickness, invalidity, old age, accidents at work and occupational diseases and unemployment.

Occupational social security directive, 1986
Aimed to implement equal treatment between women and men in occupational social security schemes. Amended in 1996.

Self-employment directive, 1986
Applies principle of equal treatment between women and men to self-employed workers, including in agriculture and provides protection for self-employed women during pregnancy and motherhood.

Pregnant workers directive, 1992
Requires minimum measures to improve safety and health at work of pregnant women and women who have recently given birth or are breastfeeding, including a statutory right to maternity leave of at least 14 weeks.

Parental leave directive, 1996
Provides for all parents of children up to a given age defined by member states, to be given at least three months parental leave and for individuals to take time off when a dependant is ill or injured.

18 '50 years of gender equality law', MEMO/07/426, 25 October 2007, <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/426>, consulted 20 April 2010.

Burden of proof directive, 1997
Required changes in member states' judicial systems so that the burden of proof is shared more fairly in cases where workers made complaints of sex discrimination against their employers.

Equal treatment in employment directive, 2002
Substantially amends the 1976 Equal Treatment Directive adding definitions of indirect discrimination, harassment and sexual harassment and requiring member states to set up equality bodies to promote, analyse, monitor and support equal treatment between women and men.

Goods and services directive, 2004
Applies the principle of equal treatment between women and men to access to goods and services available to the public. Extends gender equality legislation outside the employment field for the first time.

Recast directive equal treatment in employment and occupation, 2006
To enhance the transparency, clarity and coherence of the law, a directive was adopted in 2006 putting the existing provisions on equal pay, occupational schemes and 'the burden of proof' into a single text.

Revised parental leave directive, 2010
Revises and replaces parental leave directive of 1996. Provides for four months leave, one month of which is non-transferable, and the time can be taken until a child reaches eight years of age.

Question — My question relates to international human rights discourse. The EU does focus on human rights discourse to the extent that it says that Turkey is not yet ready for admission and so on. It is one of the benchmarks by which some of the member states are assessed for entry into the European Union. So could you comment on the role of the treaty and of the global framework in this context?

Yvonne Galligan — You raise a very big question there. One of the reasons why I didn't specifically focus on sex discrimination is because in terms of internal EU politics the question of sex discrimination particularly in employment and employment-related matters is very well provided for in a whole range of laws and policies. But the wider question, the implementation of CEDAW (Convention on the Elimination of all forms of Discrimination Against Women) and agreement around

the Turkey question are huge issues. Certainly I think that the European Union would have particular positions in terms of the enactment of CEDAW that would be very supportive of the CEDAW provisions and treaty and protocol. The European Union itself in terms of its own treaties sees gender equality as a fundamental value of the European Union and also a specific requirement of the European Union to eliminate gender inequalities. Now when the question comes to the access of Turkey to the European Union there are many dimensions to be brought to bear on that in terms of human rights. I think certainly in terms of the EU's relationship with Turkey that it has had an impact internally in terms of Turkey's own legislation on human rights. Certainly Turkey feels a pressure from the European Union to implement human rights legislation. There are a lot of very sensitive questions around religion and politics that come to bear but these are big questions that member states need to address. The Irish President not so long ago stated that she hoped that Turkey would find its way into the European Union, but it is still a long way off, I think, certainly in terms of the larger states of France and Germany who have particular views in that regard. So I'm not sure exactly how you want me to fuse all of that, but there are influences that are taking place in Europe on human rights legislation in Turkey and there is certainly a dialogue taking place. There are influences in that regard, though it's not a story with an ending very soon in sight.

Question — Could you reflect upon the role in the Northern Ireland Assembly of the Women's Coalition political party, particularly its effect on the other parties with regard to equality for women?

Yvonne Galligan — That's a very interesting point because in fact the Women's Coalition as a political party owes a great deal to the connections that the women's movement in Northern Ireland maintained with Europe all during the period of the troubles and one of the strong elements of women and politics in Northern Ireland has been how to keep connected again in terms of human rights, how to keep connected with these kinds of questions without being totally absorbed and totally sucked in by the conflict over the constitutional question. So in fact Europe and the United Nations provided during the period of the troubles an arena for women involved in politics and concerned with democracy and democratic questions to maintain some kind of a different perspective on what was happening within Northern Ireland society. It's no accident that the Women's Coalition arose not just from a feminist movement but from being informed by the debates that were happening in the European arena and in the wider international arena. Because of that, because they were able to bring a different perspective, a different way of speaking about the problem of the conflict, to bear on the question, when the point came for negotiating a peace, then there was space for their voice. Now mind you, they had to struggle to have that recognised, but nonetheless it was recognised and was seen as being an important new and different perspective that the parties that centred their politics around the conflict and around

resolving the conflict were not bringing to bear. I think that it is very indicative that George Mitchell in his autobiography says that the Good Friday agreement of 1998 could not have come about if the Women's Coalition had not been present to be the facilitator of that agreement. George Mitchell put great store in the way the Women's Coalition was able to speak to all sides and was not trapped and was not captured by any side. That was its unique contribution. Then it further went on in terms of the assembly to develop a distinctive voice on politics in Northern Ireland. Sadly, the politics of the conflict kind of caught them as a middle ground party and caught others and kind of squeezed the centre so they were squeezed out of politics. But nonetheless the Northern Ireland Women's Coalition played a very important role at a very critical point in time precisely because they were able to look at the question through a different discourse, through a different set of eyes.

Question — I wanted to briefly raise two areas where I have difficulty in understanding the rationale for what you are saying. One concerned your apparent criticism of holiday resorts which were not child-friendly and I didn't understand why this constituted discrimination on the basis of sex or gender. But perhaps the deeper question concerns insurance. I assume that the criticism of the insurance industry was based on the perception that the costs of insuring men and women are different. What is the rationale for requiring companies to charge the same to customers where the costs in fact are different?

Yvonne Galligan — Regarding the children-free hotels in Estonia—there is something deeper going on there than just the issue of people being entitled to a quiet retreat. The question there is to some extent based around resorts that are used for male entertainment. The child-free spas really feed into the trafficking of women for prostitution and that is really what is going on in the Estonia case rather than people of different ages looking for different things in their recreational lives. So it is not just a simple family-friendly or non-family-friendly question.

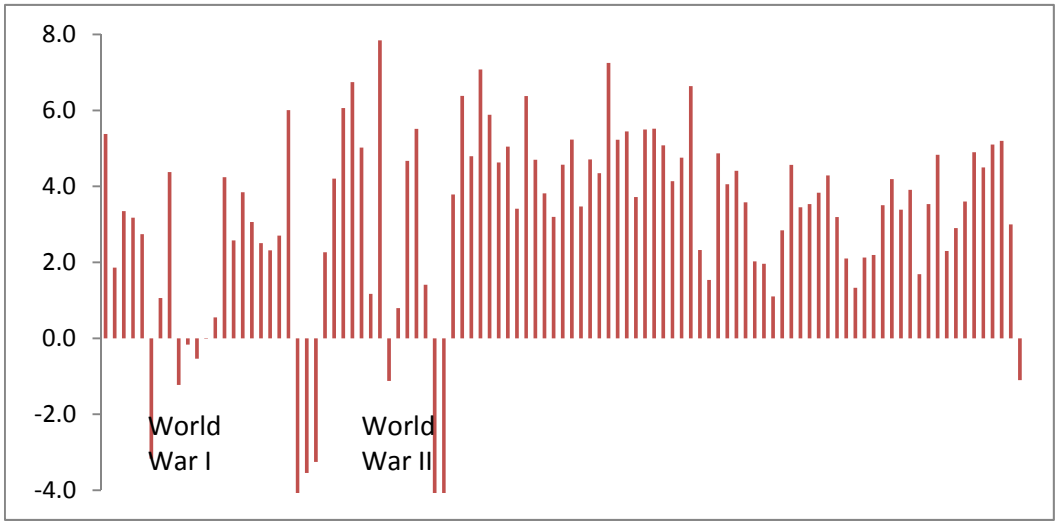
The question around insurance, and again I didn't go into huge detail, because I wanted to give a bigger picture story there. What the commission and others were trying to ensure that women were not being discriminated against on grounds of pregnancy, on the grounds of maternity, on grounds that were related to their lives as women. So that if women were in insurance schemes and if men were in insurance schemes the issue of maternity and pregnancy would not be a loading factor for women. Now the fact that women live longer than men and that loads women's insurance is in fact permitted because that is an objectively justified risk factor. But other factors, such as being a mother of young children, is not an objectively justifiable reason for loading women's pension insurance or life contributions or whatever else.

Two Global Crises, Two Senate Committees*

John Hawkins

Other than during the world wars, there have only been two periods in the past century when the global economy has contracted: the Great Depression of the early 1930s and 2009 (chart 1).[1] In both periods the Australian Treasurer sought to adopt active macroeconomic policies to offset the impact on the Australian economy. In both cases these measures (or at least their magnitude) were opposed in certain quarters. In both cases Senate committees were asked to investigate aspects.

Chart 1: World real GDP: annual percentage change 1909–2009



The Great Depression and the Select Committee on the Central Reserve Bank Bill

The Labor Treasurer 'Red Ted' Theodore was unwilling to accept the Depression in 1930. Arguably ahead of his time, he advocated a proto-Keynesian policy of stimulating demand by an expansionary macroeconomic policy. As part of this he envisaged the creation of a central reserve bank which could help stabilise the financial system and facilitate an expansion of credit and economic activity. Theodore was influenced by John Maynard Keynes' writings in the 1920s and

* Thanks to Bill Bannear and Selwyn Cornish for helpful comments. The author was secretary to one of the Senate committees discussed but writes in a personal capacity and views expressed are not necessarily shared by the committee.

1 The two episodes are compared in D. Gruen and C. Clark, 'What have we learnt? The Great Depression in Australia from the perspective of today', *Economic Roundup*, Department of the Treasury, Canberra, issue 4, 2009, pp. 27–50.

assisted by Hugh Armitage at the Commonwealth Bank.[2] The bill would have separated central banking functions from the Commonwealth Bank into a separate Central Reserve Bank, to be managed by a board appointed by the Governor-General consisting of a governor, two deputy governors, the Treasury secretary and five other directors, retiring in rotation 'who are or who have been actively engaged in agriculture, commerce, finance, industry or labour'. (The remainder of the Commonwealth Bank would then be able to compete freely with the private banks for ordinary banking business.) The Central Reserve Bank would have control of the note issue, and banks would be required to hold reserves with it and supply it with information on their operations. The bank would be empowered to buy and sell exchange and securities and make advances.

While the Commonwealth Bank had some central banking powers, it was under the control of the intensely conservative Sir Robert Gibson who would not countenance Theodore's expansionary policies. While controversial in Australia, informed opinion overseas found Theodore's proposal unobjectionable; the British magazine *The Economist* described it as 'an attempt to put an end to a long-standing anomalous situation … there is no obvious weakness in these proposals'.[3]

The Central Reserve Bank Bill was introduced into the House of Representatives on 2 April 1930 and reached the Senate on 18 June. Even before the bill had reached the Senate, the banks had arranged with the Leader of the Opposition to refer the bills to a select committee 'in order to have the whole question examined in an endeavour to educate public opinion'[4] or more cynically just to delay it. It was the first bill ever referred to a select committee by the Senate.[5]

Theodore later suggested the bill could have been a double dissolution trigger if rejected rather than just delayed.[6] As with more recent legislation, there was

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2 C.B. Schedvin, *Australia and the Great Depression*. Sydney, Sydney University Press, 1970, pp. 86, 173. Schedvin suggests that a bill drafted for the previous Treasurer, Earle Page, in 1928 may have formed the basis for Theodore's bill, but there appears to be no documentary evidence.

3 *The Economist*, 5 April 1930, pp. 767–8.

4 Bank of New South Wales General Manager Davidson, 12 May 1930, cited in B. Schedvin, 'Sir Alfred Davidson' in R. Appleyard and B. Schedvin (eds), *Australian Financiers: Biographical Essays*. South Melbourne, Macmillan, 1988, p. 342.

5 See R. Laing (ed.), *Annotated Standing Orders of the Australian Senate*. Canberra, Department of the Senate, 2009, p. 371 for further information.

6 P. Cook, 'The Scullin Government 1929–1932', PhD thesis, Australian National University, 1971, p. 120. Cook is sceptical that this was the thinking when the bill was introduced.

debate about whether delaying a vote or referring a bill to a committee constitutes a 'failure to pass'.[7]

On 10 July the Deputy Leader of the Opposition, Sir William Glasgow, moved to refer the bill to a select committee comprising himself and Senators Dooley, Dunn, Colebatch, Lawson, Carroll, O'Halloran and Sampson (i.e. a committee with a 5–3 Opposition majority) to report in four weeks.[8] The motion passed 14–6 on party lines. Glasgow was an outstanding soldier and in his political career concentrated on defence issues, rising to Minister for Defence in the Bruce–Page Government.[9] While he had briefly worked in a bank, there is no record of him having a particular interest in economics or knowledge of central banking.

The government refused to cooperate with the committee, which they regarded as 'an attempt to shelve the measure'.[10] On 11 July Senator Daly said that government senators would not be taking part and moved unopposed that Senators Dooley, Dunn and O'Halloran be discharged.[11] Furthermore, the government refused to pay for the committee's expenses.[12] The Clerk of the Senate, George Monahan, apparently served as secretary to the committee.

On 16 July the Senate appointed Senators Thompson and Cox to the committee to replace the discharged Labor members. Senator Glasgow had been elected chair.

At its first meeting the committee decided to invite a range of bankers and representatives of chambers of commerce to appear as witnesses.[13] The Treasurer was asked to nominate an officer from his department to attend as a witness but none appeared. The Australian Workers' Union and Australian Labor Party were

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7 See, for example, Senator Daly, *Senate Debates*, 13 November 1930, p. 224.

8 Senator Lawson rejected criticism of the Opposition majority on the committee by arguing, perhaps tongue-in-cheek, that 'those who accept the responsibility of service on it will be bound to dismiss from their minds preconceived notions', *Senate Debates*, 10 July 1930, p. 3944.

9 P. Edgar, 'Glasgow, Sir Thomas William (1879–1955)' in A. Millar (ed.), *The Biographical Dictionary of the Australian Senate*, vol. 2. Carlton, Vic., Melbourne University Press, 2004, pp. 344–8 and R. Harry, 'Glasgow, Sir Thomas William (1879–1955)', *Australian Dictionary of Biography*, vol. 9. Carlton, Vic., Melbourne University Press, 1983, pp. 21–3.

10 Senator Daly, *Senate Debates*, 10 July 1930, p. 3945. He pointed out that the matter had already been before the Parliament for three months and that the establishment of the Commonwealth Bank and the note issue were not referred to committees.

11 *Senate Debates*, 11 July 1930, p. 4064.

12 The government agreed to pay only for the cost of the secretary and a reporter. See also Cook, op. cit., p. 118.

13 The committee's minutes are printed in Parliamentary Paper no. S4/1930, *Journals of the Senate*, vol. 1, 1929–31, pp. 473–6.

also asked to send witnesses. At subsequent meetings it was agreed to call further businessmen and financiers, the Deputy Governor of the Commonwealth Bank,[14] Professor Copland and 'the Professor of Commerce, Adelaide University'.[15] In practice, almost half the witnesses were private sector financiers. The only labour representative to appear was Maurice Duffy, the secretary of the Melbourne Trades Hall Council, a moderate unionist who served on the Commonwealth Bank Board from 1930 to 1945.[16] There is no record of any written submissions being sought or received from domestic sources although a general invitation was extended through the press for persons desirous of giving evidence.[17]

The opening witness was Commonwealth Bank Governor Ernest Riddle. He gave a clear but conservative overview of central banking principles, and argued that the Commonwealth Bank already was discharging most of the functions of a central bank.[18] The private bankers generally were supportive of a central bank in principle, but this seems to be partly motivated by the idea of converting the Commonwealth Bank from an active competitor to a neutral umpire—they conspicuously refer to the Commonwealth Bank becoming a central bank and dropping its trading operations rather than a new central bank being established in addition. The Commonwealth Bank's Deputy Governor suggests the private banks may fear that the Commonwealth would become a more aggressive competitor if shorn of its central banking roles. These fears may have been amplified when the Commonwealth Bank Bill of May 1930 seemed to set it up for more vigorous competition.[19] While he was the man then calling the shots at the bank, its chairman, Sir Robert Gibson, declined an invitation to appear.

Two academic economists appeared—Professors Shann and Copland, both of whom were soon to work on what became known as the Premiers' Plan: the orthodox policy alternative to Theodore's ideas that was adopted as Australia's

[14] The Deputy Governor was Hugh Armitage. The governor had already been called at the previous meeting.

[15] The professor was Leslie Melville. Unlike Professor Copland he was not specifically named, and in the event did not appear.

[16] L. Louis, 'Duffy, Maurice Boyce (Morrie) (1886–1957)', *Australian Dictionary of Biography*, vol. 8. Carlton, Vic., Melbourne University Press, 1981, pp. 353–4.

[17] Some witnesses tabled (opening) statements and Alfred Davidson from the Bank of New South Wales and Professor Copland tabled a number of papers.

[18] The transcripts give only the answers to senators' questions (and the senator to whom they are directed) but not the questions or comments of the senators themselves.

[19] R. Holder, *Bank of New South Wales: A History*, vol. 2. Sydney, Angus and Robertson, 1970, p. 653.

response to the Depression.[20] Professor Copland referred to a central bank as a 'banks' pawn-shop' but thought it could be a useful for discipline as Australia had 'erred and strayed from the fold of international parity'. However both academics opposed the bill. There is no record of whether any academic economist who would probably have supported the bill, such as Robert Irvine, the first professor of economics from the University of Sydney, sought to appear.

Senator Glasgow was a diligent chair attending every public hearing and private meeting. The other members also attended most meetings. The transcripts suggest that the questioning was led by the chair and Senators Colebatch and Thompson.

In his history of central banking, Professor Giblin gave the following assessment:

> In reviewing the evidence given by this imposing array of witnesses the outstanding impression is of the very scanty harvest obtained from a promising field. The Governor and Deputy Governor of the Bank were almost alone in addressing themselves to the Bill under consideration as a practical measure … Nearly all the other witnesses gave the impression of exercising their ingenuity in finding reasons for condemning proposals which they disliked for other undisclosed reasons … A critical member of the Senate Committee, if there had been one, would have had a glorious field for his activities. But the Committee appeared too anxious to swallow any absurdity that would fortify its instinctive prejudices.[21]

The committee's progress report on 6 August 1930 reported that witnesses saw a central bank as a 'desirable adjunct to the financial system', so long as 'it performed the true functions of Central Reserve Banking, and that it was assured, by its constitution, of freedom from political control'. However, the committee assessed the volume of evidence as saying that this was not the time. The committee suggested seeking the advice of Sir Otto Neimeyer and Professor Gregory. Finally, the committee requested an extension of reporting time, to which the Senate agreed on 8 August. On 13 November there was a further extension granted until 27 November.

The chair's draft of the final report was adopted by the committee with the only amendment being the deletion of a final paragraph. There were no minority reports.

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[20] Notwithstanding Shann's radical youth, both were conservative economists. Copland later aspired to join the Menzies Cabinet; A. Martin, *Robert Menzies: A Life*, vol. 2. Carlton, Vic., Melbourne University Press, 1999, pp. 101–2.

[21] L. Giblin, *The Growth of a Central Bank*. Melbourne, Melbourne University Press, 1951, pp. 113–14.

The committee spent a good portion of its final report, tabled on 3 December, chastising the government for not acting on the recommendation in the progress report to seek the opinions of Messrs Neimeyer and Gregory and blamed this for their needing to seek a further extension. The committee itself sought written reports from these two gentlemen which are attached as appendices to the report.

The final report reaffirms the conclusion of the interim report buttressing the argument by a quotation from Sir Otto Neimeyer that the midst of a crisis was not an opportune time for changing the structure of the Commonwealth Bank. Nonetheless it concedes that there may be no impetus to establish a central bank at other times:

> During the Australian crises of 1843 and 1866 and in 1893 there were strong expressions of expert opinion in favour of the establishment of a truly national bank for purposes closely allied with those for which Central Reserve Banks have since come into being in many countries. In each case political opinion seems to have determined that the time was inopportune. The crisis passed, and with it the recommendations of the experts were forgotten.[22]

This leads the committee to consider there may be a case to establish a central bank during a time of crisis, but it would have to be a different central bank to that proposed in the bill. The provisions of the bill were criticised, with an article by the Bank of England's Sir Ernest Harvey being cited at length as a guide to the 'vital principles' which should guide the establishment of a central bank.[23] Also quoted was a passage by C. Kisch and W. Elkin supporting central banks being independent of government.[24] Both these had been cited extensively by witnesses.

There is a discourse on the nature of money ('to the individual money is freedom') and dire warnings that 'a government is tempted to a subtle form of robbery if it have power to create new money'. Notably absent in the discussion in the report are explicit references to arguments put by witnesses at the hearings.

An appendix to the report compares the constitutions of central banks in thirty countries and it is noted that only five are purely owned by the state.[25] This gives

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22 Parliamentary Paper no. S4/1930, p. xiii.

23 E. Harvey, 'Central banking', *Economic Record*, vol. 3, no. 1, 1927, pp. 1–14. Harvey had visited Australia in 1927 at the invitation of the Bruce–Page Government.

24 C. Kisch and W. Elkin, *Central Banking*: *A Study of the Constitutions of Banks of Issue, With an Analysis of Representative Charters*. London, Macmillan, 1930. Sir Cecil Kisch was financial adviser to the UK Government's India Office. The book was described as 'that bible of the time' and cited by people on all sides of the debate; Holder, op. cit., p. 652.

25 The appendix is compiled from information in Kisch and Elkin, op. cit.

an inference that some measure of private ownership may be desirable but this argument is not put explicitly in the body of the report. By the conclusions, the committee opines 'the arguments against exclusive state ownership have already been reviewed and seem to be unanswerable'. These arguments are to this author not reviewed at all in the report. Indeed Harvey, the authority apparently most respected by the committee, did not oppose government ownership. Some degree of private ownership could be justified as one way of giving the central bank some independence from government control but it is far from the only way and likely to generate conflicts of interest which are not addressed in the report.

The committee draws out from the international survey that none of the central banks were permitted to make unlimited unsecured advances, even to the government. In his evidence, however, the Commonwealth Bank's deputy governor suggests 'advancing to a government without security and advancing to a government on the security of its own bonds are practically identical'.

The committee is committed to the gold standard, quoting approvingly a memorandum by Professor Gregory citing it as one of the two primary functions of a central bank.

The press coverage centred on the committee's opposition to 'political control'. The views of Sir Otto Neimeyer, opposing the bill, were widely reported but not any comments from its supporters.[26]

When the Senate resumed debate on the bill in December following the tabling of the report, consideration of the bill was again deferred and did not resume until April 1931, more than a year after its initial introduction in the Parliament, when it was finally voted down. The main argument put by the opponents of the bill remained that while not opposed to a central bank, they could not accept a central bank under the control of the government.[27]

The Commonwealth Bank accrued some more powers during World War II but a true central reserve bank was not created until the late 1950s. Ironically it was then the creation of the conservative parties and opposed by Labor.[28] There was no further Senate committee inquiry and the views of the 1930 committee were

[26] *The Age*, 4 December 1930, p. 10; *The Argus*, 4 December 1930, p. 8; *Canberra Times*, 4 December 1930, p. 2. Among domestic stories, the committee's report was competing with the appointment of the first Australian-born Governor-General.

[27] The conservative parties, when in government in 1924, had themselves introduced a board for the Commonwealth Bank which was appointed by the government.

[28] S. Cornish, *The Evolution of Central Banking in Australia*. Sydney, Reserve Bank of Australia, 2010.

completely disregarded with the central bank being wholly government-owned and capable of being directed by the government.

The 2008–2009 global economic crisis

The onset of the Great Depression had been marked by the crash on Wall Street and share prices there fell sharply too in 2008. Most notable was the carnage among some of the largest American financial institutions such as Bear Stearns, Merrill Lynch, Lehman Brothers, American Insurance Group, Fannie Mae and Freddie Mac, Wachovia and Washington Mutual. Inter-bank lending markets seized up around the world. There is still debate among the relative importance of differing factors behind the crash, but they included a speculative boom, global imbalances and poorly understood securitisation instruments and associated derivatives which disguised growing risks.[29]

The Reserve Bank of Australia acted quickly and decisively to slash interest rates and this monetary policy response was largely uncontroversial, although some commentators felt they should have gone further and taken rates down to near zero.

There was more debate about the appropriate use of fiscal policy. The operation of 'automatic stabilisers' meant that the Budget was inevitably going to swing into deficit; tax revenues would drop and expenditure on unemployment benefits would rise. Unlike in the Great Depression, there were few calls to cut government spending or raise taxes to try to preserve the surplus. It was generally acknowledged that this would exacerbate the crisis.

The controversy was about whether, and to what extent, there should be additional, discretionary, fiscal measures to support demand and how any such stimulus should be allocated between increases in government infrastructure spending, cash payments to households and tax cuts.

The government implemented a large fiscal stimulus package. In this it was in line with governments around the world of various political stripes. As Lord Skidelsky notes:

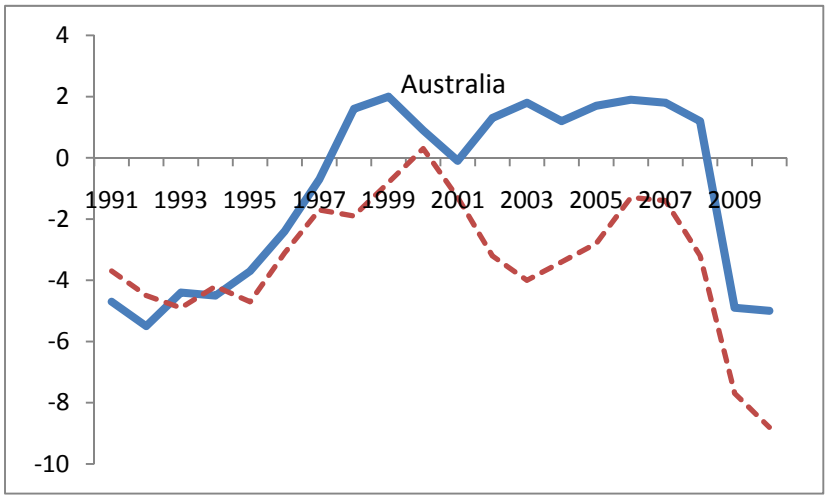
> By January, even Germany, whose chancellor, Angela Merkel, had derided the autumn round of fiscal stimuli as 'a senseless race to spend billions', had unveiled a package worth €50 billion. Stimulus packages around the world

[29] R. Garnaut, *The Great Crash of 2008*. Carlton, Vic., Melbourne University Press, 2009.

have included subsidies to motor-car manufacturers, cash payments to households, and public investment in schools, housing road and railways.[30]

A record of prudent fiscal policy going back more than a decade meant that Australia was better placed than many of its peers to introduce a large fiscal stimulus (chart 2).

Chart 2: General government financial balances: Australia vs. OECD (1991–2010; per cent to GDP)



Source: Senate Economics References Committee, government's economic stimulus initiatives, October 2009, p. 23. Based on data in *OECD Economic Outlook*, June 2009.

A set of bills implementing a significant portion of the stimulus package were referred to the Senate Finance and Public Administration Committee for review in February 2009 but this committee was only allowed less than a week to report. The committee had a government majority and concluded that the Senate should pass the bills as a matter of urgency.[31] A dissenting report by Opposition senators argued that the package was too large, was introduced too early, created too much debt and was poorly targeted.[32]

The Senate passed the bills after some amendments. Including measures in October 2008, November 2008, December 2008, February 2009 and the May 2009 budget, the total stimulus measures amounted to around $90 billion over four to five years.

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30 R. Skidelsky, *Keynes: The Return of the Master*. London, Allen Lane, 2009, pp. 19–20.

31 Senate Standing Committee on Finance and Public Administration, *Nation Building and Jobs Plan Inquiry into the Provisions of the Appropriation (Nation Building and Jobs) Bill (No. 1) 2008–2009 and 5 Related Bills*, February 2009, p. 54.

32 ibid. p. 56.

The economic outlook improved during 2009 which led to calls to wind back the stimulus package more quickly than the government planned. The Senate referred the government's fiscal stimulus strategy to the Senate Economics References Committee to report by October 2009. The inquiry was supported by the Opposition, although the initiative for it came from the leader of the Greens, Senator Bob Brown.

As in 1930 the committee had an Opposition majority, but unlike in 1930 government senators took an active role in proceedings. As the 2009 inquiry was by a standing rather than select committee, a specific chair was not appointed and the inquiry was chaired by Senator Alan Eggleston, the regular chair of the Economics References Committee.

Developments in economic theory between the 1930s and 2009

The impact of the Keynesian revolution meant that an active fiscal policy is now a much more 'orthodox' view, rather than the radical proposition it was in 1930.[33] One of the witnesses in 1930, and an author of the Premiers' Plan of the 1930s, Douglas Copland, had repented by 1951, commenting:

> … the mistake was made of not recognising clearly enough that government activities need to expand tremendously to offset the fall in private spending … The second important error some of us made in the early days was to oppose credit expansion.[34]

Looking back in his retirement, even Sir Robert Menzies commented:

> …there was a strong case for deficit-budgeting in a period of depression; we have all come to accept this.[35]

It should be noted that the Keynesian revolution was advocating temporary stimulus during recessions, not an ongoing insouciance about government deficits. As Lord Skidelsky recently points out:

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[33] In 1930, while Keynes had published articles advocating expansion of public works in certain circumstances, his *General Theory* was still six years away. While his pamphlet *Can Lloyd George Do It?* (1929) and his book *A Treatise on Money* (1930) contained some of the ideas that would later form Keynesian orthodoxy, they were not well known in Australia at the time. See N. Cain, 'Australian economic advice in 1930: liberal and radical alternatives', *ANU Working Papers in Economic History*, no. 78, April 1987 and J. Hawkins, 'Theodore: the proto-Keynesian', *Economic Roundup*, issue 1, 2010, pp. 91–110 and references cited therein, for a further discussion.

[34] D. Copland, *Inflation and Expansion*. Melbourne, FW Cheshire, 1951, pp. 21–2.

[35] R. Menzies, *Afternoon Light*. Melbourne, Cassell, 1967, p. 120.

> 'Deficits don't matter.' This was not Keynes: it was Glen Hubbard, chairman of George W. Bush's Council of Economic Advisers in 2003. It may surprise readers to learn that Keynes thought that government budgets should normally be in surplus.[36]

While the Keynesian approach is now the orthodoxy, it is still not unanimously supported. Some of the most ardent pro-market economists still oppose any government activism. In the US context this has been termed the 'freshwater' view.[37] A survey of Australian economics professors by M. Anderson and R. Blandy found that that fewer than ten per cent of them disagreed with the statement that 'fiscal policy has a significant stimulative impact on a less than fully employed economy'.[38]

There is more disagreement about the size of the stimulus from fiscal expansion. This is summarised in the value of the 'fiscal multiplier'; the ratio of the resultant increase in GDP to the increase in government spending. W. Coleman shows that the earliest estimates of this multiplier ranged from one to three.[39] Today's economics textbooks use values of 2½ to five to illustrate the concept, but when citing empirical estimates refer to lower numbers, but typically still above one.[40] At the committee's hearings, there was reference to a study by E. Ilzetzki, E. Mendoza and C. Vegh which concluded that multipliers were higher in economies with higher incomes and lower trade shares, such as Australia.[41]

Views of the witnesses

Accordingly some fiscal stimulus was supported by most of the witnesses.

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36 Skidelsky, op. cit., p. xvi. He is the author a well-respected three volume biography of Keynes.

37 It is termed 'freshwater' because it has most adherents at the University of Chicago, Milton Friedman's base, while the Keynesian orthodoxy prevails at the 'saltwater' universities of New England and California; Skidelsky, op. cit., p. 30.

38 M. Anderson and R. Blandy, 'What Australian economic professors think', *Australian Economic Review*, 4th quarter, 1992, pp. 17–40.

39 W. Coleman, 'Cambridge, England or Cambridge, Tasmania? Some recent excavations of the Giblin multiplier', *History of Economics Review*, vol. 39, Winter 2004, p. 3.

40 Textbooks examined were: P. Krugman, R. Wells and K. Graddy 2007, *Economics*, European edn. Basingstoke, Palgrave Macmillan, 2007; P. Samuelson and W. Nordhaus, *Economics*, 18th edn. Boston, McGraw-Hill, 2005; J. Gans, S. King, R. Stonecash and G. Makiw, *Principles of Economics*, 3rd edn. Melbourne, Thomson, 2005; R. Dornbusch, S. Fisher and R. Startz, *Macroeconomics*, 7th edn. Boston, Irwin McGraw-Hill, 1998; and O. Blanchard, *Macroeconomics*, 5th edn. New Jersey, Pearson, 2009, some of the most popular and respected texts with a number of Nobel prizewinners among their authors.

41 E. Ilzetzki, E. Mendoza and C. Vegh, 'How big are fiscal multipliers?', *CPER Policy Insights*, no. 39, October 2009.

As in 1930 the committee regarded the head of Treasury as a desirable witness, but unlike in 1930, this time he did appear. The Governor of the Reserve Bank, the successor to the Commonwealth Bank, was another key witness. Both were supportive of the fiscal stimulus package.

A wider range of economists appeared in 2009 than in 1930. As well as the heads of Treasury and the Reserve Bank, who unlike in 1930 are now themselves well-qualified economists, the committee heard from one of Australia's leading academic economists, Professor Andrew Leigh from the ANU, Dr Richard Denniss from the Australia Institute and Rory Robertson from Macquarie Bank. As in 1930 the committee heard from business representatives, in this case from the Australian Industry Group and the Australian Chamber of Commerce and Industry. All were broadly supportive of the stimulus package.

Academia provided the only witnesses to challenge the current economic orthodoxy and argue that fiscal policy is ineffective and undesirable. A few academic economists known to hold these minority pre-Keynesian views were invited to present their perspectives.

The report

The majority report did not accept the minority academic view that there should have been no fiscal stimulus, noting:

> There was a consensus view that a range of factors have contributed to Australia's exemplary economic performance. These include the continuing strong growth of China and demand for Australia's exports; the legacy of rapid growth, strong budget position and sound prudential regulation of the financial system that was left by the previous Coalition government; the rapid move to strongly accommodative monetary policy; the fall in the A$ in the second half of 2008; and the fiscal stimulus.[42]

However, it stated 'fiscal policy alone was not the only significant factor'.[43]

The majority report concluded that 'the economy has strengthened and that the rationale for maintaining the proposed spending levels by the Rudd Government are no longer valid and is of the firm opinion that the levels of spending need to be reduced, postponed or offset to prevent the economy from overheating' and

[42] Senate Economics References Committee, *Government's Economic Stimulus Initiatives*, October 2009, p. 46.

[43] ibid.

recommended a cost–benefit study be undertaken of the remaining stimulus projects.[44]

A minority report by government senators highlighted that Australia was the only advanced economy to grow in the year to the June quarter of 2009, which it interpreted as indicating the fiscal stimulus package had been timely and effective. They concluded 'without fiscal stimulus of the scale and structure of that implemented in the past year, there is no doubt that Australia would have experienced a quite severe recession' and that the existing provisions for the gradual withdrawal of the stimulus were appropriate.[45] Similarly, the Greens, in their additional comments, said they 'are satisfied with the evidence presented to the Committee by the Treasury Secretary Ken Henry that the Australian economy would have been in recession without the stimulus package'.[46]

Media reports, while headlined by the majority report's call to cut the stimulus spending, generally reflected the diversity of views between the majority and minority reports of the committee.[47]

The government has not modified its fiscal package in response to the committee's report.

Concluding comments

Both the 1930 and 2009 Senate inquiries provided a valuable forum for discussion of the merits of macroeconomic policy in response to the challenges faced by Australia in the face of a global downturn.

A difference between the two inquiries, both the initiative of non-government parties and chaired by an Opposition senator, was the degree to which the government cooperated. In 1930, as well as withdrawing its senators from the inquiry, the government ignored a request for Treasury officers to appear and would not facilitate the appearance of other expert witnesses. As Giblin comments in his history of central banking:

> These pinpricking tactics, for which Mr Fenton and Mr Lyons (as acting PM and acting treasurer) must have been responsible, are hard to understand as

44 ibid.

45 ibid. p. 68.

46 ibid. p. 69.

47 *The Age*, 27 October 2009; *Australian Financial Review*, 28 October 2009, p. 3.

> they played into the Opposition's hands, both in weakening the Government case and giving justification for prolonging the inquiry.[48]

By contrast the cooperative stance by government senators in 2009 meant that the report, and media commentary based on it, included support for as well as criticisms of their policy.

[48] Giblin, op. cit., p. 113. As noted above, Giblin believed an incisive government senator would have been able to highlight inconsistencies and weak arguments.

Reaching Bicameral Legislative Agreement in Canberra and Washington*

Stanley Bach

Whatever the virtues of bicameralism may be, there is no doubt that it can complicate the legislative process in any assembly, and especially in national assemblies that represent the diverse interests and preferences of complex societies. Under some democratic constitutions, a proposed new law cannot take effect with binding legal force until both halves of a bicameral parliament or legislature have approved it in precisely the same terms. This requirement for bicameral legislative agreement can cause delays, require difficult and sometimes acrimonious negotiations, and even prevent enactment of a bill that each house already has passed, albeit with somewhat different provisions.[1]

The potential difficulties of reaching bicameral agreements in any national (or sub-national) political assembly depend on at least five factors: constitutional powers, partisan control, party cohesiveness, procedural comparability, and legislative autonomy. Individually and collectively, these five factors shape and condition the legislative process, especially at that final stage at which the initial legislative decisions of the two houses must be reconciled.

Five factors affecting bicameral relations

Perhaps the most important of these factors is the first: the respective constitutional powers of the two houses regarding legislation. It certainly is the most durable in its consequences for national assemblies. Do the two houses enjoy roughly the same legislative powers? Are there constitutional arrangements governing the process for reaching bicameral legislative agreements that favour one house at the expense of the other? Typically, national constitutions assign considerably more legislative power, or give considerably more democratic legitimacy, to one house of a bicameral assembly.[2] And in such cases, one way in which constitutions can establish the

* This paper was prepared for presentation at the Ninth Workshop of Parliamentary Scholars and Parliamentarians, 24–25 July 2010, Wroxton College, Oxfordshire, UK, sponsored by the Centre for Legislative Studies at the University of Hull.

1 My sincere thanks to Elizabeth Rybicki in Washington and David Sullivan in Canberra for alerting me to some inaccurate and intemperate statements that somehow found their way into an earlier draft of this paper.

2 In post-Ceausescu Romania, to cite an extreme counter-example, members of the two houses were elected in the same ways and for terms of the same length, and the two houses enjoyed the same powers. The original plan evidently called for a 'differentiated bicameralism'. 'The final Constitution called for an undifferentiated bicameralism, however, conferring an identical democratic legitimacy upon both chambers. This unusual choice was partly motivated by the framers' fear that one institution's claim to ultimate legitimacy might permit an excessive concentration of power'. Elana Stefoi-Sava, 'Romania: Organizing Legislative Impotence', *East*

dominance of one house over the other is by enabling it to impose its will in cases of legislative disagreements.

For example, a constitution may deny to one house the power to initiate or amend certain kinds of bills—most likely, essential financial legislation. It also may provide that, in cases of persistent bicameral legislative disagreement over the final terms of a bill, the preferences of one house are to prevail over the other.[3] Or it may achieve the same result somewhat more indirectly by submitting such legislative disagreements to majority votes of both houses sitting together, so that if each house is unified in defence of its position, the position of the larger house will prevail.

In most democratic regimes with bicameral national assemblies, one house clearly dominates the other. Australia and the United States are unusual in having national assemblies in which the two houses have relatively comparable powers, both houses are directly elected so they enjoy the democratic legitimacy without which they might be reluctant to exercise their powers (compared to Canada's appointed Senate, for example), and neither house has the constitutional means to impose its will on the other in the regular course of business.[4]

The other four factors are more subject to change over time, just as they are more subject to influence by national assemblies and their members.

First, with regard to partisan control, is the distribution of party strength largely the same in the two houses? If the same party or coalition of parties controls a majority of seats in both houses, then, everything else being equal (which, of course, it rarely is), it should be easier for the two houses to reach agreement than it would be if there are different and opposing partisan majorities in the two houses, or if at least one of them is not controlled by a single party or stable coalition.[5]

European Constitutional Review, vol. 4, no. 2, Spring 1995, pp. 78–83. Stefoi-Sava also describes the resulting arrangement as 'carbon-copy bicameralism' and 'monochrome bicameralism'.

3 In France, for example. See fn. 32 below.

4 In Australia, as I discuss below, there is the constitutional option to resolve legislative disagreements in a joint session. However, this option arises only if the two houses fail to pass the same bill in the same form on three separate occasions, with a 'double dissolution' election of all senators and members of the House of Representatives occurring between the second and third occasions. Obviously, therefore, this process is too slow and cumbersome to be used regularly. And in fact, it has been used only once.

5 This assumes the existence of a party system, which usually is a safe assumption to make, at least for national assemblies. In non-partisan assemblies, or in assemblies in which parties are inchoate or embryonic, the difficulties of reaching agreement may be greater because of the need for supporters of legislation in each house to assemble majorities one vote at a time. On the other hand, the absence of parties may facilitate agreement because there are less likely to be groups of assembly members whose first instinct is to oppose each other's positions.

Second, to what degree is the majority party or coalition in each house unified or disciplined? If it consists of a collection of uncomfortable bedfellows who have policy disagreements among themselves and who do not feel obliged to vote with their fellow party members, much less with members of any coalition partners in the assembly, then the two halves of the assembly may prefer significantly different versions of the same bill, even if they have the same ostensible majorities. This difficulty can arise in assemblies controlled by multi-party coalitions, but it also can occur in what formally are two-party systems if one or both parties is, itself, a coalition of diverse factions (whether or not they are organised and recognised as such) and those factions are not represented in similar proportions in the two houses.

Third, do the rules or standing orders or the procedural practices of each house enable the majority party or coalition to control its legislative outcomes?[6] Even if both houses have majorities of the same party or parties and even if the parties are unified or disciplined, it also matters if the legislative procedures of each house allow a simple majority of its members to control its decisions without undue delay. If so, they are more likely to reach similar or identical decisions than if the procedures of one house give the minority (or opposition parties) more leverage that it (or they) can use to extract concessions and compel compromises.

And fourth, does the same sense of legislative autonomy prevail in each house? Again, even if the two houses are controlled by the same cohesive party or coalition, it also matters if the legislative agendas of the two houses and the specific legislative proposals they each consider are decided elsewhere—namely, by the executive government. If so, the differences in the versions of legislation that each passes are likely to be less significant than if each house exercises more control over its legislative agenda and if each acts more autonomously in drafting the legislation that it then passes and sends to the other house for its concurrence.

This combination of endogenous and exogenous conditions helps both to shape and to explain how bicameral legislative agreements are reached, as a comparison of the Australian Parliament and the US Congress illustrates. The interplay among these five factors accounts largely for the major systemic difference between the final stages of the legislative process in these two assemblies.

Comparing Parliament and Congress

How do the Australian Parliament and the US Congress compare with respect to these factors? No brief summary can begin to do justice to such an encompassing question,

[6] References throughout to ‘rules’ encompass not only the codified and formally adopted rules of each house, but also the enforceable (and published) precedents and practices by which these rules have been interpreted and applied.

but it can lay the groundwork for a comparison of how the two national assemblies try to reach legislative agreements.

With respect to constitutional powers affecting legislation, the Australian and US national assemblies are remarkably similar, notwithstanding the other differences in the two constitutional systems of which the assemblies are a part. This is no accident, of course. In designing the Parliament, the authors of Australia's Commonwealth Constitution drew knowingly and deliberately on the American example, just as they drew on the British example for the parliamentary relationships between the executive government and the House of Representatives.

In Canberra as in Washington, most legislation can originate in either house. In both assemblies, most bills are passed first by the House of Representatives and then by the Senate, although this tendency is much more pronounced in the Australian Parliament than in the US Congress. Also in Canberra as in Washington, most taxing and spending bills are exceptions to the general rule: they can be introduced only in the House of Representatives. In Washington unlike Canberra, however, the US Senate is free to amend these bills once it receives them from the House of Representatives.

By contrast, section 53 of the Australian Constitution provides that the 'Senate may not amend proposed laws imposing taxation, or proposed laws appropriating revenue or moneys for the ordinary annual services of the Government', nor may it 'amend any proposed law so as to increase any proposed charge or burden on the people'. Instead, the Senate may request that the House of Representatives make specific amendments that the Senate cannot make itself. No taxing or spending bill can become law until any Senate requests for amendments are disposed of to the Senate's satisfaction, so it can be disputed whether this constitutional restriction on the Australian Senate's powers is a matter of substance or primarily one of form and procedure.[7]

With legislative powers allocated so equally to the two chambers of both assemblies, the need to reach legislative agreements acceptable to both of them becomes an inevitable part of the legislative process. The US Constitution is entirely silent on this subject. By contrast, the Australian Constitution (in s.57) lays out a procedure for resolving legislative differences, but it is so difficult and time-consuming to use that it has been employed only once (in August 1974) since the Constitution came into force in 1901. This process requires the two houses to attempt, and fail, to reach an agreement on the final provisions of a bill, and to do so on three different occasions with a 'double dissolution' of both houses and an election of all members of both the House of Representatives and the Senate intervening between the second and third

[7] But see the discussion of legislative autonomy below.

attempts. Then, if these requirements have been met, the executive government can request the Governor-General to convene a joint sitting of both houses at which decisions are made by a majority vote of all members of both houses voting together.

If such joint meetings were held regularly, they would enable the Australian House of Representatives to prevail over the Senate (if both houses were unified in support of their legislative positions) because there are twice as many members of the House of Representatives as there are senators. But precisely because these procedures are too impractical for regular use, and especially to reach agreement on legislation that requires prompt enactment, the constitutionally created ability of the House to prevail over the Senate has little practical effect. The government of the day has seemed happy to have one or more bills fail of passage twice so it can ask the Governor-General to declare a double dissolution when it wishes, but more for the purpose of capitalising on what may be a temporary political advantage or resolving a general political impasse than breaking a particular legislative deadlock.[8]

Consequently, the practical situation in Canberra is largely the same as it is in Washington: the actual procedures for reaching legislative agreement are to be found in the assemblies' standing orders and in the procedures and practices that have grown up around them.

With respect to partisan control, the situation in Canberra and Washington also is more similar than it might appear at first glance. In Australia, the electorate is closely divided between its support of the Australian Labor Party (ALP) and the coalition of the Liberal and National parties (the Coalition). This durable fact of electoral life, combined with the different systems for electing members and senators, has, during recent decades, tended to produce a situation in which one party has a clear if not large majority in the House of Representatives, but lacks a similar majority in the Senate.[9]

Since 1981, and regardless of which party has been in power, the government has had a majority in the Senate only once, between mid-2005 and mid-2008. At all other times, the Senate has had a non-government majority. In 2009, for example, the ALP government held only 32 of the 76 Senate seats and the Coalition held 37.[10] For the government to win a Senate division against the Opposition, it needed the support of

[8] Also, Australian governments think more than twice before asking the Governor-General for a double dissolution because the elections that follow are more likely to result in the election of minor party and independent senators than are the usual half-Senate elections at which half of Australia's senators are elected.

[9] For most purposes here, the Coalition is treated as if it were a single party. While it is true that, during Senate elections at least, the Liberal and National parties may run separate slates of candidates, the two parties almost always vote as one in Parliament.

[10] There are twelve Australian senators from each of the six states and two from each of the two territories (the Northern Territory and the Australian Capital Territory).

all the other seven senators (five Greens, one independent, and one representing the Family First Party).

In the United States, as in Australia, one house is much larger than the other—435 members of the US House of Representatives (hereafter representatives) compared with 100 senators—and senators serve for longer than representatives—six years for US and Australian senators compared with two years for US representatives and a maximum of three years for members of the Australian House of Representatives (hereafter members). But the two countries have adopted different electoral systems. In the US, representatives and senators are elected in the same way—by plurality elections in individual constituencies. In Australia, by contrast, one member is elected from each constituency whereas senators are elected by proportional representation on a statewide basis.[11]

Both Australians and Americans have become accustomed to a situation in which the party that holds a majority of seats in its House of Representatives does not also hold a majority of the seats in its Senate. However, this similarity masks an equally important difference. During Australia's recent history, it has become expected that neither party will have the votes to control the Senate by itself. In the US, by contrast, it has not been unusual since the 1980s for the House of Representatives to have a majority of one party (Democrat or Republican) and for the Senate to have a majority of the other.[12] The modern US Congress recently has tended to oscillate between unified and divided control of its two houses.

In practice, however, it is unrealistic to say that either party ever actually *controls* both houses of the US Congress. The reason lies in Senate rules permitting filibusters that can be ended only by an affirmative vote of 60 of the 100 senators on a motion to invoke cloture. Because neither party in the Senate often has 60 votes of its own, a unified Senate minority party (whether it is the government or the Opposition party in parliamentary terms) usually can prevent the Senate from passing almost any bill.[13] If one party has a majority in the US House of Representatives but is in the minority in

[11] In elections to both houses, Australia also uses a system of preferential voting, such that the House candidate who wins a plurality of votes in his or her constituency does not always win the seat. However, the details of the two voting systems need not detain us here. These details are readily available elsewhere—for example, in Scott Bennett, *Winning and Losing: Australian National Elections*. Melbourne, Melbourne University Press, 1996.

[12] There are no minor parties represented in Congress, and rarely more than one or two independents in either house. Furthermore, independents usually act, and for most purposes are treated, as members of one party or the other.

[13] One challenge in writing about contemporary political institutions is that they can be moving targets. Days after I first wrote this in 2009, a Republican US senator announced his intention to switch parties. That development, combined with the belated resolution of a contested Senate election in favour of the Democratic candidate, gave Senate Democrats a total of exactly 60 votes, at least until the subsequent death of Democratic Senator Edward Kennedy. Once Kennedy's temporary replacement was named, the Democrats regained what was, in theory, a filibuster-proof

the Senate, the situation in Washington is not much different from what usually prevails in Canberra. And even if both houses in Washington have the same majority party, that party still must negotiate with the minority party in the US Senate to attract the votes of some of its Senate members because those votes usually are needed to forestall or end a filibuster.

With respect to party cohesiveness, the situations in the two assemblies again are more similar in practice than they once were. One of the defining characteristics of Australian national politics is the disciplined voting that characterises both Labor and Coalition members and senators. Since its first days in Parliament, Labor has required its members in each house to vote in accordance with the party's positions, and in self-defence if for no other reason, voting cohesion within the Coalition parliamentary parties is just about as perfect. It is newsworthy when an Australian member or senator crosses the floor on a division. The only exceptions to this pattern tend to be on the handful of so-called 'conscience votes', on matters such as abortion and euthanasia, on which the parties allow their members to vote as they please (although they still tend to vote with their party colleagues).[14]

In the Australian House of Representatives, therefore, the government can expect to win every division, even if its majority is a slim one. And in the Senate, the government and Opposition each look to minor party and independent senators with whom to form majority coalitions. Rarely is there any serious prospect for either major party to attract one or more Senate votes from the other.[15] To be sure, there are policy disagreements over legislation within Labor and within the Coalition, but these differences typically are resolved in the party rooms before the bill at issue comes before the House or Senate for formal consideration and public debate.[16] When the two parties face each other and the Australian public, they stand united.[17]

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majority until a Republican successor was elected in January 2010, which again reduced the Democratic majority to 59. Regardless, Democratic leaders in the Senate are acutely aware that not all majority party senators can be expected to vote for all cloture motions.

14 See John Warhurst, 'Conscience voting in the Australian Federal Parliament', *Australian Journal of Politics and History*, vol. 54, no. 4, pp. 579–96. A recent, rare, and remarkable exception was the carbon pollution reduction legislation that divided the Liberal Party at the end of 2009, with some Liberal senators crossing the floor and the leader of the Liberal Party being replaced.

15 It should not be assumed, however, that all Senate divisions pit the government against the Opposition, with minor party and independent senators holding the 'balance of power'. The government and Opposition have voted together on divisions more often than their combative public rhetoric would suggest. See Stanley Bach, *Platypus and Parliament*. Canberra, Department of the Senate, 2003, pp. 157–237.

16 The bill may be delayed if these differences are intractable.

17 But note fn. 14 above as well as the several instances in which Senator Joyce, the current National Party leader in the Senate, crossed the floor to vote with the ALP.

In Washington, the conventional wisdom for decades was that party discipline in Congress was very weak. That was true, and remains true, in the sense that national party organisations have few means to impose *discipline* by penalising representatives and senators who oppose the party position, if one can be identified, on specific issues. What has changed in recent decades, however, has been the degree of voluntary party *cohesiveness* in congressional voting.

Into the 1970s, there was a distinctive cohort of so-called liberal Republicans in Congress, who were noticeably to the left, on a simple left–right continuum, of most of their fellow partisans in the US House and Senate. Even more important was the split among congressional Democrats between a majority of generally liberal representatives and senators and a sizeable minority of institutionally powerful Southern Democrats who, in policy terms, often had more in common with their Republican counterparts than with most congressional Democrats. The result was that, on most of the most important rollcall votes, a minority of Republicans typically would vote with a majority of Democrats, and a minority of Democrats would vote with most Republicans. If the Democrats held only a narrow majority in the House, the Republicans could prevail anyway if, as sometimes happened, there were more conservative Democrats to vote with the Republicans than there were liberal Republicans to vote with the Democrats.

Today, however, far fewer representatives and senators of one party vote with members of the other. The so-called liberal Republicans have almost entirely disappeared, and the once solidly Democratic South is now the bastion of the Republican Party in Congress. The Southern states now elect more Republicans than Democrats to both the House of Representatives and the Senate. As one US senator is reported to have put it, clearly if a bit too simply, 'Today, most Democrats are far left; most Republicans are to the right; and there are very few in between'.[18] Party unity in US congressional voting is not nearly as perfect as it is in Canberra—if it were, it normally would be impossible to break a Senate filibuster—but voting patterns in the two assemblies now are much more similar than they once were, regardless of whether those patterns are attributable to enforceable discipline or voluntary cohesiveness.

Still, the difference between legislative voting patterns in Canberra and Washington, though reduced, remains significant. Once a bill becomes subject to votes in the Australian Parliament, any necessary intra-party adjustments probably will already have been made. The government knows that it can win in the House of Representatives, so it can devote most of its efforts to attracting the increment of non-

[18] Quoted in Walter J. Oleszek, *Whither the Role of Conference Committees: An Analysis*. Congressional Research Service report RL34611, August 2008, p. 10.

government votes that it needs to prevail in the Senate as well. In Washington, majority party and committee leaders try to ensure that the bills they bring to the chamber will satisfy their fellow party members, but they must rely primarily on persuasion, compromises, and concessions to prevent defections on rollcall votes. Increasingly in recent years, the majority party's leaders in the US House have relied heavily, and sometimes only, on their own party members to form voting majorities, as each party has become more homogenous and as the two parties have become more polarised. In the US Senate, on the other hand, the ever-present threat of a filibuster gives a bill's majority party supporters a powerful incentive to ensure that it is acceptable to at least some minority party senators.

Therefore, with regard to the third factor, procedural comparability, there is an important difference between the US House of Representatives and the US Senate as well as between the US Congress and the Australian Parliament. In Canberra, the legislative processes in the two houses are quite similar. In both houses, the critical votes on second and third reading, as well as intervening votes on amendments and other questions, all are decided by simple majority votes, with almost all members and senators participating in divisions when they are called. So too in Washington, where the votes in the House of Representatives and the Senate on final passage of legislation (the effective equivalent of a vote on third reading of a bill in Canberra) also are decided by simple majorities.[19]

It has become commonplace in Washington, however, to explain that it will take 60 votes—a three-fifths majority—for the Senate to pass a certain bill. Such a statement really is a shorthand way of saying that, although the Senate can pass the bill by a simple majority—51 or more—it will require 60 votes to allow the Senate to reach the point at which it can vote to pass the bill (or not). One reason is the prospect of filibusters, discussed above, which can continue indefinitely unless terminated by a three-fifths vote in favour of a motion to impose cloture.[20] A second reason is a series

[19] In Washington, however, absences are much more common. Representatives and senators are most likely to be present for the most important votes, but perfect attendance never can be taken for granted and often cannot be achieved. Especially on controversial matters, the majority party leaders in both houses do their best to schedule votes for days of the week when the fewest possible number of their members are away from Washington. However, there have been occasions on which party leaders have encouraged some of their fellow party members to miss a vote, the leaders preferring those party colleagues to be absent rather than having them present and voting against the prevailing party position.

[20] During the past several decades, there has been a striking increase in the number of Senate filibusters and filibuster threats, as well as in the number of cloture motions proposed to end them. During the 1960s, for instance, filibusters were restricted primarily to a handful of regionally and politically sensitive 'civil rights' bills. Today, on the other hand, almost any major bill will inspire some talk of a filibuster, even if it does not materialise. Although there may be disagreement about whether a particular debate is, or is in the process of becoming, a filibuster—the number of cloture motions on which senators vote is a very imperfect measure of the number of filibusters—there can be no disagreement that filibusters are a more pervasive aspect of US Senate life than ever before.

of requirements and prohibitions that affect budget-related legislation and that the Senate can waive in individual circumstances, but only by a three-fifths vote.[21] These three-fifths waiver requirements were imposed to make it more difficult for the Senate to impose constraints on itself in principle but then to circumvent them easily whenever tempted to do so.

The effect of these three-fifths voting requirements has been to create a different procedural dynamic in the US Senate than prevails in the House of Representatives. In the House, it is necessary to construct only a minimal winning coalition—one more than half of the representatives present and voting. And if this majority can be found solely within the ranks of the majority party, there is no need and not much incentive (and, today, not much likelihood of success) for efforts to attract more than a smattering of votes from minority party members. In the Senate, by contrast, there is a powerful incentive to attract some minority party support for legislation because the majority party in the contemporary Congress rarely can supply 60 votes of its own. If a bill runs afoul of the congressional budget process, those 60 votes are needed to overcome the procedural barrier it imposes. But even absent such a problem, the same 60 votes are required more and more often to break filibusters or to prevent them from beginning in the first place. Consequently, the incentives for inter-party compromises on legislation are much stronger in the US Senate than in the House of Representatives.

With regard to the fifth factor, legislative autonomy, there are three obvious and important differences between the situations in Canberra and Washington.

First, in Canberra, almost all legislation originates with the executive government, and the government controls the legislative agenda in both the House of Representatives and the Senate. The standing orders of both houses are designed for this purpose. A government bill may be amended, even in important respects, in one or both chambers, but it remains the government's bill. The essential question before the Parliament is how that government bill might be modified during the course of the legislative process. To be sure, there are private members' and private senators' bills, but they are relatively few in number and even fewer are enacted.

In Washington, by contrast, all bills are private members' and senators' bills, although they are not called that because there are no government bills as such. The president and his Cabinet secretaries (ministers) may send draft bills to Congress, but they must be taken up and introduced by representatives or senators before they can be considered. Even then, it is the rare bill of any importance, whether it has its origins in

[21] These all are three-fifths votes of all serving senators—senators 'duly chosen and sworn'—not just the senators present and voting. So the effect of a senator being absent when such a vote takes place is the same as if the senator were present and voting 'No'.

the executive branch or in the imagination of a member of Congress, that is not substantially revised or even radically rewritten before it even reaches either chamber for consideration. US congressional committees originate much (perhaps most) of the most important legislation, either by writing new bills or by approving amendments that replace the entire texts of bills referred to them. And while the House of Representatives is considering a bill on a subject of importance, the Senate committee with responsibility for the same subject may be drafting its own bill that addresses the same policy issue in an entirely different way. As we shall see, this has consequences for how the two houses later try to reach their legislative agreements.

Second, in Canberra, the Senate does not request specific amendments to the basic appropriation bills that fund 'the ordinary annual services of the Government', even though it is constitutionally free to do so. There probably are at least two connected reasons for this restraint. First, these bills reflect the government's priorities for the coming financial year, and so they go to the very heart of the programs and priorities of the party that the Australian people elected. Senate requests for amendments to these bills might be thought to challenge the government's ability to implement its campaign commitments. And second, for these reasons, any contemporary government is likely to reject any such requests for amendments with indignation and with accusations that the Senate is trying to delay or block 'supply', a partisan stratagem widely discredited by the 1975 imbroglio in which the non-government majority in the Senate declined to act on essential funding legislation and convinced the Governor-General to dismiss the Labor Party government of Prime Minister Whitlam, even though it still enjoyed majority support in the House of Representatives.

In Washington, on the other hand, the presentation in February of the president's spending plans for the next fiscal year that will begin in October only initiates a process of intense and tortuous negotiation that usually is not completed these days until well after the putative deadline of 1 October. When President Obama took office in January 2009, one of his first legislative priorities, amidst the greatest economic crisis in 70 years, had to be to negotiate with Congress for legislation that would complete funding for the financial year that already had been in progress for four months. Such a situation would be just as inconceivable in Canberra as would the possibility of basic annual budgetary legislation sailing through the US Congress, unchallenged and unchanged.

And third, in Washington, the House of Representatives and the Senate see themselves as competitors for influence and pre-eminence. Since the very early decades of the American republic, there have been periods in which the House has been more visible and influential than the Senate, and other periods in which the reverse has been true. I have heard it said, presumably in jest of course, that large

majorities in both houses would prefer a unicameral Congress, but they could never agree on which house to abolish. Certainly, neither house has thought it fitting to defer to the other for constitutional reasons, and each tends to react swiftly to any perceived intrusion by the other into its constitutional powers and prerogatives. The Senate has never doubted its legitimacy as a legislative body, even before senators began to be directly elected in 1914. Representatives leave the House to run for the Senate, and senators make much more credible presidential candidates than do representatives. If anything, senators consider the Senate to be the more prestigious and important of the two halves of Congress. What else would we expect from an institution that has not blushed to call itself 'the world's greatest deliberative body'?

One of the most influential of the early academic studies of the modern US Senate was Donald R. Matthews' *U.S. Senators and Their World.*[22] In his best known chapter, on 'The Folkways of the Senate', Matthews wrote that 'Senators are expected to believe that they belong to the greatest legislative and deliberative body in the world. They are expected to be a bit suspicious of the President and the bureaucrats and just a little disdainful of the House. They are expected to revere the Senate's personnel, organization, and folkways and to champion them to the outside world'.[23] Such 'institutional patriotism' as Matthews called it, clearly has diminished since his book first appeared, but still the best way to bring senators together across party lines is to disparage the Senate's powers or challenge its prerogatives.

I don't think it can be said that the same situation prevails in Canberra. Historically, both major parties and the governments they have formed have been sceptical or critical of the Senate when it has hampered or blocked their legislation. For years the Labor Party called for the abolition of the Senate; one of its recent prime ministers contemptuously dismissed senators as 'unrepresentative swill'. Recent Coalition governments also have been less than enthusiastic about having to confront important Senate amendments to their key legislation (until they lost control of government, of course, after which they discovered new-found wisdom and value in an assertive Senate). Ever since Federation, some Australians have viewed the Senate as an awkward encumbrance on what always was intended to be a responsible parliamentary government emulating the British model. Indeed, this attitude can be found expressed in writing on the subject by political scientists. L.F. Crisp, who undoubtedly was one of the most influential writers of the late 20th century on Australian government, wrote as recently as 1983 that: [24]

22 Donald R. Matthews, *U.S. Senators and Their World*. New York, Vintage Books, 1960.

23 ibid. pp. 101–2.

24 Quoted in Stanley Bach, 'Crisp, the Senate, and the Constitution', *Australian Journal of Politics and History*, vol. 54, no. 4, December 2008, pp. 548–9.

> A Senate for whose election the Constitution and the laws combine to provide conditions likely to produce at least party stalemate in that Chamber, and even a party majority hostile to, and empowered to frustrate, the Government of the day, is in the 1970s not simply an anomaly but, ultimately, a threat to the essential status of responsible government in the eyes of citizens.

From this point of view, the Senate is very much the second—the secondary—house of Parliament, and it should behave accordingly. The government is formed primarily in the House of Representatives and is responsible only to the House of Representatives. While Crisp's conclusion is debatable, what cannot be debated is that individual ambition usually takes Australian politicians from the Senate to the House of Representatives, which is the reverse of the pattern in the United States. As an institution, the Australian Senate does not have the self-esteem and sense of self-importance that characterises the US Senate. All US senators would agree that the Senate is at least as important, powerful and valuable as the House of Representatives, and many probably would argue that the Senate really is the pre-eminent legislative body in Washington. It is hard to imagine such contentions being heard from either of the major parties in Canberra.[25]

In short, when the Australian House of Representatives and Senate try to reach legislative agreements, they do not approach the task with the shared understanding that each has an equal right to prevail. The reason lies not in the Senate's constitutional weakness but in the opinion of governments and most members of the House of Representatives that it is the House—which, after all, is the agent of the executive government—that has the greater legislative legitimacy and, therefore, the stronger claim to prevail.

Paths to legislative agreement

These factors provide a context that helps to explain how the Australian Parliament and the US Congress go about trying to reach bicameral legislative agreements. As noted earlier, the need to do so arises because, under both national constitutions, both the House of Representatives and the Senate must pass a bill and agree completely on its text before it is eligible to become law.

These requirements mean that a bill that originates in one house must also be passed by the other: i.e., the Senate must pass a bill that the House of Representatives already has passed and then sent to the Senate, or conversely. As also noted earlier, the great majority of Australian bills originate in the House of Representatives, and this has been the tendency in Washington as well, although to a lesser extent. If either House

[25] Not surprisingly, minor parties that have no realistic prospect of being in government are more likely to be champions of Senate power and activism, at least so long as they hold seats there.

of Representatives passes a bill and transmits it to the Senate, and the Senate then passes it without change, bicameral agreement has been reached and the bill is ready to become law.[26] If, however, the Senate amends the bill from the House of Representatives before approving it—by passing it (in the US) or by agreeing that the bill be read a third time (in Australia)—the two houses then must agree on how to dispose of the Senate's amendments.[27]

Simply put, there are two ways in which the two houses of a bicameral assembly can act on amendments to a bill in order to reach legislative agreement: the two houses can act on the amendments one at a time or they can act on them all at once. In both Canberra and Washington, the standing orders of both houses, as well as other enforceable procedures that have not been formally incorporated into their adopted rules, include what sometimes are very complicated procedures by which they can act on the amendments individually, considering and disposing of one amendment and then taking similar action on each of the other amendments in turn. In both assemblies, this is the default option: they follow this *individual approach* as they try to reach a bicameral agreement unless they act affirmatively to do it differently. And both the Australian Parliament and the US Congress can do it differently, through a *collective approach* that involves the use of a conference in Canberra or a conference committee in Washington.[28]

The difference between the individual and collective approaches can be more formal than real. The individual approach suggests that the two houses treat each amendment in isolation from the others, disposing of it on its own merits and without regard to how they already have disposed of the other amendments or how they expect to dispose of them. The collective approach suggests, on the other hand, that the two houses act on each amendment in the context of all the others, so that how they dispose of one amendment very well may be affected by the agreements they have made or expect to make regarding the others. In practice, however, the difference between the two approaches is not nearly so clear. Just because the individual approach calls for the two houses to dispose of one amendment before taking up the next one, this does not mean that the members of both houses have not already

[26] Unless, that is, the US president vetoes the bill and Congress fails to override the veto by a two-thirds vote in each house, or in the very unlikely event that the Governor-General in Australia exercises his or her constitutional authority under s.58 to withhold royal assent.

[27] Most of the discussion that follows regarding Australia focuses on amendments and not on requests for amendments, but in most respects, the procedures governing disposition of requests are the same as those governing disposition of amendments.

[28] The best known comparative and theoretical treatment of the subject is George Tsebelis and Jeannette Money, *Bicameralism*. Cambridge, Cambridge University Press, 1997. The standing Bundestag–Bundesrat mediation committee as well as the conciliation committees used by the European Union also are discussed by Thomas Konig and Bjorn Horl, 'Bicameral conflict resolution: an empirical analysis of conciliation committee bargains in the European Union'. Paper presented at the 2003 annual meeting of the American Political Science Association.

discussed all of them, formally or informally. Indeed, they may very well have reached understandings—understandings that members are loathe to violate even if they are not enforceable under the rules of either house—as to what action they intend to take with regard to each of the amendments.[29]

Such *behaviours* reduce the practical differences between the two individual and collective approaches to reaching legislative agreements. In addition, and as I shall discuss later on, there have been recent *procedural* developments in Washington that further erode whatever practical differences remain in Washington between the two approaches. The next section of this essay discusses the nature and advantages of conference committees. The section that follows explores why conferences are not used in Canberra, even though the standing orders of both houses allow for them. Then, in the section after that, I muddy the waters by discussing recent procedural developments in the US Congress that have had the effect of reducing the clarity of the distinction between the two approaches in the US legislative process.

Conference committees and conferences

The most striking and important difference in how the US Congress and the Australian Parliament reach bicameral agreements emerges from an inquiry into how they do, or do not, use the collective approach to resolving their legislative differences. Therefore, the remainder of this essay focuses primarily on how this approach is, or is not, used to complete the legislative process in Canberra and Washington.[30]

In Washington, the process begins when one house approves amendments to a bill that the other house already had passed. For ease of explanation, assume that the House of Representatives passes a bill and the Senate then amends that bill before passing it as well. The Senate next returns the bill to the House, together with the amendments that it has approved, and asks the House of Representatives to concur in those amendments. If the House does so, the two houses have reached agreement and

[29] The same US Representatives and senators who might otherwise be appointed to a conference committee on a bill may meet informally, much as they would as members of a conference committee, and reach an agreement on all aspects of the bill. This agreement then is presented to the House of Representatives, for example, as a House amendment to the Senate's amendment to the underlying House bill. If the House accepts this new amendment, it then asks the Senate to do likewise. If the Senate concurs, the legislative process is complete. In such a case, the final version of the bill emerges from negotiations similar to those that occur in a conference committee, but without the formalities that conference committees and their reports involve. On the other hand, an agreement reached through this kind of informal alternative to conference is not protected, as is a conference report, from amendments when the House and Senate consider it.

[30] For a discussion of conference committees elsewhere, see George Tsebelis and Jeanette Money, op. cit., ch. 8. The same authors point out elsewhere that reliance on the individual approach to resolution is the norm in international practice. Jeannette Money and George Tsebelis, 'Cicero's puzzle: upper house power in comparative perspective', *International Political Science Review*, vol. 13, no. 1, pp. 25–43.

the legislative process is complete. If, however, the House does not do so—if the House simply disagrees to the Senate's amendments or if it approves its own amendments to the Senate amendments—then the bill and amendments are returned to the Senate, which is expected to take further action of its own. This process of exchanging amendments and positions can continue through several more rounds and become very complicated.

At any stage during this process, however, either house of the US Congress has the option of proposing that the two houses appoint members to a conference committee. This is a temporary joint committee established solely for the purpose of considering all the Senate's amendments to the bill in question and presenting a single report to both houses that recommends how to dispose of each and all of them. The House of Representatives or the Senate then debates and votes on this report, either accepting it or rejecting it in its entirety (or, rarely, returning it to the conference committee for revision).[31] If one house agrees to the conference report, it is sent to the other house which also debates it and may either accept or reject it.[32]

A conference report in Washington is a kind of bicameral treaty. The negotiators from the House of Representatives and the Senate propose in their report a package settlement of all the differences in the versions of a bill that the two houses originally had passed. It is virtually certain that, during the conference negotiations, there are trade-offs in which, for example, the Senate's negotiators may agree not to press for agreement to one of its amendments in exchange for an agreement by the House's negotiators to accept a change that the Senate also proposed somewhere else in the bill. The conference committee's report incorporates all the formal, legislative agreements that the negotiators (the 'conferees') reached with respect to all the

[31] The second house to act on a conference report may not return, or 'recommit', it to the conference committee for revision, because the vote of the first house to agree to the report has the effect of dissolving the committee. Thus, there no longer is a conference committee to which the second house might otherwise recommit the report.

[32] In the French case, which has been well-analysed in English by Tsebelis and Money, the process in broad brushstrokes is similar to that in Congress, in that a bill passed by one house then is sent to the other which in turn may propose amendments for the first house to consider. After both the National Assembly and the Senate have acted twice on a bill (or sooner if the bill is declared to be urgent)—the process of sending the bill back and forth is known in France as the *navette* or shuttle—the government may call for creation of a conference committee comprising equal numbers of members from the two houses. If the conference committee proposes a compromise that both houses accept, the legislative process is complete. However, if the conference committee fails to agree or if its report is rejected, the government can ask the National Assembly, to which it is responsible, to pass the bill in whatever final form the government proposes. In other words, the government and its parliamentary partner, the National Assembly, have the final word if they want it. See George Tsebelis and Jeanette Money, 'Bicameral negotiations: the navette system in France', *British Journal of Political Science*, vol. 25, 1995, pp. 101–29; and Jeanette Money and George Tsebelis, 'The political power of the French Senate: micromechanisms of bicameral negotiations', *The Journal of Legislative Studies*, vol. 1, 1995, pp. 192–217.

Senate's amendments to the House's bill.[33] The conferees are likely to agree to accept some Senate amendments, to reject others, and to agree to alternatives to still others.

When their treaty then reaches the floor of the House and Senate, it may not be picked apart by amendments. If a majority of the members in either house simply cannot stomach one of the agreements that the conference committee reached, the only recourse those members may have is to reject the report in its entirety.[34] They then may propose that a new conference committee be created to negotiate a different treaty (or, as noted above, they may be able to return it to the original conference committee for the same purpose). Otherwise, the bill dies.[35]

There is no reference in the US Constitution to conference committees, but they are covered by the standing rules of both houses of Congress. These rules govern the creation of conference committees, the appointment of their members, their authority and meetings, the permissible content of their reports, and the procedures by which each house debates and votes on their reports. There is one subject, however, on which the rules of procedure of the House and Senate are silent: how the conferees are to conduct their meetings and reach their agreements.[36] The reason is that conference committees are negotiating forums, so both houses leave it to the conferees to decide for themselves how best to proceed, recognising that the most effective way to reach agreement is not going to be the same for all bills.

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33 The report itself is accompanied by an explanatory document which details what the conferees mean by some of the new legislative provisions they propose, and how they expect executive branch officials to interpret and implement them. These 'statements of managers' have no legal force, but executive branch officials ignore them at their political peril.

34 See note 31 above.

35 US conference committees have been the subject of several books, including Ada C. McCown, *The Congressional Conference Committee*. New York, AMS Press, 1967 (reprint of original 1927 Columbia University Press edition); Lawrence D. Longley and Walter J. Oleszek, *Bicameral Politics*. New Haven CT, Yale University Press, 1989; Gilbert Y. Steiner, *The Congressional Conference Committee*. Urbana, IL, University of Illinois Press, 1951; and David J. Vogler. *The Third House*. Evanston, IL, Northwestern University Press, 1971. They also are discussed in various official House and Senate publications, the most accessible of which are Wm. Holmes Brown and Charles W. Johnson, *House Practice*. Washington, US Government Printing Office, 2003 (available online at www.gpoaccess.gov/hpractice/index.html); and Floyd M. Riddick and Alan S. Frumin, *Riddick's Senate Procedure*. Washington, US Government Printing Office, 1992 (available online at www.gpoaccess.gov/riddick/index.html). Even more digestible are the materials available on the website of the House of Representatives' Committee on Rules at www.rules.house.gov/leg_process.htm. Regrettably, the Congressional Research Service of the US Library of Congress does not make its relevant reports available to the general public. However, the most comprehensive of these reports—*Resolving Legislative Differences in Congress: Conference Committees and Amendments Between the Houses*, by Elizabeth Rybicki (Report 98–696; November 26, 2008)—can be found at opencrs.com/document/98–696.

36 One exception is the general requirement imposed by both the House of Representatives and the Senate that meetings of conference committees be open to the public. However, there is less here than meets the eye. It is quite possible, and not at all unusual, for conferees to meet privately—and, therefore, unofficially—at great length, and then have one brief formal—and public—meeting to announce the agreement that they have reached.

Enactment of most national laws in the US has not required the appointment of conference committees. During the eight years from 1999 through 2006, more than 1900 public laws were enacted in Washington.[37] Only about seven per cent of them went through a conference committee. Almost 80 per cent of the total were passed initially by both the House and the Senate with exactly the same wording, so there was no bicameral agreement that had to be reached. In about twelve per cent of the cases, the first house that passed bills simply accepted the amendments to those bills that it received from the other house. The residue—1.5 per cent—were readied for enactment by use of the individual approach to reaching agreement that I defined above.[38]

The usual practice of the US Congress has been to create a conference committee only when bicameral agreement could not be reached quickly and easily. More often than not, a conference committee has not been necessary. But the final versions of most of the most important and contentious laws that the modern Congress has passed were written in conference committees.[39]

Some of the advantages of conference committees are obvious. First, they concentrate responsibility in the hands of a small proportion of all representatives and senators, and it always is easier for small groups to negotiate successfully than the 435 members who comprise the House or even the 100 members of the Senate. Second, conferees can negotiate quietly and privately, notwithstanding the requirement that their formal meetings be open to the public. Third, conferees can conduct their business, whether in public or in private, without being constrained by all the formal procedures and rules of debate that govern the conduct of plenary sessions of the House and Senate.[40] Fourth, conferees can meet while the other members of both houses are meeting at the same time to conduct other business.

Finally, the use of conference committees tends to encourage enactment of bills by presenting both houses with what typically are described by their proponents as the best final versions that could be negotiated of bills that majorities in the House and Senate already have passed. Members are warned, and often with good reason, that if

[37] This does not include the handful of 'private laws' that were enacted to benefit named individuals or entities. Private bills are rarely, if ever, considered by conference committees.

[38] Based on data made available by the Congressional Research Service.

[39] There have been exceptions, to be sure, especially when there has been intense time pressure to reach agreement, because of the time it can take to appoint and convene a conference committee, prepare its written report, allow members of both houses some minimal time to study it, and then for each house to debate and vote on the conference report. See also the discussion of this subject later in this essay.

[40] Indeed, there is no practical alternative, because the formal rules and procedures of one house differ in some fundamental ways from those of the other.

they defeat the conference report on a bill, the bill itself is very likely to die.[41] Faced with the choice between accepting the recommendations of the conferees, however imperfect those recommendations may be, and leaving the statutory status quo unchanged, the members who supported the bill when they considered it initially are likely to prefer the conference report. So at first blush and for all these reasons, it would seem surprising that the use of this collective approach to reaching bicameral legislative agreements is essentially unknown in Canberra.

It is true that the standing orders of both Australian houses provide for conferences, and govern, in very similar terms, how conferences are to be requested, arranged, and convened.[42] However, conferences are intended to be a last resort, and primarily an alternative to laying a bill aside (that is, allowing it to die for lack of bicameral agreement).[43] The standing orders of the House of Representatives mention the possibility of a conference as an option only at the last stages of the process of trying to reach bicameral agreement regarding a House bill that the Senate has amended. Similarly, the standing orders of the Senate raise the possibility of a conference on a Senate bill that the House has amended only after the individual approach to reaching agreement has not worked.[44] The Senate may request a conference after the House has amended a Senate bill, but only 'when agreement cannot be achieved, by an exchange of messages, with respect to amendments to Senate bills'.[45]

In Washington, by contrast, the collective approach to reaching agreement (that is, recourse to a conference committee) has not been an alternative that arises when the individual approach has failed. Instead, for the US Congress, the collective approach has been essentially an alternative to the exchange of positions and proposals between the two houses.

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41 This is a political statement, not a procedural one. It has been said that conferees present the House and Senate with a 'take it or leave it' proposition, but that is not true. First, a conference report may be recommitted by the first house to consider it. And second, even if one house or the other defeats a conference report, that brings the bill back to the procedural stage it was at before being sent to conference. The House and Senate can agree to create a new conference committee or they can turn instead to an exchange of messages and amendments. That said, in practice the defeat of a conference report can mean the death of the bill, especially for the practical reason that at the end of a two-year Congress, there simply may not be enough time to continue negotiations over the bill.

42 House Standing Orders 373–84 and Senate Standing Orders 156–62. This discussion of conferences incorporates with revision part of my discussion of the subject in *Platypus and Parliament*, op. cit.

43 House Standing Order 162 and Senate Standing Order 127.

44 The effect of the two houses' standing orders (House Standing Order 162 and Senate Standing Order 127) is that only the Senate may request a conference on a Senate bill that the House has amended and, conversely, only the House may request a conference on a House bill that the Senate has amended. Since most Australian legislation, and certainly almost all of the most important legislation, originates in the House, the decision to request a conference rests in practice with the House, not the Senate.

45 Similarly, '[c]onferences between the two houses provide a means of seeking agreement on a bill or other matter when the procedure of exchanging messages fails or is otherwise inadequate to promote a full understanding and agreement on the issues involved'. Harry Evans (ed.), *Odgers' Australian Senate Practice*, 12th edn. Canberra, Department of the Senate, 2008, p. 541.

In part because conferences in Canberra are essentially a last resort, when the difficulty of reaching bicameral agreement on a bill already has been demonstrated, and in part for the other reasons discussed below, conferences are not a regular and familiar element of the procedural repertoire of the Australian Parliament. In fact, there have been only two formal conferences since Federation.[46]

In 1930, the House requested a conference after the Senate had insisted on its amendments to the Commonwealth Conciliation and Arbitration Bill 1930.[47] Each house appointed five managers who agreed to propose that the House should agree to some of the Senate amendments, that it should not agree to others, and that the House should agree to still other Senate amendments with modifications. Both houses agreed to these recommendations. In the following year, a conference on the Northern Territory (Administration) Bill 1931 was arranged and held in the same way. But during the almost 80 years that followed, no other formal conferences have been held.[48] The House of Representatives' own guide to its procedures explains that, 'in practice the conference procedure is not used, and if it is recognised that further negotiation by message would be pointless it is usual for the House to order the bill to be 'laid aside'—that is, abandoned and removed from the Notice Paper'.[49]

The absence of conferences in Canberra

It is typically harder to account for the absence of something than for its presence—harder to explain why there are no conferences in Canberra than why there are conferences in Washington. That said, there would seem to be at least six reasons—reasons that reflect the factors I discussed in the first section of this analysis—why the collective approach to reaching legislative agreements has been used regularly in Washington but essentially never in Canberra.[50]

When a conference committee meets to negotiate in Washington, the agreements it reaches must be supported by a majority of the representatives appointed to the committee as well as by a majority of the committee's Senate members. It never

46 I. C. Harris (ed.), *House of Representatives Practice*, 5th edn. Canberra, Department of the House of Representatives, 2005, pp. 452–3.

47 There was another instance in which the Senate requested a conference on a Senate bill, the Social Services Consolidation Bill 1950. The House had amended the bill and insisted on its amendment, and the Senate had insisted on its disagreement to the amendment. However, the House did not agree to the conference.

48 On an informal conference as well as a 1903 proposal for a conference comprising all members of both houses, see also Evans, op. cit., pp. 541–2.

49 House of Representatives, Parliament of Australia, *Guide to Procedures*, 3rd edn. Canberra, Department of the House of Representatives, 2008, p. 84.

50 To reiterate, I refer here to the two different formal, procedural approaches to resolving bicameral disagreements. That the individual approach always is used in Canberra does not mean that the two houses always, or even often, consider each amendment in isolation from the others. It does mean that the Australian Parliament does not create formal negotiating forums to propose how to reconcile their legislative differences.

makes sense to take a vote among all the conference committee members; instead, votes are taken within the House delegation and within the Senate delegation. For this reason, it has never mattered how many representatives and how many senators are appointed to the same conference committee. Three Senate members have the same voting power as 33 (or any other number of) representatives; unless at least two of the three senators agree with a majority of the 33 representatives, there is no agreement.

As this voting rule suggests, a conference committee, in principle at least, is a forum in which representatives of both parties negotiate with senators of both parties. The delegation from each house is supposed to be defending the version of the bill that its house previously had passed; the negotiation is supposed to be between the two houses, not between the two parties. Not surprisingly, the reality has been somewhat different and, as I shall discuss shortly, the increased partisan polarisation in Congress during recent years has affected how often conference committees are appointed and how they work.

Still, the principle remains that the two houses of the U.S. Congress are expected to be negotiating with each other in conference committees. When conferees reached an agreement and the two houses then debated the merits of the conferees' report, the members (especially the leaders) of each conference delegation traditionally were anxious to argue that the conference agreement resembled their house's original version of the bill at issue more closely than it resembled the version brought to the conference committee by the other house. Political scientists have attempted to answer the question, 'Who wins in conference more often, the House of Representatives or the Senate?'[51] There are good reasons to think that this question has no answer, but the fact that the question is asked is evidence that conference committees traditionally have been understood to be a setting for a competition between the two houses.[52] Will the final version of a bill reflect the collective

[51] For example, John Ferejohn, 'Who wins in conference?', *Journal of Politics*, vol. 37, 1975, pp. 1033–46; John Carter and John Baker, 'Winning in House–Senate conferences: the 'revised theory' and the problem of countertrending conferences'. Paper presented at the 1986 Annual Meeting of the Southwest Political Science Association; Lawrence Longley and Walter Oleszek, 'The three contexts of congressional conference committee politics: bicameral politics overviewed'. Paper presented at the 1983 Annual Meeting of the American Political Science Association; Gerald Strom and Barry Rundquist, 'A revised theory of winning in House–Senate conferences', *American Political Science Review*, vol. 71, 1977, pp. 448–53; and David Vogler, 'Patterns of one-house dominance in congressional conference committees', *Midwest Journal of Political Science*, vol. 14, 1970, pp. 303–20. The outcomes of conference committee negotiations in state legislatures are the subject of Donald Gross, 'House–Senate conference committees: a comparative state perspective', *American Journal of Political Science*, vol. 24, 1980, pp. 769–78.

[52] The reason why this question has no answer is that it depends on what each house actually hopes to win in conference. Elementary strategic calculations suggest the likelihood that one or both houses may pass a version of a bill that takes into account the version that the other house already has passed or is expected to pass. The Senate, for example, has been known to include provisions in bills that it fully expects to relinquish during its negotiations in conference with the House. Writing of Senate floor consideration in 1987 of a major trade bill, Stephen Van Beek found that '[m]ost of

preferences of the Senate more closely than those of the House, or will the House be recognised as having prevailed in conference over the Senate?[53]

The nature of US congressional conference committees as forums for competition between the two houses reflect three of the five factors I discussed at the outset: first, the essentially comparable constitutional powers over legislation that the two houses enjoy; second, the autonomy of each house from external direction as it makes its legislative decisions; and third, the strong sense in each house that its legislative preferences should carry at least as much weight as those of the other.

As I argued above, the situations in Canberra and Washington are quite similar with respect to the first of these factors. Under each national constitution, the legislative powers of the two houses are much the same. The House of Representatives and the Senate in each capital have the same powers over legislation except for certain money bills, and whereas the US Senate can amend these bills while the Australian Senate cannot, a money bill cannot become law in Australia unless the House of Representatives satisfies all the Senate's requests for amendments or the Senate decides not to press its requests.[54]

With regard to the other two factors, however, the situation in Canberra is quite different than in Washington. While the Australian House and Senate each could appoint some of its members to meet and negotiate with counterparts from the other house, all concerned always would understand that the House of Representatives would be acting as a reliable agent of the government. If the two houses were to agree to convene a conference, it would ostensibly be a setting in which the Senate would negotiate with the House, but in practice, the Senate would be negotiating with the government. The members participating in a conference could be expected only to reach agreements with the Senate that the government already had signalled its willingness to accept.

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the 160 amendments the Senate considered were adopted without a great deal of debate, as Bentsen [the Senate committee chair] allowed his colleagues to include add-ons that only increased his leverage in conference'. In this way, Bentsen 'loaded up the bill with proposals to bargain them away' in conference. Stephen Van Beek, 'Post-passage politics: the changing nature of bicameralism'. Paper presented at the 1992 Annual Meeting of the American Political Science Association, pp. 11, 14. The fact that the Senate 'gives away' such bargaining chips during conference negotiations may be misinterpreted as a victory for the House and a defeat for the Senate when, in fact, the Senate merely is trading away provisions it does not particularly want to retain in return for concessions from the House on provisions that really do matter to the Senate.

53 The recent growth, in both size and number, of voluminous and multi-focus omnibus bills also challenges efforts to arrive at a single answer to the question of 'who won in conference?'. At best one can ask 'who won' with respect to one or more particular dimensions of such a bill.

54 Except for the very unlikely possibility that a money bill might be considered in a joint meeting of the members of both houses following a double dissolution.

In Washington, even when the president's party has majorities in both houses, the versions of any major bill that each house passes is likely to differ in some respects from the president's preferences. Members of a conference committee who also are members of the president's political party are very likely to consult with him and his subordinates, but they are not there simply to do the president's bidding. In Canberra, on the other hand, once any necessary intra-party negotiations in the party room have taken place, the government and its majority in the House of Representatives almost always speak with one voice, and that is likely to be the voice of the prime minister or his agent.[55]

So one reason why the collective approach fits the legislative process in Washington better than it does in Canberra is that when there are legislative disagreements to be resolved in Canberra, the actual parties to negotiations usually are representatives of the government, on the one hand, and representatives of the non-government majority in the Senate, on the other. Negotiations in a conference between members and senators in Canberra would, to a large degree, mask the part played by the government and exaggerate the autonomous part played by the participating members. In Washington, by contrast, while the president may be an interested observer or even a de facto participant in conference negotiations, the House and Senate members of a conference committee are autonomous actors who have interests and preferences of their own and who are willing to press for their satisfaction.

A second reason is closely related to the first. The regular use of conferences in Canberra would require the House of Representatives or the government (or both) to accept the Senate as an equal partner in writing new legislation, and that is not likely to happen. Notwithstanding the very similar legislative powers that the two houses enjoy under Australia's Constitution, the opinion of L.F. Crisp, quoted above, that a Senate with a non-government majority is 'a threat to the essential status of responsible government' may still be widely held among Australian politicians, and especially among politicians of the party that happens to be in government at any given time. A government is elected with a mandate to enact its legislative program (or so the argument goes) and, for this purpose, it can and should depend on a reliable majority in the House of Representatives. If and when a non-government majority attempts to block or even demand major changes in government legislation, it thereby challenges the essential logic of responsible government by which the people elect the House of Representatives, which chooses the government, which decides on its legislative program, which the Parliament enacts, and on the basis of which the people

[55] That is, the appropriate minister or the government's leader in the House of Representatives or the Senate.

decide whether to re-elect the same House majority and government at the next election.

If this logic is taken as a starting point, then the Australian Senate, especially when it has a non-government majority, is not supposed to play a part equal to that of the House in deciding on the content of new laws, and the government certainly should not be expected to negotiate with the Senate's non-government majority as if it had equal constitutional claims to legislative influence or equal political claims to popular support for its legislative preferences. In short, the government, acting through the House, should prevail in the legislative process as a matter of constitutional right. Needless to say, the situation is very different in Washington, where the US Senate has absolutely no doubt that it is an equal partner with the House in writing law and, indeed, to some senators, it is unquestionably the senior partner.

The flip side of this coin, so to speak, reveals a third and distinguishable reason why the US Congress utilises conference committees and the Australian Parliament does not. Not only do the Australian Government and its majority in the House of Representatives have no doubt about their right and mandate to enact their legislative program, the Senate does not always press its own claim to equal partnership in the legislative process. If the Senate were more assertive, it could compel the House and the government to treat with it as a co-equal half of the legislative branch, however reluctant and unhappy they might be to do so. As we shall see, there is evidence suggesting that the Senate often has been willing to give way when the House objects to its legislative decisions. If so, why should the House agree to establish legislative conferences that, almost by definition, give the Senate equal standing when the Senate has not consistently pressed its own claim to be the constitutional equal of the House?

In short, conferences or conference committees make eminently good sense as a negotiating forum between equals. So they are appropriate for the US Congress, in which the Senate has no doubt that it is the legislative equal of the House and, in the view of many, the seat of broader perspectives and sounder judgements. On the other hand, conferences are inappropriate for the Australian Parliament so long as the House of Representatives asserts its legislative primacy and the Senate does not consistently challenge this assertion.

Another pair of reasons for the differences between the Australian Parliament and the US Congress in their use of the collective approach to reaching legislative agreements is related to their internal organisation and the preliminary stages of their legislative processes. Simply put, these reasons are reflected in the fact that the standing orders of both houses in Canberra provide for appointing *conferences* while the standing rules of both houses in Washington provide for creating conference *committees*.

Committees are at the heart of the legislative process in both the US House of Representatives and the US Senate. As long ago as the 1880s, Woodrow Wilson, later to be better known as a US president than as a political scientist, famously wrote that 'it is not far from the truth to say that Congress in session is Congress on public exhibition, whilst Congress in its committee-rooms is Congress at work'.[56] This was an exaggeration then as it is now, but Wilson's emphasis on the importance of congressional committees was not misplaced.

Most bills introduced in the US House of Representatives are referred to a committee (or sometimes more than one committee) for it to study and then to recommend whether the House should pass each bill.[57] Almost invariably, the committee's written report on any significant bill includes one or more amendments that the committee proposes that the House make in it. Much the same situation prevails in the US Senate. In Canberra, on the other hand, while the Australian Senate is rightly proud of its committee system, the fact remains that, between 1990 and 2007, roughly 70 per cent of all bills introduced in the Senate or received from the House of Representatives were not referred to a committee.[58] Furthermore, amendments to a bill recommended by a US congressional committee receive priority consideration when the House or Senate takes up that bill in plenary session. Amendments recommended by an Australian Senate committee enjoy no such preferential status. So it may be said that, in the Senate's consideration of all the legislation it passes, committees play a valuable but not a pivotal part. And in the Australian House of Representatives, committees have little legislative role at all.

Not only do committees in Washington review most bills before the House or Senate considers them in plenary sessions, the texts of the bills that the House or Senate passes frequently originate in the committees of the US Congress. House and Senate committees routinely conduct public hearings to hear testimony on the merits and contents of a bill referred to one of them, and the committee then typically conducts one or more 'markup' meetings at which committee members propose, debate, and vote on amendments to the bill, amendments that the committee proposes to recommend to its parent body (that is, either the Senate or the House of Representatives). And these amendments frequently are sweeping in nature. In

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[56] Woodrow Wilson, *Congressional Government*. Cleveland and New York, The World Publishing Company, 1956, p. 69 (originally published in 1885).

[57] This requirement often is waived by unanimous consent or suspended by a two-thirds vote, but almost always for relatively minor bills that enjoy broad bipartisan support. When the committee referral requirement is bypassed for important bills, it is almost always because of the need for extreme speed in passing the bill.

[58] Stanley Bach, 'Strengthening Australia's Senate: some modest proposals for change', in *Papers on Parliament*, no. 50. March 2009, p. 87 (available online at www.aph.gov.au/Senate/pubs/pops/index.htm), drawing on John Vander Wyk and Angie Lilley, *Reference of Bills to Australian Senate Committees*, *Papers on Parliament*, no. 43, June 2005 (available at www.aph.gov.au/Senate/pubs/pops/index.htm).

Washington, every committee with legislative responsibilities regularly makes written reports on bills that the House or Senate had referred to it with recommendations for amendments that propose to change those bills beyond recognition.

Committee members are expected to be, and usually are, the legislative experts and specialists in the US Congress. No wonder, then, that when a bill is brought before the House or the Senate for its consideration, the debate is almost always initiated by members of the committee that had studied and reported on it. The chairman and the senior member of the minority party lead the debate for their respective parties, explain the bill and why it should be passed or defeated, and take the lead in proposing amendments and in reacting to amendments proposed by other members.[59] The importance that the House and Senate attach to the recommendations of their committees is reflected in the fact, mentioned above, that the first amendments that either house debates when considering a bill are any amendments that the committee which reported the bill had recommended. Almost always, the House or Senate debate on a bill focuses on what its committee has recommended, not on the bill as it was originally introduced, even if it had been suggested by the president or some other executive branch official. As an old saying goes, the president proposes, but the Congress disposes.

After each house has passed its own version of a bill and the need arises to reach agreement on how to reconcile these differing versions, it is only natural that the House and Senate should again turn to the members of its standing committees to take the lead in this process. These, after all, are the members who first studied the bill, who evaluated it and proposed amendments to it, who led the House or Senate debates on it, and who, by virtue of their expertise and specialised knowledge that often derives from having spent many years serving on the same committee, are assumed to know more about each bill than almost any other Representative or senator.

For many years, the membership of a conference committee on a bill would be drawn exclusively from the members of the House and Senate standing committees who had nurtured, shaped, and guided the bill to passage in their house. In fact, the delegation appointed by each house to a conference committee typically consisted of three members: the two most senior members of the majority party on the committee (including the chairman) and the committee's most senior minority party member. That practice has given way to larger conference committees, a trend that reflects a

[59] As a general rule, congressional party leaders have not participated very actively and substantively in legislative debates. Their concern has been more with managing and expediting the procedural flow of legislative business. When a party leader in the House of Representatives speaks on a bill or an amendment, his or her purpose usually is to stress the importance of an issue to the party and to rally his or her troops as the time for voting draws near. In the Senate, party leaders have taken on a more active legislative role in recent years, both reflecting and contributing to the increased partisan polarisation that I mentioned above and to which I shall return below.

dispersal of power that has taken place within Congress since the 1970s. Yet most conference committees continue to be dominated by members of the House and Senate committees who first had worked on the same bill in their separate committees and chambers, and who now meet together—not only as representatives of their house but as its policy experts—to reach a final agreement on the content of a bill as it approaches enactment.

To a considerable extent, therefore, (though less so than in earlier times) the use of conference committees in Washington is a natural extension of the deference that representatives and senators give to the knowledge and power that reside within their standing committees. Since it is the members of those committees who typically write the texts of the bills that the two houses debate in plenary sessions, who better to work on those bills once again and to propose final legislative agreements on them to the Senate and the House?

The situation in Canberra, of course, is quite different. Committees of the House of Representatives focus on non-legislative inquiries, or at least on inquiries that do not focus on the strengths and weaknesses—and the details—of individual bills that the government has proposed. In the Senate, and notwithstanding the much greater legislative role of Senate committees, those committees may consider only the bills that the Senate has voted to refer to them. The committees' members do not necessarily dominate the debate when one of their bills comes before the Senate, a committee's recommendations for changing the bill typically are not drafted as specific amendments, and any specific amendments a committee may have recommended to a bill do not receive priority attention when the Senate entertains amendments to the bill. Also, there is not nearly the same durability and stability in Senate committee memberships that there are in congressional committees in Washington, where representatives and senators sometimes chaired the same committees for decades until both houses began experimenting in the 1990s with term limits for committee chairmen.

Thus, it seems likely that the differences in the centrality of committees to the legislative process in Canberra and Washington are another significant reason why the collective approach to reaching legislative agreements has been relied on so much more in one capital than in the other.

There also is a fifth, procedural, reason why conferences are less common in Canberra than conference committees are in Washington: conferences in the Australian Parliament would be much less likely to enable the two houses to reach bicameral agreement on legislation.

As I discussed earlier, the report of a congressional conference committee is a non-amendable package. Most representatives and senators are inclined to accept the argument that the only alternative to approving a conference report is to witness the death of a bill that majorities in both houses already have voted to pass. And if both houses agree to a conference report, the effect is to complete the legislative process because all legislative disagreements with respect to that bill have been resolved.

In Canberra, by contrast, the report of a conference, were one to be created today, would present only a set of recommendations that are subject to further legislative action, including amendment by the House or the Senate. 'The adoption of a report of a conference does not necessarily bind the Senate to the proposals of the conference, which, with reference to amendments in a bill, come up for consideration in committee of the whole'[60]—and it is during consideration of bills in committee of the whole that senators may offer amendments to them. So there would be no compelling reason to assume that a conference on legislation in Canberra actually would lead to a settlement of legislative disagreements.

Finally, there is another, more technical, reason why the collective approach is more appropriate in Washington than it is in Canberra, and this reason too derives from two procedural consequences of the work and influence of US congressional committees.

First, when a US House or Senate committee has completed its public hearings on a bill (or several bills on the same subject) and then convenes in the first of its markup meetings, the legislative text that the committee members debate and propose to amend frequently is not the text of the bill (or any of the bills) that had been introduced and referred to it. Instead, the committee may debate and amend an entirely different text that has originated within the committee. For example, the committee chairman may direct the committee staff to write a new draft of a bill that reflects a different approach to the subject, an approach that is preferred by the chairman and the other committee members of the majority party. Then, ultimately, the committee votes to send that new draft back to the House or Senate, either as a new bill or as an amendment that proposes to replace the entire text of a bill that had been referred to the committee.[61] In either case, it is the committee's version of the bill, not the president's draft or any other bill on the subject, which is taken up for consideration in plenary session.

Second, and reflecting the sense of legislative autonomy that is well-rooted in both the US Senate and the House of Representatives, neither house feels any compulsion to wait until the other has passed a bill before beginning its own legislative work on the

[60] Evans, op. cit., p. 544.

[61] Such an amendment often is called 'an amendment in the nature of a substitute', and proposes to replace everything after the 'enacting clause' of a bill—the legally mandated phrase at the very beginning of a bill that is necessary for the bill, once enacted, to have legal force.

same subject. It is not at all unusual for legislative hearings on a subject to take place simultaneously, or close to it, in both houses. The fact that a House committee has reported a bill on some subject usually does not discourage the corresponding Senate committee from developing its own bill on that subject (or conversely). Even if the House has passed its bill and sent it to the Senate, that is no bar to the Senate committee continuing to mark up and report its own bill which may take a fundamentally different approach to the subject. Finally, if either house then faces a choice between taking up, in plenary session, a bill already passed by the other house or the version of a bill on the same subject that originated in one of its own committees, it almost invariably chooses to devote its time and attention to the text written by some of its own members in one of its own committees.[62]

Imagine, for example, that the US House of Representatives has passed a bill, H.R. 1, to reform the health care delivery system, and has sent that bill to the Senate for its consideration. But imagine also, that the appropriate Senate committee already has reported, or is about to report, its own bill, S. 2, for the same purpose as H.R. 1.[63] Under these circumstances, the Senate is most likely to consider, debate, and amend S. 2 instead of H.R. 1. But if the Senate does so, and then passes S. 2 and sends it to the House, the two houses will have failed to pass the same bill, which they must do before they can begin any formal process to reach agreement on just what its provisions should be. After completing its work on S. 2, therefore, the Senate is likely to take up H.R. 1 (the House-passed bill) and amend it by replacing every substantive word it contains with the corresponding text of S. 2 (as the Senate may have amended it). In other words, the Senate substitutes the text of its own bill—I shall refer to it here as a full-text substitute amendment—for the text of the bill it had received from the House of Representatives.

This may seem complicated and technical (and it is), but it also is important because it means that when the two houses begin to reach agreement on all the substantive differences between the House and Senate versions of their health care delivery reform bill, all of these differences are embodied in what is formally only one Senate full-text substitute amendment to the House bill. A comparison of the text of H.R. 1 (as passed by the House) and the Senate substitute amendment to it (the amended text of S. 2, which now is the Senate's amendment to H.R. 1) may reveal countless numbers of specific differences, but each of these differences is not a separate

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62 This discussion passes over numerous procedural details, including some differences between the rules and practices of the House and Senate, that would unnecessarily complicate and obscure the argument that I am making here. These details are available in, among other sources, Elizabeth Rybicki's Congressional Research Service report on *Resolving Legislative Differences in Congress: Conference Committees and Amendments Between the House* (Report 98–696, November 26, 2008), available at www.opencrs.com/ document/98-696.

63 A system such as this for numbering bills is a great convenience, but one that the Australian Parliament does not use.

amendment; they all are part of one single Senate substitute amendment. Indeed, the House and Senate versions of the bill may take such radically different approaches to the same subject that it is not possible to line them up against each other and to identify specific differences between them.

In Washington as in Canberra, the two houses must treat each Senate amendment to a House-passed bill (or each House amendment to a Senate-passed bill) as a single entity. They may not disaggregate an amendment into two or many component parts and reach agreement separately on each of those parts. Instead, they must reach agreement on each amendment as a whole. Consequently, the individual approach to reaching legislative agreements is not an available option when, procedurally, there is only one full-text substitute amendment on which agreement is needed, even if that amendment differs from the bill it amends in ways too numerous to count. (And, as I shall discuss in the next section, this is precisely what now typically occurs in Congress.)

On the other hand, this procedural situation is very well-suited to the collective approach to reaching agreement, especially in a conference committee, because the conferees have before them every element of the House bill as well as every element of the Senate substitute amendment. They may pick and choose from among the general approaches and specific provisions that are found in either the House or the Senate versions of the bill. In fact, they have no alternative. The conferees' final agreement ultimately takes the form of a new, third version of the bill that they propose for the House and Senate to accept in place of the versions of the bill that the House and Senate originally had passed.

This procedural situation does not arise in Canberra. If the Senate receives a bill from the House and does not refer it to a Senate committee, then, of course, it is that bill that the Senate debates and amends in plenary session. The result is a House bill that the Senate passes with separate discrete amendments (assuming the Senate amends the bill at all). And even if the Senate does refer a House bill to a Senate committee, and even if the committee is less than pleased with the bill, it does not report to the Senate instead on a bill that the committee itself has written or that a senator has introduced. This practice flows logically, and even necessarily, from the understanding shared among all members of both houses and all parties that the government should control the legislative agenda in both houses, and that this control extends beyond identifying the subjects that deserve legislative attention and includes writing the exact language of the bills that the House and Senate begin to consider in plenary sessions.[64]

[64] These generalisations exclude the handful of private members' and private senators' bills that are introduced each year.

As a result, whenever the Australian Senate agrees to two or more amendments to a government bill that the House already has passed, each of these amendments remains procedurally separate from the others. Never are they all combined into a single Senate substitute amendment, as occurs so often in Washington. This situation does not preclude recourse to the collective approach in Canberra; the two houses could refer all the Senate's separate amendments to a conference or a conference committee with the hope that the conferees could reach agreements with respect to all of them. However, the legislative process in Canberra never produces a situation in which recourse to the collective approach is so suitable because there are not separate amendments to be addressed individually.

On the other hand, there is good reason to think that the Australian Senate and House of Representatives do reach agreement with respect to many Senate amendments by means of an approach that is collective in a political sense, though not in a procedural one. So long as there is a non-government majority in the Senate, the government must attract the support of enough non-government senators to pass each of its bills, which obviously may involve accepting one or more amendments to each bill. Clearly, if the government agrees to some unwelcome Senate amendments in order for its bill to pass the Senate, it thereby commits itself, explicitly or implicitly, to accepting those same amendments when the Senate sends them to the House for its concurrence. If the government were to accept some amendments in the Senate and then fail to support those same amendments in the House, it would be seen to be reneging on its commitment and, as a result, seriously jeopardising its ability to negotiate the passage of other bills in the Senate.

So it is reasonable to assume that when the House takes up Senate amendments to one of its bills, the House in effect acts collectively, in a political if not in a procedural sense, in agreeing to all those amendments that the government already had committed itself to supporting. There is no such prior commitment, however, with respect to any other amendments that the government opposed in the Senate but that the Senate nonetheless approved.

Procedural consequences of political change in Washington

In sum, there is a fundamental difference in the formal procedures by which the US Congress and the Australian Parliament have gone about reaching bicameral agreements on legislation. Both of the assemblies have relied most of the time on a process of exchanging messages and amendments with the hope that this process eventually would produce a version of each bill on which both houses (or, in Australia, both parties) could agree. The difference is that the Australian Parliament has relied on this process exclusively, whereas the US Congress has tended to rely on conference committees (that is, temporary joint committees) to negotiate a proposed

package settlement of all the differences between House and Senate versions of the most important and contentious legislation.

The reasons for this difference, as I have tried to identify and explain them here, are various. However, they all can be traced, directly or indirectly, to the constitutional, institutional, and political contexts in which the US and Australian legislative processes take place. Of particular importance at the constitutional level are the parliamentary sources and underpinnings of Australia's national political system, reflected, for example, in the government's control of the legislative agendas of both houses, even though the government usually does not control a majority of seats in the contemporary Senate. As for the institutional context, the different roles that Australian (Senate) and US standing committees play at the front end of the legislative process are reflected, not surprisingly, in the part they play at the back end. And of particular importance at the political level is the strength of party discipline in the Australian Parliament, even when compared with the historically high levels of party cohesiveness in the contemporary US Congress. From these differences, and others closely related to or flowing from them, emerge what seem to me to be a satisfactory set of explanations why the collective approach to reaching bicameral legislative agreements has been an available and valued procedural option in Washington but not in Canberra.

Neatness would be served if it were possible to conclude the analysis here. In recent years, however, there have been two related—and, unfortunately, complicated—changes in congressional procedures and practices of which we need to take account. One is unlikely to be reversed; the durability of the second remains open to conjecture. For as long as they persist, however, they affect the foregoing analysis in two ways. First, they reduce the clarity of some of the differences that I have drawn between politics and procedures in Washington compared with those in Canberra. But second, they only strengthen the underlying argument that the legislative procedures in a democratic national assembly will reflect the political context in which they are employed, and sooner or later they will be adjusted to reflect changes in that context.[65] The first of these two developments is one that I introduced earlier: the possibility that one house in Washington may pass a bill received from the other, but pass it with a

[65] This discussion has benefited from the more extended Congressional Research Service report for Congress on the same subject by Walter J. Oleszek, *Whither the Role of Conference Committees*, op.cit. Regrettably, this report is not available to the public, but a version of his analysis appears as 'Whither the Role of Conference Committees, Or is it Wither?', *Extension of Remarks*, Newsletter of the Legislative Studies Section of the American Political Science Association, vol. 33, no. 1, January 2010, available at www.apsanet.org/~lss/Newsletter/jan2010/front.html. For a broader perspective on changing bicameral relations in Congress in light of changes in their context, see Edward G. Carmines and Lawrence C. Dodd, 'Bicameralism in Congress: The Changing Partnership', in L.C. Dodd and B.I. Oppenheimer (eds), *Congress Reconsidered*, 3rd edn. Washington, CQ Press, 1985, pp. 414–36.

full-text substitute. This substitute constitutes an entirely different version of the bill and it often embodies a significantly different approach to the subject of the bill. Even so, there is only one amendment on which the two houses now have to agree, no matter how many policy differences may be reflected in that amendment.

If the House passes a bill that takes one approach to an issue and the Senate then passes it with a full-text substitute amendment that takes a different approach, the two houses usually have no choice but to negotiate a third approach—presumably some kind of compromise between the approach proposed by the House and the approach preferred by the Senate. This third approach can be presented by a conference committee and embodied in its report which then is put before both houses for their approval. Alternatively, though, the same new version of the bill can take the form of a new full-text substitute that the House is asked to approve in lieu of the Senate's previous amendment to the House's bill. If the House approves the new, negotiated version of the bill, and the Senate does so as well, the two houses will have reached agreement and the bill will be ready for it to be presented to the president for his approval. The various differences between the two houses' approaches to the issue will have been resolved collectively, not individually, whether by means of a conference committee or the exchange of amendments, and for the reason that the approaches which the two houses initially took to the same issue could not be reduced to a series of specific differences that lent themselves to being resolved individually.

Increasingly during the closing decades of the last century, the US House and Senate found themselves in precisely this situation—having before them a bill first passed by one house and then passed by the other with a very different full-text substitute amendment. One important reason may well have been the perceived time pressures that made it seem impractical for the second house (usually the Senate) and its relevant standing committee to await the arrival of a House-passed bill and then to base their deliberations on that version of the bill. Instead, it became increasingly likely for the Senate to debate and amend its committee's own bill on the same subject and then to substitute the text of that bill for the text of the House's bill, whenever it arrived.

Smaller, less important, bills often were passed by one house and then passed by the other house with several discrete amendments, on which the two houses could negotiate and reach agreement individually, through the exchange of amendments. By the 1990s, however, the differences between the two houses over most major bills had to be resolved collectively because of the prevalence of full-text substitutes from one house for the texts of bills already passed by the other. The primary exceptions were the annual appropriations bills, generally thirteen in number, which the House always passes first. Until the 1990s, the Senate's general practice had been to await the arrival of each of these bills from the House. The Senate's Committee on

Appropriations and then the Senate as a whole would consider and vote on amendments to each House bill, passing it with many, sometimes hundreds, of individual amendments, rather than with a single full-text substitute.

Consequently, these appropriations bills were much better suited to the individual approach to reaching agreement. Even so, in the absence of severe time pressures, congressional practice was to send each appropriations bill to a conference committee. It was not unusual, however, for the reports of these committees to leave some of the individual Senate amendments remaining in disagreement.[66] In that case, first the House and then the Senate would vote on the conference report, proposing a collective resolution of most of the bicameral differences over the bill, and then act on each of the remaining amendments individually. The result was to combine the use of both the collective and the individual approaches to resolving legislative disagreements.

Congressional practice regarding appropriations bills now has changed. Today, the Senate is as likely to pass an appropriations bill with a full-text substitute amendment as any other bill. Consequently, because of this procedural development, the individual approach to reaching agreement now tends to be limited to only those bills of lesser significance on which the differences between the two houses are relatively small and easily identifiable.

There is no obvious political reason for the development that I have just discussed. By contrast, the second procedural development, which is even more recent, clearly has its roots in the changed partisan differences that have come to characterise the contemporary US Congress.

The standard logic of American legislative politics assigns a triad of motives to the members of US congressional conference committees. First, each member (or ‘conferee’) seeks to advance individual goals and interests that are some combination of making what he or she conceives to be good national policy, protecting or advancing the interests of his or her constituency, and enhancing his or her own power and influence within Congress. Second, each conferee also seeks to promote a conference agreement that advances the policies and programs of his or her political party. And third, each conferee is to advocate the position of his or her house vis-à-vis that of the other.

[66] There were two reasons why an appropriations conference committee would submit a conference report to the House and Senate with one or more amendments remaining in disagreement: either the conferees actually could not reach agreement on them, or the agreement they could reach on each of them violated their authority as conferees—for example, by exceeding the scope of the differences between the initial positions of the House and Senate. (See the discussion below on p. 35.)

This triad of individual, partisan, and cameral (as opposed to bicameral) motives, of course, usually are closely linked. Conferees' own policy views typically are very close to, and may be indistinguishable from, those of their party, and US representatives and senators historically have demonstrated a remarkable ability to conclude that their own policy preferences and those of their constituents are compatible or identical. Also, conferees enhance their own standing within Congress by delivering back to the House or Senate, as the case may be, a conference report that represents a victory both for their party and for their house over the other party and the other house.

However, there always has been the potential for conflict between conferees' partisan interests and their cameral responsibilities, between their incentive to negotiate with their party's policies in mind and to negotiate with a view toward reaching a conference compromise that resembles the original position of their house more than that of the other house. The cameral dimension of conference negotiations is reflected in the fact that conference agreements must garner the support of a majority of the conferees from each house (as well as in scholars' attempts to decide whether the House or Senate 'wins' more often in conference). And the partisan dimension is reflected in the fact that a majority of the conferees from each house invariably are members of the majority party.

The Speaker appoints all the conferees from the House of Representatives, but his discretion is constrained in three ways. He is expected to draw most, if not all, of the conferees from the membership of the standing committee or committees with jurisdiction over the bill in question. He also is expected to accept and appoint the minority party's choices for its conference committee members. And finally, the rules of the House admonish the Speaker to appoint as House conferees 'no less than a majority who generally supported the House position as determined by the Speaker', including those who were 'primarily responsible for the legislation' and 'the principal proponents of the major provisions' of the bill being sent to conference (clause 11 of rule 1).

Although this rule cannot be enforced, its purpose and intent are clear: to ensure that most of the House's conferees (i.e., the majority who are drawn from the majority party) will promote a conference agreement, and in particular, an agreement that reflects the position of the House on the major matters in disagreement with the Senate. Although the Speaker cannot assure that the minority party representatives on the conference also will seek the same kind of conference agreement, it was not supposed that the Democratic and Republican representatives (or senators) on a conference automatically would be at odds with each other. For much of the last century, most members of some standing committees of the House and Senate often were able to reach bipartisan agreements on legislation that they then joined forces to

defend against amendments during plenary sessions of their own house and against members of 'the other body' in conference. Other standing committees, not surprisingly, tended to be more partisan, in part because of the subjects with which they dealt, so the House and Senate conference delegations that their members tended to comprise also were more likely to divide along party lines.

In short, there was a shifting balance between the influence in conference committees of party preferences as compared with chamber preferences. The degree to which conferees emphasised their preferences as party members or their responsibilities as the agents of their houses depended on such things as the subject of the bill in question, the controversy that it evoked, its centrality to the fundamental policies of either or both parties, the similarities and differences in constituency interests among committee members of the two parties, perhaps the proximity of the next election, and even the personalities of the leading conferees and their working relationships with the other conferees from their house but the other party, as well as with those from the other house but the same party.

In recent years, the growing strength of party in US congressional voting has affected this balance. As each party in Congress has become more homogeneous and as the two parties have become more polarised, the notion that the Republicans and Democrats from the House or Senate who are appointed to a conference committee are expected to work together in support of their house's version of the bill in question has come to be seriously challenged, if not reduced to a polite fiction. The high levels of partisanship that now frequently characterise votes in the House and Senate on passing the two versions of a bill that then are sent to conference are likely to carry over into the work of the conference committee itself. Minority party conferees who voted against passing the bill in the House or Senate have less incentive to argue in conference in favour of their house's position than they would if they had voted for it. So majority party conferees have less reason to expect bipartisan support for their efforts to defend their house's position against the position of the other house. In short, the heightened party polarisation in Congress has tended to encourage lines to be drawn in conference committees between the two parties, not between the two houses.[67]

The result has been to cause what may prove to be a temporary or lasting change in how the US Congress now attempts to reach bicameral agreements on bills that previously would almost certainly have been committed to conference committees. The change has been much more a change in practice than a change in the formal procedures of either house; in fact, one reason for the change in practice has been a

[67] As recently as 1997, Tsebelis and Money could write of US conference committees that 'conferees act mainly as representatives of their chambers'. Tsebelis and Money, *Bicameralism*, op. cit., p. 203. I doubt that such careful scholars would make the same assertion today.

new-found willingness among senators to take advantage of procedural opportunities that previously had been ignored.

First, more decisions in conference came to be made along party lines, and fewer minority party representatives and senators were willing to endorse conference committee reports. Walter Oleszek quotes a Senate majority party conferee as telling the minority party conferees in 1991 that '[w]e don't expect you to sign [the conference report], so we don't expect you to be needed' in the negotiations.[68] And second, minority party conferees came to find that they sometimes were being excluded from the informal negotiations that almost always precede official conference committee meetings, and that are intended to reduce those meetings to nothing more than formal presentations and endorsements of agreements already negotiated. To illustrate, Oleszek quotes three other laments from senators, made in 2000, 2001, and 2005:[69]

> I have been appointed to conference committees in the Senate in name only, where my name will be read by the [presiding officer] and only the conference of Republicans goes off and meets, adopts a conference report, signs it, and sends it back to the floor without even inviting me to attend a session.
>
> After much talk of bipartisanship, the other side locked out the Democrats from the conference committee … We were invited to the first meeting and told we would not be invited back, that the Republican majority was going to write the budget all on their own, which they have done.
>
> On issue after issue, we have had conferences where the minority was excluded so that the majority could ram through unpopular provisions as part of an un-amendable conference report.

Third, therefore, minority party senators, frustrated by what they viewed as their increasing exclusion from the conference process, began to delay or prevent bills from being sent to conference in the first place.[70]

It has long been established that there are three steps the Senate must take in sending a bill to a conference committee. First, it must disagree to the House amendment to a Senate bill, or insist on its own amendment to a House bill. In doing so, the Senate reaches what is known as 'the stage of disagreement', and both houses must reach this stage before a conference committee can be created. Second, the Senate must either request a conference with the House, or it must agree to the request for a conference

68 Quoted in Oleszek, *Whither the Role of Conference Committees*, op. cit., p. 12.

69 ibid.

70 It should not be assumed that these developments occurred in such a simple, linear progression.

that the House already has made. And third, the Senate must authorise its presiding officer to appoint the Senate's conferees, if that is the Senate's wish, as it always is.[71]

For decades, it had been the invariable practice of the Senate to take these three steps as if they were one, and to take them with the unanimous consent of all the senators present, and without any delay or debate. It probably never occurred to many senators that, by objecting to such a unanimous consent request, they could require the Senate to take each step by agreeing to a motion that is debatable and, therefore, subject to being filibustered.[72] Even if the Senate is prepared to invoke cloture on each of the three motions as soon as its rules permit, that still can leave as much as thirty hours for senators to debate each motion after invoking cloture on it. Consequently, a large and determined Senate minority can delay for days or even weeks what had been an almost unnoticed process of completing the procedural formalities necessary to send a bill to conference.[73]

By asserting procedural rights that they had implicitly been waiving, minority party senators discovered an effective way to respond to what many of them saw as their increasing irrelevance to the process of resolving legislative disagreements in conference. By threatening to compel the Senate to resort to making and agreeing to the three pre-conference motions, minority party senators (whether Democratic or Republican) could protest what they saw as the majority's unwillingness to take satisfactory account of their concerns during conference negotiations, and even the majority's apparently deliberate decisions to exclude them from those negotiations altogether. And by making the same threat or, even worse, by carrying through on it, the Senate minority could seriously delay or even prevent the establishment of conference committees on bills that they opposed in the form in which the Senate had passed them, and which the minority did not believe would emerge from conference in a form they could support. In turn, not surprisingly, the majority could conclude that the minority was interested only in delaying or blocking legislation, and would

[71] When the Senate authorises its presiding officer to appoint Senate conferees, the presiding officer automatically appoints whatever list of names is presented by the party or committee leaders. Should the Senate not authorise the presiding officer to make the appointments, the Senate would have to elect its conferees, and the opportunities for delay that then would arise would be daunting indeed.

[72] The House of Representatives also has typically agreed by unanimous consent to go to conference on legislation. If there is an objection to doing so, however, the House, unlike the Senate, can agree by a simple majority vote to a motion that accomplishes the same result.

[73] Walter Oleszek cites one instance of this having been done in 1994, and several steps in the same direction that senators had taken during 1992–94. Oleszek, *Whither the Role of Conference Committees*, op. cit., pp. 9–10. Actually, the potential for delay is considerably greater. After the Senate authorises its presiding officer to appoint Senate conferees but before he or she does so, an apparently unlimited number of motions are in order to give non-binding instructions to the Senate conferees. Each of these motions is debatable and, therefore, subject to being filibustered. Thus far, it has not been thought necessary to exploit this opportunity.

have nothing constructive to contribute to bicameral negotiations, whether in a conference committee or otherwise.

By compelling the Senate to comply with long-established procedures that the Senate had gotten into the habit of bypassing consensually, minority party senators were able to make the collective approach to resolving legislative disagreements with the House much more costly in both time and effort. As a result, the advantages of the collective approach, compared with the individual approach, declined during the past decade, and Congress turned to the process of exchanging messages and amendments to reach bicameral agreements on some bills that, in years past, almost certainly would have been given over to conference committees. As I noted earlier, even before these developments, less than ten per cent of the bills that became law had been committed to conference committees, so this recent trend may not have made much of an impression statistically.[74] However, members of both houses unquestionably would agree that it complicated and retarded what already had been a complex and time-consuming legislative process.[75]

For the majority party in the Senate, and especially when the same party has majorities in both houses, there are some compensating advantages in having to rely more on the individual than the collective approach to reaching bicameral agreements on difficult bills. It offers more flexibility: there is no need for a public meeting, however perfunctory, of the conference committee; there is no need to write a conference report and the accompanying explanation; and there is no need to give members of either house time to review the conference report. Also, some restrictions on the kinds of proposals that can be included in conference reports do not apply to the exchange of amendments between the House and Senate.

In principle, for example, conferees are supposed to resolve each disagreement between the two houses by reaching a settlement that falls within the scope of the differences between their positions. To take the most simple kind of obviously hypothetical example, if the House proposes to appropriate $5.00 for a purpose and the Senate proposes $10.00 instead for the same purpose, the conferees can agree on $5.00, $7.50 or $10.00, but they are not to agree on $2.00 or $12.00 because either sum would fall outside the scope of the differences between the House and Senate positions. Furthermore, conferees are not to propose any changes in provisions to which both houses already have agreed, nor are conferees to propose in their report recommendations on any subject that was not addressed in either the House or Senate

[74] In fact, there is no statistical evidence of a declining frequency of conference committees versus amendments between the houses during the period 1993–2007. Data recalculated from Walter Oleszek, *Whither the Role of Conference Committees*, op. cit., table 1 on p. 4.

[75] Oleszek includes several instructive case studies in his analysis. Oleszek, *Whither the Role of Conference Committees*, op. cit., pp. 14–23.

version of the bill that they sent to conference. All these restrictions apply to conference reports but not to amendments sent back and forth between the houses.[76]

On the other hand, when the Senate considers any new amendment to send to the House, that amendment is not only subject to being filibustered, as a conference report would be, it also might be subject to being amended, which a conference report is not. In other words, whereas the use of the collective approach to resolving differences can present each house with a package settlement that it usually must accept or reject in its entirety, the use of the individual approach does not come with the same guarantee.

In 2007, the Senate acknowledged the problem that had developed with regard to the participation of minority party senators in conference committees. One small part of the much larger and ambitiously named 'Honest Leadership and Open Government Act of 2007' states in part that '(1) conference committees should hold regular, formal meetings of all conferees that are open to the public; (2) all conferees should be given adequate notice of the time and place of all such meetings;' and '(3) all conferees should be afforded an opportunity to participate in full and complete debates of the matters that such conference committees may recommend to their respective Houses …'[77]

Notice though that these are admonitions, not requirements: the law states that these things *should* be done, not that they *shall* or *must* be done. In fact, this section of the law is explicitly identified as a 'sense of the Senate' provision, which is a way for the Senate to express its opinion or judgement on something without taking any legally binding action. As such, this provision is not enforceable either as law or as a rule or order of the Senate.[78] The provision calls for nothing that should not be, and once was, standard practice in both houses of Congress.

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[76] However, these restrictions on the content of conference reports are not as stringent as they might seem at first. First, the House has procedures available to waive any of them by simple majority vote. Second, the Senate traditionally has adopted accommodating standards for enforcing these restrictions. ('Rulings and practices in the Senate have left the chamber with a body of precedents that allow the inclusion of new matter as long as it is reasonably related to the matter sent to conference'. Elizabeth Rybicki, *Senate Rules Restricting the Content of Conference Reports*. Congressional Research Service report for Congress RS22733, 13 February 2009, p. 1.) And third, the Senate recently introduced a new procedure by which a violation of these restrictions need not prove fatal to the other agreements that the conferees reached.

[77] Section 515 of the Honest Leadership and Open Government Act of 2007, Public Law 110-81, 110th Congress, enacted on 14 September 2007. Full text available at <http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:publ081.110.pdf>.

[78] The fact that this 'sense of the Senate' provision was included in a bill that became law makes no difference. Under the constitutional authority of each house to make its own rules, any provision of law that affects only the Senate or the House of Representatives may be amended or repealed—or suspended, waived, or ignored—by that house alone, acting unilaterally and without the participation or consent of the other house or the president.

Furthermore, majority leaders of both parties in the Senate sometimes have employed a procedural stratagem by which they could try to have their legislative cake and eat it too. This stratagem allowed them to avoid the newly severe difficulties they were encountering in attempting to send bills to conference committees. It also allowed the Democratic or Republican majority party to continue excluding the minority party, to the extent it wished to do so, from negotiations to resolve legislative differences with the House, and it could preclude amendments to, and compel a single vote on, its proposal to resolve those differences through an exchange of amendments, just as there are no amendments to and only one vote on accepting or rejecting a conference report.

The procedures are complex but they can be summarised briefly.[79] If the House passes a bill and the Senate then passes it with its own full-text substitute, the majority party members of the two houses can negotiate a third, compromise version of the bill, with only as much participation by the minority in the negotiations as the majority wishes.[80] Once this agreement is reached, the House is asked to accept it as a replacement for the Senate's full-text substitute, and the House can do so by a simple majority vote after no more than one hour of debate and with no opportunities for amendments to the new, third version of the bill. After the House informs the Senate of the action it has just taken, the Senate's Majority Leader moves that the House also accept the same new version of the bill; formally, he moves that the Senate concur in the House amendment that embodies this version.

Before the Senate votes on such a motion to concur, any other senator may offer a motion to amend the new proposed text of the bill; formally, he or she can move that the Senate concur in the House amendment with a further Senate amendment. To pre-empt that possibility, the Majority Leader makes that motion himself, with the further Senate amendment he proposes being of negligible importance (for example, to change by one day the date on which the bill, once enacted, will take effect as law).[81] Finally, the Majority Leader files a motion to invoke cloture on his original motion to concur.[82]

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79 Fortunately, they are explained carefully in Elizabeth Rybicki's *Amendments Between the Houses: Procedural Options and Effects*, Report R41003 for the Congress by the Congressional Research Service, 4 January 2010. Unfortunately, this report is not yet available to the public.

80 All this assumes that the same party has majorities in both the Senate and the House. Should there be divided party control within Congress, the political dynamics and strategic calculations would be considerably different.

81 The Majority Leader also offers an amendment to his own second motion—that is, his motion to concur with an amendment—in order to prevent anyone else from doing so.

82 The Majority Leader is able to do all this because the Senate's precedents instruct the Presiding Officer to recognise him—that is, to give him the floor—in preference to any other senator who is seeking recognition at the same time. This is one of the few procedural powers the Majority Leader has, but it can be a critically important one.

Until the Senate votes on whether to invoke cloture on the Majority Leader's motion to concur, the actions he has taken prevent any other senator from offering any amendment, and especially an unwelcome amendment, to the proposed final version of the bill that majority party members of the two houses have negotiated. The critical question then becomes whether three-fifths of all the serving senators will vote for the cloture motion.

If the cloture motion fails, the stratagem collapses. Eventually, there will be a vote on the Majority Leader's motion to amend the House amendment (formally, to concur in it with a further Senate amendment), which represents the majority party's negotiated bicameral agreement. Thereafter, other senators can propose one or more amendments of their own to the proposed bicameral agreement. If, however, the Senate invokes cloture by the required three-fifths vote on the motion to accept (formally, concur in) the House amendment, that vote indicates that a simple majority of senators is prepared to accept the bicameral agreement (in the form of the pending House amendment) without change. So no motion to concur in the House amendment with a Senate amendment is likely to prevail.

Any readers who have slogged their way through the last four paragraphs will see, therefore, that these procedures may enable the Senate's majority party to compel a vote on whatever bicameral agreement between the two houses that the majority party's political and policy leaders have been able to reach. Furthermore, they can arrange for this vote to take place in a way that undermines any attempts to change the terms of the agreement, just as if the Senate were considering a conference report instead. Implementing this strategy does require the Senate to agree to a cloture motion, but so too may cloture be required to end the debate on a conference report.

The key to the success of this strategy is convincing three-fifths of all senators to vote for the Majority Leader's motion for cloture on his motion to concur. Most often, the majority party in the Senate holds fewer than three-fifths of the seats, meaning that the strategy cannot succeed if the minority party is united in opposing it. The 2008 Senate elections produced a result that is unusual but not unprecedented in modern US history: the Democratic majority did have 60 votes if it also held the votes of two independent senators (on one of whom it can depend). This made the strategy I have described a viable one, even when the majority was opposed by a united minority party.

As of January 2010, however, the Democrats had lost their 60-seat majority in the Senate, raising doubts about the continuing viability of this strategy. Furthermore, the current distribution of seats in the Senate between the parties is far from being stable and secure. In fact, conventional wisdom, based on previous election patterns, suggests that the Republican minority party will hold more than 41 of the 100 Senate

seats when the Senate convenes in January 2011, following the November 2010 elections. Should that be the case, the Democratic majority in the Senate (presuming that the Democrats remain in the majority) may face the unhappy choice between having difficulty overcoming minority party efforts to block bills from going to conference, and having the same difficulty compelling the Senate to vote without amendments on the legislative product of its reliance instead on an exchange of amendments.

It seems likely that the intent of the Senate's minority party always had been to convince the majority to let it back into the conference negotiations. Filibustering the triad of motions that are necessary to send a bill to conference is not a pleasant undertaking; it requires time, energy, and a considerable degree of coordinated effort. Moreover, if the Senate minority requires the majority to resort to an exchange of amendments instead of sending a bill to conference, the minority can be sure that it will be excluded from whatever negotiations take place. Finally, and in any event, the Senate minority retains the right to filibuster any proposed agreement that is produced, regardless of whether it emerges through a conference committee or an exchange of amendments with the House. Breaking such a filibuster requires jumping the 60-vote hurdle that is necessary to invoke cloture either on a conference report or on a motion that the Senate concur in a House amendment that is the functional equivalent of a conference report.

There are good reasons, then, for the Senate to revert to its practice of sending major and contentious bills to conference committees, unless the pressure of time simply is too great to permit it.[83] But this would not mean a return to the political *status quo ante*. The intra-party homogeneity and inter-party polarisation that now characterise both houses of Congress create a different context for bicameral negotiations than when both the proponents and opponents of a bill in both houses were more likely to find a significant number of allies on the other side of the aisle. To whatever extent House or Senate conferees of both parties once really did think of themselves as negotiators on behalf of their own house's version of a bill—and that expectation often was honoured in the breach—today the opponents in conference are much more the members of the other party than the members of the other house. For this reason, the politics of reaching bicameral legislative agreements in Washington will remain different from what they were several decades earlier, even if the procedures for reaching these agreements revert to their earlier pattern.

[83] From time to time, however, the Senate majority party may have its own incentive to rely on an exchange of amendments instead of sending a bill to a conference committee, if the ultimate agreement on the bill that the majority envisions would include elements that would violate the restrictions on the contents of conference reports.

Procedures in constitutional, institutional, and partisan context

To summarise: in both Washington and Canberra, the national constitutions effectively leave it up to Congress and Parliament to devise procedures for resolving their legislative disagreements, and such disagreements are certain to arise if each House of Representatives and each Senate is not reluctant to exercise its legislative powers. The US Constitution is totally silent on how these disagreements are to be resolved. Perhaps it did not occur to the authors to address this potential problem; perhaps they thought it best to leave it to the imagination and wisdom of future generations of legislators. The Australian Constitution does address the subject, but only by establishing a mechanism—a joint meeting after legislative deadlock on a bill has been reached three times, and with a new election for all members of both houses intervening between the second and third attempts—that they must have known would be entirely impractical to use during the ordinary course of legislative business. So they too left it to future members of Parliament to devise other procedures that are better suited to the workaday business of legislating.

Both Parliament and Congress responded by making room in their standing rules and orders for both the individual and collective approaches to resolving their differences. Their rules are not identical, of course, nor would we expect them to be. For instance, the congressional rules are more explicit and detailed on the subject of what substantive agreements the conferees can present to the House and Senate in their reports. And the parliamentary rules are more explicit in providing for conferences (the collective approach) when reliance on the individual approach has proven unsuccessful. However, any such differences in formal procedures pale in comparison to the key difference in practice that I have described: Congress would find it difficult to do its work without using conference committees; Parliament does not. Although only a small fraction of new US laws are the product of conference committees, Congress has relied on such committees for resolving bicameral disagreements on many (or most) of the most important and complex bills the two houses pass, and, notwithstanding the recent political and procedural developments I have described, it probably will continue to do so. Parliament has created only two conferences since Federation, and shows no inclination to change its practice.

Despite the obvious differences reflected in the presence of a president in Washington and a prime minister in Canberra, the Australian and US Senates share much the same constitutional powers and responsibilities for legislating, and they are differentiated from their companion Houses of Representatives in many of the same ways: for example, the numbers of their members, the ways in which the members of the two houses are elected, the length of their terms, and the sizes and diversity of their constituencies. And the essential procedural rules for addressing the bicameral legislative disagreements that almost inevitably will arise between the two houses of

either the Congress or the Parliament would be recognisable in important respects to the denizens of the other.

One reason, I have argued, for the different ways in which the two assemblies do or don't use these procedures flows from the differences in stature and influence between US congressional committees and Australian parliamentary committees, even in Canberra's Senate with the relatively active part that its committees play in reviewing legislation. US congressional committees tend to write the bills that the House and Senate consider, and their members guide and often dominate the process of debating and amending those bills in the House and Senate chambers. It would seem only natural, therefore, for the corresponding committees of the two houses to take the lead in reaching bicameral agreements and, historically, conference committees have provided a forum for just that to take place. In Canberra, on the other hand, and even in the Senate, committees can be valuable but ultimately less pivotal players in the design of legislation than their counterparts in Washington. It would be much less logical and appropriate, therefore, for Parliament to rely on a bicameral resolution mechanism that could be a natural extension of its Senate and House committee systems.

For the two other reasons that strike me as critical, we must turn to contextual factors originating outside of Parliament or Congress. One is historical or philosophical, depending on one's point of view. Since soon after the US Congress first met, the House and Senate both have viewed themselves as important legislative actors, being either equal or superior in importance to the other. Even before US senators came to be directly elected, instead of being formally chosen by the state legislatures, neither the House nor the Senate had been inclined to defer to the other on anything approaching a regular basis. In Australia, on the other hand, I think it fair to say that there always has been some question as to how constitutionally legitimate and appropriate it is for the Senate to press its own legislative judgements when they differ from those of the House of Representatives and the executive government that is constitutionally responsible to it.

The essential legislative negotiations between Australia's Senate and the government would seem to be those that produce the compromises necessary to persuade the Senate's non-government majority to pass government bills. These negotiations may in fact resemble a conference in that the resulting agreement is on a package of amendments that must be preserved as a package, even if the Senate adopts them singly, if the agreement for the Senate to pass the bill as amended is to survive. The fact that these negotiations tend to take place informally and in private is consistent with the tendency of both parties when in government to disparage the Senate as an equal legislative partner. Once an Australian government compromises enough to secure passage of one of its bills through the Senate, it should be expected to stand by the amendments to which it agreed in the Senate when it comes time for the House of

Representatives to accept those amendments. Beyond this point, however, Australian governments seem disinclined to compromise much further by accepting additional Senate amendments to their legislation.

The other contextual factor on which this analysis has concentrated is the historically greater strength of parties in Parliament compared to Congress. The almost perfect party discipline that has characterised governance in Canberra almost since Federation has made the House of Representatives a dependable agent of the government and discouraged the regular use of any legislative procedures which presume that the House and Senate are equal partners in the legislative process or which assume that their members' primary interest is in supporting the positions adopted in their chamber against those adopted in the other. In the US, the divisions within each party that prevailed for most of the 20th century and that were reflected in both the House and the Senate lent some credence to the notion that the process of resolving bicameral legislative disagreements involved a real element of House versus Senate as well as Democrats versus Republicans.

When the Australian government recently had a temporary majority in both houses, there were few significant differences between the versions of legislation produced by the House and Senate and, therefore, few contentious legislative disagreements to be resolved. By contrast, for all but four years between 1933 and 1981, the Democratic Party controlled both houses of Congress, yet conference committees were so common and important as to be described as 'the third house of Congress'.[84] In Australia, partisan politics contributed to making conferences unnecessary; in the US, the lack of equally clear and consistent party differences contributed to making conference committees repeatedly useful if not essential.

The now-higher levels of party polarisation in Congress have disrupted the previously established practices for resolving House–Senate disagreements on legislation. The majority party tended to exclude the minority party from bicameral negotiations in conference committees in the belief that the minority was less interested in promoting agreement than delay and obstruction. The minority responded in the Senate by making it painful if not impossible to send bills to conference, to which the majority reacted by devising a convoluted procedural strategy to force a Senate vote on its preferred bicameral agreement, without amendments and without the need to create a conference committee. However, this strategy depends on the majority being able to amass votes from 60 of the 100 senators, which normally—and once again today—requires some of those votes to come from the minority side of the aisle. In the short term, therefore, the procedures for reaching legislative agreements are almost certain to remain more stable and predictable in Canberra than in Washington.

[84] E.g., David J. Vogler. *The Third House*. Evanston, IL, Northwestern University Press, 1971.