

Original intent and expectations

The discussion thus far raises a collection of related questions about the intent and expectations of those who designed the Commonwealth's Constitution. What role did its authors expect and want the Senate to play? In giving the Senate the legislative powers it received, how did they foresee the relations between the Senate, on the one hand, and the House of Representatives and the government, on the other? And how did they reconcile (or fail to reconcile) their commitment to responsible parliamentary government with their commitment to federalism as manifested in the Senate? These are big and complicated questions about which books can be, and have been, written. The discussion that follows seeks only to highlight some of the salient arguments, explanations, and observations that have been offered.

Writing the Australian Constitution

The Australian Constitution was the eventual product of a pair of Conventions, the second of which met in several locales, and a series of referenda.⁹² The first Convention convened in Sydney in 1891. It framed a draft constitution for consideration by the individual colonies, but they failed to act decisively on it. In 1897 a second Convention met in Adelaide. It produced a draft that was submitted to the colonial

92 An initial caveat is in order. The records of the meetings of the constitutional Conventions are voluminous. They report the sometimes intense debates over an extended period of time among a group of thoughtful and strong-willed men to whom agreement did not always come quickly or easily. By selective quotation, therefore, it is fairly easy to construct arguments in support of different, even contradictory, understandings of their intent and expectations regarding the more contentious provisions on which they ultimately settled. I have relied largely on the research of others into these records, so much of this chapter is based on my selective use of the material they selected for their own purposes. It also is worth bearing in mind Galligan's (1986: 94) observation that, 'If the Federation Debates have not been well understood, it is partly because many of the delegates, particularly from the small States' side, were not very clear about the issues under discussion.'

parliaments which responded with suggested amendments that the Convention took up when it reconvened in Sydney later in 1897. The Convention began its last meetings in January 1898 in Melbourne and adjourned in mid-March of that year. The proposed constitution that emerged from this process was the subject of referenda in four colonies. Three approved it, but in New South Wales it failed to receive the number of votes that, by prior decision, were required to adopt it. A conference of the colonial premiers then met in Melbourne in January 1899 and agreed to a series of amendments, one of which changed the margin necessary to approve a bill in a joint sitting from a three-fifths majority to an absolute majority of the total membership of both houses. New referenda were held at which five of the six colonies approved the amended draft, with Western Australia adding its concurrence somewhat later. With minor amendment, the Constitution was embodied in a bill approved by the British Parliament in July 1900.⁹³

The Constitution was written by men of British background or birth who came from Australian colonies with (in most cases) well-established parliamentary systems. So from the beginning, their deliberations were shaped by a prevailing assumption that they would create a parliamentary government. Yet there also was little question that they would produce a federal constitution that preserved the identities of the colonies when they became states and somehow provided for a division or sharing of powers between the states and the Commonwealth. According to Samuel Griffith, the Premier of Queensland and later the first Chief Justice of the High Court of Australia, federation was possible only on the condition that:

the separate states are to continue as autonomous bodies, surrendering only so much of their powers as is necessary to the establishment of a general government to do for them collectively what they cannot do individually for themselves, and which they cannot do as a collective body for themselves. (*Convention Debates*, 4 March 1891: 31)

Jaensch (1997: 46) describes the concerns of the states as the federal constitution was being conceived:

At the time of the moves towards a nation in the 1890s, there were in existence six independent nation-states in the colonies. Each was self-governing, and had its own constitution, system of laws, practices and procedures of government and, most important, its own economic interests, and it was not surprising that each treated with considerable caution any

93 These events are well-summarized in Moore 1910: 40–55. The extended narrative history by La Nauze (1972) is essential reading.

suggestion that it should submerge itself within a national, unitary government.

There were, in fact, two pressures. On the one hand, the colonies could understand and support the need for a new national authority to provide for common needs and protection against external threat. In economic terms it made sense to have free trade between the colonies, and a national policy on duties and tariffs for overseas trade. A common defence, the need for a national transport and communication system, coupled with a growing sense of nationalism in at least some of the colonies, were some of the forces towards unity. On the other hand, the colonies, especially the smaller ones such as South Australia, Tasmania, and Western Australia (which had only received its self-government in 1890), feared that they would lose all their independence in a unitary system, and also that they would be dominated by the larger populations and stronger economies in New South Wales and Victoria. Above all, the constitutionalists in the colonial parliaments and economies were determined to protect their, and their colonies' economic interests.

If his characterization is fair, the similarities with corresponding American state concerns more than a century earlier are almost uncanny. No wonder the Australians looked not only to British practices, but also to the American constitutional compromise as they designed their new Commonwealth.

How were the state and Commonwealth governments to be connected? The obvious answer, based on the authors' familiarity with the US Constitution (Hunt 1930) and the governments of their own states,⁹⁴ was the Senate.

One constitutional issue over which there was little debate in the Conventions was the provision that the national parliament was to be bicameral. All the experience of the delegates to both gatherings pointed to the institution of a bicameral legislature, as did the oft-cited examples of federal governments, the United States and Canada, and the concept seems to have been accepted automatically. (Bennett 1971: 112)

A key question about the structure of the new Commonwealth Parliament had been answered before the first Convention assembled in 1891, and it was not put in doubt during the second Convention of 1897–1898. The Parliament would be bicameral.

From the perspective of either London or Washington, the product of the Conventions' deliberations can be dismissed as conceptually

94 'The Australian colonies all accepted the Westminster model and the necessity for a bicameral system. New South Wales and Queensland opted for upper houses whose members were nominated by the Governor. The other colonies allowed their upper houses to be elected, but with a restricted franchise based on property ownership.' (Jaensch 1997: 135)

incoherent. What they created was a parliamentary federation, a construction that, according to Sharman (1990: 205), is fundamentally and inherently contradictory:

[T]he institutional components of parliamentary federations are not self-checking elements reflecting a coherent notion of constitutionalism but represent competing views of the role of government. To this extent, parliamentary federations have no constitutional design in the sense of an internally consistent set of governmental structures with a clear philosophical basis for their justification.

The creation of the Commonwealth was a voluntary act on the part of the then-colonies, who chose to federate without being pressured to do so by irresistible military, political, or economic necessity. So there could be no Commonwealth that was not embedded in a federal constitutional structure, and no federal constitutional structure that did not include a Senate having significant constitutional powers. Yet the authors of the Constitution still opted for a parliamentary government that was responsible to the House of Representatives.⁹⁵ In doing so, they sought to combine federalism and responsibility in an unprecedented way, even though they had before them a readily available alternative in the form of the US presidential-congressional system.⁹⁶

Galligan (1995: 46) has argued that ‘The constitutional founding of the Australian nation was not an occasion either of great patriotic moment or grand institutional innovation. It was a more pragmatic piecing together of established parliamentary practices and available federal institutional arrangements.’ How pragmatic were their decisions? If the Commonwealth Constitution entrenched a contradiction between federalism and responsibility, the obvious question to ask is ‘Why?’ Several possible answers—hypotheses—suggest themselves.

95 It was not quite so self-evident to Lord Bryce, writing in 1905, that it was the House, not the Senate, that would dominate under the new Constitution. He (1905: 312) wrote that ‘Australians evidently expect that the usage hitherto prevailing in all the Colonies of letting the Ministry be installed or ejected by the larger House will be followed. Nevertheless the relations of the Commonwealth Houses are so novel and peculiar, that the experience of the new Government in working them out will deserve to be watched with the closest attention by all students of politics.’

96 Decades later, when constitutions were being written for the soon-to-be-independent British colonies of sub-Saharan Africa, the power of the British example again came into play, though in a different way. This time, the office of a powerful and directly elected president was grafted onto parliamentary government, resulting in a constitutional system that was equally incoherent conceptually. See, for example, my 1994 paper on ‘Parliamentary Reform in Zambia: Constitutional Design and Institutional Capacity,’ presented in Berlin at the XVIth World Congress of the International Political Science Association.

The Constitution's authors simply might not have appreciated the potential problem they were creating. While it may not be rocket science—in this case rocket *political* science—to recognize the contradiction today, it is not beyond contemplation that they could have failed to think through all the possible consequences of their choices. For proof that such a thing can happen, we need look no further than the recent ill-conceived and short-lived Israeli innovation of having a directly-elected prime minister preside over a government responsible to a parliament in which his party might not have a working majority and, indeed, with such a low electoral threshold as to almost guarantee a fragmented party system and the need for coalition governments.

Alternatively, the authors might have recognized the contradiction but considered it the price they had to pay or a risk they had to take. One of the challenges of writing the Constitution, as it had been more than a century earlier in the United States, was satisfying the concerns of all the states that their separate identities and powers would be submerged under the weight of the Federation unless strong legislative powers were vested in the Senate. The less populous states were especially insistent that their equal representation in the Senate was essential to protect them against potential domination by the larger states. This equality of representation would mean little, however, if the Senate itself was powerless to prevent whatever legislation the House of Representatives might concoct.

Finally, the authors might have thought that, whatever constitutional powers they gave the Senate, it was unlikely to exercise them in ways that would jeopardize or disrupt the essential relationship between the government and the House of Representatives on which responsible government depends. At the time the Constitution was drafted, after all, the House of Lords in London also retained its historic legislative powers, but it exercised them with such self-restraint that what might be a problem in principle had not (yet) proven to be a serious problem in practice. It was not until a decade after the Commonwealth Constitution was completed that Britain found it necessary to curtail the legislative powers of the House of Lords by enacting the *Parliament Act 1911*.

Galligan (1995: 75) quickly disposes of the possibility that the problem of reconciling federalism and responsibility was lost on those who met to create the Commonwealth. To the contrary, he explains that 'the design of the Senate and its accommodation with responsible government' was the 'single most contentious issue for the Australian founders, and the one that took up the most space in the Convention debates and almost caused the break-up of both the 1891 and 1897–98

Conventions ... ' In broad terms, the parallel with the Philadelphia Convention of 1787 is striking and far from surprising.

Consider the comments of Griffith, whom Souter (1988: 15) calls the 'real leader' of the 1891 National Australasian Convention, and who deserves to be quoted at length:

We propose, as I understand it, assuming that the house representing the states is to have the authority which I think it must and ought to have [namely, the authority to amend all bills, including financial legislation], to associate with it a system which has never in the history of the world been tried in conjunction with it. We propose to have an executive government having ... seats in Parliament. How shall we guarantee that the machine will work if we insist that these ministers shall hold their offices in form as well as in reality, by the will of one house only? Does not the possibility of a very serious deadlock occur here to every hon. gentleman at once? The majority of one house of the legislature will certainly be made up of the representatives of the larger colonies. Probably two colonies in that house [New South Wales and Victoria] will be able to overshadow all the rest. ... Now, that majority representing the people of these two states in that house would have the making and unmaking of governments. On the other hand, there would be an independent body in the constitution representing the states. Suppose that independent body ... differed from the house of representatives representing two states, there would be certainly a deadlock at once. ... I point out that the experiment we propose to try has never yet been tried. We must take into consideration the existence of those two forces possibly hostile, even probably hostile, before, say fifty or a hundred years are over, and we must frame our constitution in such a way that it will work if that friction does arise. (*Convention Debates*, 4 March 189: 35–36)

Therefore, according to Galligan (1980a: 2), Griffith concluded that:

it was necessary to determine which part of the system was essential and to modify the other part to fit it. Griffith insisted that the federal principle was supreme and had to be embodied in the legislature since the minimum condition of federation—'the only compromise possible'—was to 'give to the house representing the states as states ... an absolute power of veto upon anything that the majority of the states think ought not to be adopted.'

For Galligan (1986: 96), 'the small States' position rested on a *claim of principle*, that federalism entailed equal State representation in a Senate that had the same legislative powers as the House, and a *claim of practical necessity*, that the security and protection of States' rights and interests required it.' (emphasis added) One also can argue that the strength of their position rested even more on another potent 'claim of practical necessity': the fear that the prospects for federation might collapse if the concerns of the small states were not satisfied.

Griffith's concern was shared by Richard Baker, later to become the first President of the Senate, who thought that responsible government 'is unworkable with two Houses of co-equal powers' (quoted in Bennett 1971: 163). At Sydney in 1897, Baker summarized the problem as he saw it. 'The essence of federation is the existence of two houses, if not of actually co-equal power, at all events of approximately co-equal power. The essence of responsible government is the existence of one chamber of predominant power.' (*Convention Debates*, 17 September 1897: 784) Henry Higgins concurred:

The hon. gentleman [referring to Baker] says that in a federation you must have a states' house and a people's house; that these two houses must be equal; that if you have responsible government you cannot have that state of thing—that under responsible government you must have one house greater than the other. That is quite true. The two things are inconsistent. They will not mix logically; they are perfectly irreconcilable. (*Convention Debates*, 17 September 1897: 790)

To Deakin, the Convention was creating 'what you may term an irresistible force on the one side, and what may prove to be an immoveable object on the other side, and the problem of what might happen if these two were brought into contact.' (*Convention Debates*, 15 September 1897: 582) Winthrop Hackett, a Western Australian and 'an ardent States' righter' at the 1891 Convention, thought there would be no peaceful resolution: 'either responsible government will kill federation, or federation in the form in which we shall, I hope, be prepared to accept it, will kill responsible government.' (*Convention Debates*, 12 March 1891: 280)

If forced to choose, as he evidently thought he must, Hackett's commitment to federalism was stronger than his adherence to the British model of responsibility. So too for Griffith, who spoke of 'the apparent inconsistency ... of the system of giving equal powers to the states as represented in one house, and of making the executive government depend for its existence upon the other house.' His preference also was to lean in favor of the federal side of the balance; and as we have seen, he was prepared to give the Senate 'an absolute power of veto upon anything that the majority of the States think ought not to be adopted.' Deakin, on the other hand, was not prepared to adulterate responsible government as he understood it, which would be the inescapable result of attempting to combine a responsible ministry with a legislatively empowered Senate:

The Senate would be in a position to 'defy, for all time, the will of the people of the country.' Therefore, according to Deakin, the Senate had to be modified. That could best be done by modelling it on the House of Lords

rather than the American Senate and giving it only ‘those powers that have always belonged, under responsible government, to a second chamber, namely, the power of review, the power of revision, the power of a veto limited in time.’ (Galligan 1980a: 3)

Galligan goes on to aptly summarize the options that appeared during that first, 1891, Convention for addressing the problem that Griffith, among others, had identified:

Three more or less distinct positions were put forward during the 1891 debates. Some like Deakin championed responsible government at the expense of the Senate; others like Baker and Hackett wanted to abandon responsible government in order to protect the Senate’s power. The third position was more complex. It acknowledged the theoretical validity of Griffith’s dilemma but accepted the practical necessity for having the two inconsistent institutions: responsible government because familiarity and history had sanctified it,⁹⁷ and federal bicameralism because the small states demanded it as a condition of federation. The two institutions could be made to function in harmony, it was claimed, by means of the traditional good sense that was part of the British political culture inherited by the Australian colonies.

It was the third position that ultimately prevailed, but not, I would argue, because of a conviction that ‘the two institutions’ could be harmonized, but with a hope born of necessity that the inconsistency would remain a problem in theory only.⁹⁸

Some early drafts of the Constitution provided for Senators to be selected by the state parliaments. By the 1897 draft, sentiment had shifted in favor of direct popular election (except to fill casual vacancies).⁹⁹ In speaking at the Sydney Convention meetings in 1897,

97 A ‘hereditary preference’, O’Connor called it (Galligan 1980a: 6).

98 It would be a mistake, however, to view the Senate only as a necessary manifestation of federalism and, therefore, a necessary price of federation. At the time the Commonwealth Constitution was written, four of the colonies had elected upper houses. If a contradiction or incoherence was being built into the new federal charter, it was not a new one. ‘Since 1975 it has been constantly asserted that in the Commonwealth Constitution responsible government and federalism threaten one another. It has become routine to quote the prescient Hackett who warned that one would kill the other. What is rarely said is that responsible government had been threatened much earlier by the creation of strong elected upper houses in four of the colonies which became the Australian states. A strong upper house (with equal representation of the states) may have been a necessary condition for federation but federalism was not necessary for the creation of strong upper houses in Westminster-type parliaments.’ (Rydon 1983: 34)

99 Sawyer and Zappala (2001: 1) remind us that the Australian Senate was the first national upper chamber to have its members chosen by direct popular election. Ratification of the Commonwealth Constitution and the first elections of Senators under the Constitution both predated direct election of US Senators.

John Quick, who would co-author with Robert Garran the seminal 1901 *The Annotated Constitution of the Australian Commonwealth*, supported a directly elected Senate. However, Quick also recognized that having two popularly elected houses made it even more important for there to be a procedure to break deadlocks that could arise as the two houses exercised their legislative powers:

Now, in an ordinary constitution, where we have an upper house not elected by the people, or not elected on the same basis as the lower house, that second chamber would be disposed to yield to the pressure of the lower chamber elected upon a popular basis; but here, where we are creating a senate which will feel the sap of popular election in its veins, that senate will probably feel stronger than a senate or upper chamber which is elected only on a partial franchise, and consequently, we ought to make provision for the adjustment of disputes in great emergencies. (*Convention Debates*, 15 September 1897: 552)

During the interval between the 1891 and 1897–1898 Conventions, Griffith and Baker looked beyond the need for a procedure to resolve specific legislative disagreements, and devised two possible schemes for addressing the larger problem of how to reconcile the requirements of responsible government with the powers of the Senate. According to Galligan (1995: 80):

One suggestion was that the Senate would approve the ministry at the first sitting of parliament and not be able to withdraw its support subsequently, with the ministry remaining in office as long as it retained the confidence of the lower house. Another suggestion entailed a more radical departure from responsible government; it had the ministry being elected for a fixed term by a joint sitting of both houses of parliament.

Quick and Garran (1901: 706) elaborated on the views of Griffith and others (paraphrasing Hackett in the process) who were convinced that federation and responsibility could not be reconciled, and who were not averse to resolving the contradiction in favor of the Senate.¹⁰⁰ They attributed to Griffith and those who shared his analysis an argument:

that the same principle of State approval as well as popular approval should apply to Executive action, as well as to legislative action; that the States should not be forced to support Executive policy and Executive acts merely because ministers enjoyed the confidence of the popular Chamber; that the State House would be justified in withdrawing its support from a ministry

¹⁰⁰ According to Aroney (2002: 284), ‘Baker supported an executive responsible to both houses of the legislature as embodying the strengths and avoiding the weaknesses of the American and British systems.’

of whose policy and executive acts it disapproved; that the State House could, as effectually as the primary Chamber, enforce its want of confidence by refusing to provide the necessary supplies. ...

On these grounds it is contended that the introduction of the Cabinet system of Responsible Government into a Federation, in which the relations of two branches of the legislature, having equal and co-ordinate authority, are quite different from those existing in a single autonomous State, is repugnant to the spirit and intention of a scheme of Federal Government. In the end it is predicted that either Responsible Government will kill the Federation and change it into a unified State, or the Federation will kill Responsible Government and substitute a new form of Executive more compatible with the Federal theory.

This analysis anticipated the argument that would be made decades later by Governor-General Kerr and Chief Justice Barwick, during and after the crisis of 1975, as well as the primary reason why others thought the argument to be particularly pernicious.

Once it was decided that there was to be a Senate, that it was to be directly elected, and that it was to enjoy substantial legislative powers, there were three primary questions that remained to be resolved. First, just what legislative powers should the Senate have: should its powers equal those of the House of Representatives, or should the House enjoy some legislative primacy? Second, what, if anything, should the Constitution provide in order to resolve the legislative deadlocks that might arise as a result of the two houses exercising their constitutionally-assigned legislative powers? And third, just what role was the Senate expected to play in the new constitutional order; was it to be a house of the states, a house of review, a combination of both, or something else? Let us consider each of these questions in turn.

The Senate's legislative powers

According to Galligan's (1995: 77) reading of the constitutional debates regarding the first question, there was 'broad agreement' that, except respecting money bills, the Senate should have the same legislative powers as the House, and that the House should initiate money bills but the Senate should have the power to reject them. The remaining controversy was over whether the two houses should enjoy equal powers with respect to these bills. In particular, should the Senate be empowered to amend them?¹⁰¹

101 Or to put it differently, should the Senate have only a veto over each money bill in its entirety, or should it also have a 'veto in detail,' reflecting Griffith's claim for 'the senate representing the States to exercise the power of veto as to any item of expenditure of which they disapproved'? John Downer proposed unsuccessfully in

Frederick Holder, who would become the first Speaker of the House of Representatives, argued at the Adelaide meetings of the second Convention that the Senate's legislative powers should be the same as those of the House, even regarding these most important bills:

[I]f we are to have called into existence a Senate for no other purpose than to preserve the rights of the separate States as States, we must take care that the Senate shall be able to preserve those rights. ... Equal representation of the States in a manifestly inferior House would be of no value to the smaller States. We might as well have no Senate at all. ... [W]e should provide absolute strength in that House whose business and whose only reason for existence will be the protection of the interests of States one against the other. To set up a Senate which will have no power of the purse will be to set up an absolutely worthless body. (*Convention Debates*, 26 March 1897: 146, 148)

Scott Bennett summarizes the reactions of those from the larger colonies to arguments from small colony representatives such as Holder that the Senate should enjoy equal powers with the House over financial legislation:

The representatives from the larger colonies viewed this development with alarm, for they could foresee a parliament in which the majority represented in the House could be defeated by a minority represented in the Senate. The example of the House of Lords, which had for some time appeared to have given up any real pretence to financial control, was outlined, as also were the dangers to responsible government that would ensue from having the finances of the government of the day dependent upon the upper house. (Bennett 1971: 127)

But as the argument made by Carruthers of New South Wales made clear, there were practical considerations as well as constitutional principles at stake:

It is absurd that you should give to a House which may have a majority of representatives from the smaller contributories power to control the finances of the whole Federation. ... It will be intolerable if the 2 ½ million of people living in New South Wales and Victoria find the bulk of the money necessary to support Federation only to see the financial policy of the country governed by a minority of the people who might hold the majority in the Senate. (*Convention Debates*, 25 March 1897: 91–92)

1891 that the Senate 'have the power of rejecting [money bills] in whole or in part.' This, he argued, amounted to something less than the power to amend because it would not empower the Senate to propose alternatives, such as increases or decreases in spending levels, for provisions that a majority of the states opposed (Galligan and Warden 1986: 96–98).

A bar against Senate amendments to tax and spending bills was included in the draft that emerged from the 1891 Convention in Sydney.

If the Senate was to be foreclosed from amending money bills, what options remained? To deny the Senate any part at all in making what are among the most important legislative decisions that any parliament makes each year? Or to allow the Senate the power to say only ‘yea’ or ‘nay’ to money bills after the House passed them? Baker, speaking at the 1897 meetings in Sydney, foresaw the problem that might eventually arise if the Senate could reject but could not amend money bills initiated by a government responsible solely to the House. Referring to the powers of some colonial upper houses, Baker feared that a Senate with the power only to reject these bills would be:

like a fort which has only one big gun, and that gun so powerful and so uncertain in its effect that they hardly dare to let it off, because it may burst and injure those who occupy the fort, and possibly blow it to pieces. This big gun is the power of refusing to grant supplies, and to thus cause the stoppage of all the functions of government. (*Convention Debates*, 17 September 1897: 785)

By this view, the Senate’s power to reject a money bill, like any other bill, either would be meaningless because the Senate never would exercise it, or it might be calamitous if the Senate ever were to use it.

Yet that is what the authors ultimately decided: let the Senate defeat an essential money bill but not amend it.¹⁰² The requirement that ‘The Senate had to pass all bills including taxation and appropriation bills before they became law, and conversely it had the power to veto all bills. ... was accepted very early on in the 1891 Convention and never again seriously questioned.’ (Galligan 1980a: 5) As already noted, the contention was not over this question, but over whether the Senate should be empowered to amend money bills or only suggest certain amendments for the House’s consideration. However, the right of the Senate to reject a spending bill unavoidably carried with it the right to pass such a bill only if the Senate was satisfied with its content—in other words, only if it was amended, directly by the Senate or indirectly by the House acting at the Senate’s request, in whatever ways a majority of the Senate considered essential.

During the 1975 crisis, some argued that the authors of the Constitution surely could not have thought that the Senate they were creating would ever actually fire its ‘big gun’ and bring the government

¹⁰² Although contention over this issue almost caused a rupture in the Adelaide meetings of the second Convention (Galligan and Warden 1986: 94).

to a halt by denying it essential funds.¹⁰³ Yet consider this statement by Griffith at the first Convention in 1891:

[I]t must be remembered that it is not proposed to deny the senate the power of veto. Surely if the senate wanted to stop the machinery of government the way to do that would be to throw out the appropriation bill. That would effectively stop the machinery of government. I, for my part, am much inclined to think that the power of absolute rejection is a much more dangerous power than the power of amendment; yet it is a power that must be conceded. We all admit that; and in a federation there is much more likelihood of that power of rejection being used than there is of the power of amendment being used. (*Convention Debates*, 17 March 1891: 429)

Griffith's final prognostication proved mistaken and we cannot know how many others shared his views on this point. What we can say, though, is that the danger that the Senate could and might reject an essential appropriation bill was raised at an early stage in the constitutional debates.

It also is noteworthy that Victoria's Legislative Council, its upper house, had done just that in 1865, then again in 1867, and once more in 1877.¹⁰⁴ Furthermore, these events were so dramatic and contentious that they could not possibly have slipped the minds of the Convention representatives from Victoria, or from the other colonies (Hutchison 1976: 41–50).

When the Legislative Council in Melbourne refused to vote supply in 1865, according to Wright (1992: 75), the state premier 'advised all public servants that they could not be paid and that government activities would have to be curtailed. The result was an eruption of meetings, marches, letters, editorials and petitions, overwhelmingly in favor of the Legislative Assembly [the lower house].' After the first refusal of supply in 1867, the ministry resigned, only to be called back to office for just long enough to have another supply bill rejected, and

103 Hughes (1980: 45–46) argues that the authors never seriously contemplated the Senate using its power to defeat a supply bill for this purpose. 'Although the Constitutional Conventions paid considerable attention to the Senate's power in respect of money bills, speakers perceived the problem in terms of a misuse of a particular financial measure to accomplish some extraordinary end, with the Senate blocking that measure to defend the rights of one or more of the states. Such reference as was made ... to the possible use of the Senate's power against a 'corrupt' lower house was exceptional and not taken further in debate.'

104 My thanks to Ken Coghill of Monash University and former Speaker of the Victorian Legislative Assembly for calling these events to my attention. See Wright 1992: 74–91. These events involved tacking unrelated provisions on appropriations bills, and may have encouraged the authors of the Constitution to insert secs 54 and 55 that bar tacking in the Commonwealth Parliament.

for the Governor then to dissolve Parliament. Although the ensuing election returned the same Assembly majority that the Council had thwarted, the colonial secretary in London nonetheless instructed the Governor that:

You ought not to again recommend the vote [the Appropriation Bill] to the acceptance of the Legislature, except on a clear understanding that it will be brought before the Legislative Council in a manner which will enable them to exercise their discretion respecting it, without the necessity of throwing the colony into confusion. (quoted in Wright 1992: 79)

In light of this instruction, the former ministry refused to form a new government, even though it held 60 of the 78 Assembly seats. For a brief period, there was, for the first time, a government formed by a member of the Council, a government that lacked a majority in the Assembly, and, therefore, a government entirely at odds with the basic conventions of the Westminster system.

After the Council's action in 1877, 'Exhausted members shouted hysterically of injustice, instability, insurrection.' (Wright 1992: 87) The Assembly then sought to bypass the Council by insisting that the Governor make funds available once they were approved by the Assembly acting alone. The Governor reluctantly complied and, for his efforts, 'was ignominiously transferred to Mauritius.' (Wright 1992: 89) Surely in light of such events, and the public furor surrounding them, the authors of the Commonwealth Constitution understood that the Senate they were creating might, sooner or later, exercise all the powers it was granted, and that those powers would include the right to refuse supply unless the Constitution specifically precluded the Senate from doing so—which it did not, and does not, do.

These circumstances make it more difficult to explain the decision, which was not seriously challenged, to allow the Senate the power to defeat any bill, even the most essential appropriation bill, though Uhr (1989a: 138–139) makes a valiant effort, explaining that 'the argument which won the day' was:

that there should be a Senate with full veto power over all kinds of legislation, but one which could not initiate, amend or otherwise attempt to mould basic financial measures. To allow the latter powers would be to permit the Senate to interfere with the basic machinery of responsible government. *Outright rejection was different and legitimate*: it would be the strongest possible action of dissent from a government's policy, and the government thus defeated could seek a new House election with the hope of popular endorsement of its policy. It seems that most thought that the Senate would be somehow bound to accept such a mandate won by a government. However, to empower the Senate to amend even basic financial measures would be to tempt the Senate to frustrate the more

mundane matters relating to the machinery of government, creating uncertainty, and deviating the course of administration away from the accepted conventions of responsible government in which the lower house is primary. (emphasis added)

The contemporaneous statement that has been offered in explanation is one made by Barton in Adelaide during the 1897 meetings. The perplexing nature of the question warrants quoting Barton at some length:

If the Second Chamber makes suggestions ... and if the suggestions are not adopted, that House must face the responsibility of deciding whether it will veto the Bill or not. If the procedure is to be by way of amendment, and the amendments are disagreed with by the House of Representatives, and are still insisted upon by the Second Chamber, then it is upon the House of Representatives that the responsibility must rest of destroying its own measure. ... In the first case the responsibility rests where it should, with those who wish to negative the policy of finance upon which the entire policy of the Government hangs; because without money you cannot govern. If the policy of the Ministry according to their desires in the main is not carried out there must be another Ministry, and those who lead to the formation of that Ministry should take the responsibility. If the procedure is by way of suggestion, which is insisted upon, the Senate must take the responsibility of the veto. (*Convention Debates*, 14 April 1897: 557)

I find these proffered explanations to be somewhat less than clear and compelling, and wonder whether there is another one that lies in the difference between the cannon of rejection and the shotgun of amendment. Perhaps the Constitution's authors thought they could satisfy those concerned with protecting state interests by giving the Senate the power to reject any bill, including money bills, because they were confident that this power would not be used in circumstances that would jeopardize the functioning of responsible government. That 'big gun' of which Baker spoke simply was too powerful, too dangerous—and too likely to backfire. We will encounter an argument that supports this explanation later in this chapter.

So the view that prevailed at the constitutional Conventions appears to have been that Australia should enjoy responsible government conventionally understood, with the government responsible only to the House and with the Senate unable to amend money bills, but that the Senate should be empowered to reject all bills, even money bills, in their entirety. It must have been the widespread assumption that the Victorian experience had been aberrational and—for whatever reason or reasons, and maybe (or especially) with that experience in mind—that the new Commonwealth Senate was very unlikely ever to fire its 'big gun.' And in fact, this assumption proved to be well-founded—

until the 1970s. In his 1946 book on the Parliament, Denning (1946: 64) concluded that ‘the House of Representatives controls the raising and expenditure of money, and the Senate cannot interfere except to throw the whole financial machinery into disorder, and precipitate a crisis. So we see that, despite its technical seniority, the Senate occupies a very restricted and inhibited place in the parliamentary order.’

Yet two other points need to be kept in mind. First, the Constitution carefully circumscribed, in secs 54 and 55, what either a spending or taxing bill may contain, so that the House could not take undue advantage of the limits on the Senate’s legislative powers. And second, the Senate was allowed to request that the House agree to specific amendments to any money bill.¹⁰⁵ To those with an expansive view of the Senate and its place in Australia’s constitutional firmament, the effect of permitting such requests, as we have seen, was to restore the Senate’s legislative status to one of essential equality with the House, because a determined Senate majority can refuse to pass any money bill that the House will not amend to the Senate’s satisfaction.¹⁰⁶

Breaking legislative deadlocks

Although the Senate ultimately was given the power only to request, not make, amendments to critical financial legislation, every other bill was vulnerable to the possibility of legislative disagreements between the houses that could not readily be resolved. That possibility was a necessary consequence of the powers that each house enjoyed, and a reflection of the larger problem of combining federalism and responsibility in the same charter of government. As we saw earlier, three options for resolving the underlying problem had emerged clearly as early as 1891: sacrificing federalism to the requirements of

¹⁰⁵ But I do not rest much weight on that grant of authority because it is something that the Senate surely could have done anyway. Barring an explicit constitutional prohibition, there is no reason why the Senate could not have said to the House, in effect: ‘Before we vote on passing or defeating this money bill that we have been debating, we would like to know if the House would be willing to make certain amendments that would make us much more inclined to pass the bill.’ While such a communication to the House might have been extra-constitutional, I see nothing that would have made it unconstitutional even if there were no express authority for it in the Constitution. The procedure for requesting amendments evidently had its origins in procedures of the South Australian Parliament (Galligan and Warden 1986: 92).

¹⁰⁶ There was no consensus about how much difference it was likely to make in practice that the Senate could not amend money bills directly but could request amendments to them. George Reid said that ‘a strong Senate will compel attention to its suggestions; a weak one would not insist on its amendments.’ (*Convention Debates*, 7 March 1898: 1998)

responsible government; sacrificing the purity of responsible government to the demands for a national parliament that reflected the federal nature of the Commonwealth; or somehow joining the two together in a marriage that would last. The first two options were rejected because they necessitated emasculating one or the other. That left only the third option, which could be approached in one of two ways, or a combination of both. 'One was to rely on the good sense of those who operated the system to make it work ...' (Galligan 1980a: 4) '[H]owever we may err in allotting too much or too little power to this or that body,' Barton said, 'we still have the good sense of an English-born race to carry us through ...' (*Convention Debates*, 17 March 1891: 410)

The other approach, and one that was compatible with the first, was to embed in the Constitution a procedure for resolving legislative deadlocks as they occurred. However, the draft Constitution that emerged from the 1891 Sydney Convention contained no such procedure. When the Australasian Federal Convention first met in Adelaide in 1897, it confirmed the 1891 draft in this respect. At the Sydney meetings of the second Convention, however, this issue was revisited, and at length. Richardson (2001: 298) calculates that the debate over whether to include a procedure for resolving legislative deadlocks and, if so, what that procedure should be, 'lasted six days and accounted for some 400 of the 1100 pages of the official record, making deadlocks easily the most debated single subject in the entire series of Convention debates.' One proposal called for a deadlock to be resolved by a simple majority vote at a national referendum, an approach that would work to the obvious advantage of the most populous states and so was unacceptable to the less populous ones.¹⁰⁷ The alternative was some form of double dissolution procedure, for which there was precedent in a procedure that South Australia had adopted in 1881.

The virtues and vices of both approaches continued to be debated, as were various permutations and combinations of consecutive or simultaneous dissolutions of both houses, sometimes linked to joint sittings or referenda and sometimes not. The issue remained unresolved when the Convention reconvened in Melbourne in January 1898. It was then and there that agreement finally was reached to include the procedures now found in sec. 57, but with the requirement for three-

107 'The Convention could find no consensus on the appropriate form of referendum. The conservatives argued for a dual or double referendum requiring a majority of votes and a majority of States while the radicals argued for a single mass referendum requiring only a majority of votes.' (Galligan and Warden 1986: 107)

fifths majorities at joint sittings. Still later, in January 1899, when the six colonial premiers met in Melbourne, they changed this requirement to an absolute majority of the members of both houses. (At that meeting, the premiers also agreed that neither house should be able to prevent a constitutional amendment from being submitted to a referendum.)

The issue was not simply one of deciding what mechanism, or which of the two, would be more efficient or dependable; there were thought to be important political interests at stake. Galligan (1980b: 251) summarizes the choices nicely:

The usual colonial procedure of a single dissolution of the House of Representatives was available, but was rejected because it would leave the House at the Senate's mercy. Popular plebiscite was also considered and discarded since a popular majority would most likely favour the House. Similarly, a joint sitting of both Houses of Parliament was rejected because the Senators would be out-numbered two to one by members of the House.

In fact, any mechanism for overcoming legislative disagreements could undermine the leverage that the Senate was thought to give to the small states and for which they fought so doggedly during the Conventions.

The small states feared that any method of resolving deadlocks would undermine the power of the Senate by enabling the large States, through the executive, to manipulate a deadlock and thus ensure *de facto* control of the Senate. They saw a proposed mechanism for resolving conflicts not as a precautionary measure to avoid a parliamentary, and hence a national crisis, but rather as a sinister instrument of coercion. (Galligan and Warden 1986: 106)

From this perspective, Bennett concludes (1971: 131) that, on balance, what became sec. 57 was 'a clear victory on points for the larger colonies', a victory that contributed to the balance of the overall compromise that included equal representation of the states in the Senate. Perhaps the reason for this outcome, Galligan and Warden suggest, is that the small states were even more opposed to the most likely alternative to the double dissolution and joint sitting procedure. That alternative was some form of a national referendum at which the voting strength of the larger states would allow them to prevail (assuming the merits of the bill actually did put the small and large states at odds with each other). For delegates from the smaller states, 'The referendum was ... an instrument far more antagonistic to the spirit of federation and their own States' interests than was the simultaneous dissolution.' (Galligan and Warden 1986: 108)

As Galligan (1995: 85) points out, however, this mechanism was not well-suited to deal with deadlocks over supply, 'being too cumbersome

and time-consuming.’ No joint sitting can occur until after the two houses have reached deadlock three times over the same bill, and with a double dissolution and new elections intervening between the second and third attempts. If deadlocks were to be anything other than rare, the Constitution’s mechanism for resolving them was hardly workable. O’Connor had recognized this when he advised distinguishing between deadlocks over supply, which could bring the operations of the government to a halt, and deadlocks over all other bills, which did not entail the same risk. For the former, he proposed that a deadlock be broken by a vote at a joint sitting, without the need for an intervening double dissolution and the time-consuming process of holding an election.

This proposal was rejected in favor of the sec. 57 procedures that apply equally to all bills and that cannot offer a timely resolution of a deadlock over supply. This brings us to Galligan’s conclusion that ‘The lack of a fail-safe mechanism for handling supply deadlocks, not the Senate’s legislative power over such bills, is the problem in the Constitution.’ Why did the authors not address this problem more satisfactorily? Galligan’s answer is that they thought it unnecessary to do so because the Senate would not act in a way that would put the essential operations of government at risk:

It seems that most delegates considered O’Connor’s ‘dangerous’ deadlocks were so serious as to be practically unthinkable. According to Glynn, a deadlock over an appropriation bill would ‘open up the way to a revolution’ and the fear of such a thing occurring would ‘operate as a sanction to prevent it.’ ... At Melbourne, McMillan suggested that the blocking of supply would throw the whole finances of the Commonwealth into confusion and ‘would mean revolution.’ (Galligan 1980a: 9)

‘[T]he Australian founders profoundly trusted their rugged sense of British constitutionalism and parliamentary politics,’ such that either ‘prudential restraint’ or the deterrent of giving the Senate only the ‘big gun’ of rejecting supply would suffice (Galligan 1984: 144–145).

Was this naïve? W. Harrison Moore, a respected legal scholar who was not involved in drafting the Constitution, evidently did not think so. In his commentary on the Constitution, published a decade after Federation, he wrote that, especially in view of the bar against Senate amendments to the most critical appropriation bills, deadlock, ‘bringing the machinery of government to a standstill—is a contingency so remote as hardly to be within the range of practical politics.’ (1910: 154) Recall that it was not until more than a decade later that Britain found it necessary to adopt the *Parliament Act 1911*. And recall also that the US Constitution is entirely silent on mechanisms for breaking deadlocks between the American House and Senate, deadlocks that

were likely enough to arise in view of the different modes of electing the members of each. Perhaps the essential difference is that the prospect of new laws being delayed or prevented by deadlocks in Congress probably would not have perturbed many authors of the US Constitution, given their skepticism about an activist, expansionist federal government.

So the most plausible conclusions seem to be that: first, authors of the Australian Constitution recognized that they were giving the Senate powers that could lead to deadlock; second, their mechanism for breaking such deadlocks ultimately favored the House; and, third, this mechanism would not work well, or at all, for spending legislation; but, fourth, they were sufficiently confident that good sense and restraint would prevail that they did not think it necessary to devise a more practical mechanism to expedite resolutions in cases of deadlock.

A House of the States? A House of Review?

As the statements by Holder and Carruthers, quoted above, reveal, the questions we have asked about the powers of the Senate, and its exercise of those powers, are inseparable from questions about the kind of institution the Senate was expected to be, and especially whether it was to be a 'House of the States,' and if so, what that meant.

Souter (1988: 21) estimates that debate concerning 'the composition and powers of the Senate vis-a-vis those of the lower house ... occupied more than one-third of the 7053 pages of the federation convention debates in the 1890s.' Much of this debate, and especially about the Senate's powers over financial legislation, turned on the relations between large colonies/states and small ones, and on the relations between a House based on population and a Senate based on representation of the states as such. Opponents of equal powers for the two houses emphasized that the Senate with equal powers could block the House to the detriment of responsible government. Underlying that argument was the assumption that any such Senate action would represent the interests of the states (that is, a majority of the states, and presumably the less populous ones) coming into conflict with the interests of the general public as represented in the House.

Delegates to the constitutional Conventions debated whether there were distinctive state interests that required protection, whether any such differences in interests distinguished the small states from the large ones, whether the powers proposed for the Commonwealth were restricted enough to protect the states' ability to protect their own interests, and, therefore, whether it was necessary to provide for equal representation of the states in the Senate and to empower the Senate to

amend those all-important money bills. Implicit in these debates was the assumption that Senators would approach issues and evaluate government proposals from the perspective of the interests of their respective states. Senators were to be directly elected, but that did not mean that they would be insensitive to their states' preferences and needs. There was no question that the smaller states saw in the Senate their protection against domination by New South Wales and Victoria. The questions were, first, how much any of the states, as states, needed the protection that the Senate could provide them, and, second, how much protection the Senate would be constitutionally empowered to provide.

Hugh Collins has concluded that the Constitution's authors approached these questions as questions of practical governance, not abstract political theory. In Australia:

[F]ederalism is a product of convenience rather than conviction. Unlike Switzerland, or French and British Canada, Australian federalism is not a means for preserving the integrity of linguistically distinct communities within a single polity. Nor, as in the American case, is it traceable to the normative assumption that, even within a relatively homogenous community, power should be divided between levels as well as branches of government. Rather, the constitutional framework chosen in Australia in the 1890s was a practical adjustment to circumstance. Faced with small communities separated by great distances but already endowed with political institutions, those seeking a limited range of cooperative action in matters like defense, trade, and immigration found a federal scheme expedient. (Collins 1985: 152)

There are two other matters that deserve mention here. The first is that a second chamber such as the Australian or American Senate is not an essential element of a federal system. Federalism is characterized by more than one level of government and some division of powers among them. Federal systems differ, for instance, in how powers are distributed between or among levels of government, where the residual jurisdiction resides over undistributed powers, and how disagreements or incompatibilities between national and state (or provincial, etc.) policies or legislation are to be resolved. Notwithstanding Baker's claim at the Sydney Convention in 1897 that 'The essence of federation is the existence of two houses, if not of actually co-equal power, at all events of approximately co-equal power,' the representation of the states within the legislative structure of the national government is not an essential part of the federal arrangement (Sampford 1989: 356–361). If a constitution assigns certain authority to the national government and other authority to subnational governments, perhaps with an independent court to adjudicate boundary disputes, there is no

compelling reason why the subnational units have to be represented as such in the councils of the national government.

When states are given representation in the national Parliament, they typically are given equal representation or at least representation that does not accurately reflect population disparities among the states. The essential reason for such representation is not theoretical, it is political, because the smaller states want disproportionate influence over how the national government exercises its powers within its constitutional jurisdiction and using its own resources. It is understandable why smaller states want such representation; it is in their interests to have it. But it is no more natural or necessary for the states to have a share of the powers of the federal government than for the federal government to have a constitutional share in the governance of each state—for example, by giving the US President a veto power over legislation enacted by each of the 50 states. An ‘upper’ or ‘second’ house in which the states are represented equally may be a price that smaller states demand for their agreement to federate, but it is not necessary to the design or operation of federal systems.

It follows that I must disagree with an assertion that Griffith made during the debates and that Galligan (1980b: 251) quotes with evident approval. In support of the proposition that the Senate had to have the same, or very close to the same, legislative powers as the House, Griffith invoked the ‘strict federal principle’ that ‘in a federation the laws—and the laws affecting money as well as others—must be passed by the consent of a majority of the people of the commonwealth and also with the consent of a majority of the states.’ To the contrary, I find nothing inherent in federalism which requires, for reasons of theory or ‘strict principle’, that the states as such should have anything to say about how the federal government allocates the funds that it has received under its own constitutional powers and that it now proposes to spend to fulfill its own constitutional responsibilities. Most of those who spoke during the debates about the Canadian system were less than enamoured with it, primarily because of the dominance of the government in Ottawa and a consequent lack of provincial autonomy. I doubt that any federal system can work, or work well, if the federal and state governments are entirely autonomous within completely separated constitutional jurisdictions. Some sharing, some overlap, some interpenetration probably is inescapable as well as desirable. But from that starting point, it is a long jump indeed to the conclusion that a ‘strict principle’ of federalism requires a simple majority of the states to have a veto power over the federal government’s budget.

It also follows that the problem for the Constitution was not to reconcile responsible government with federalism but with something

that is often and easily thought to be, as Baker suggested, essential for a workable federal system—the Senate. Like others before me, I succumb in these pages to the seductive ease of summarizing the ‘problem’ or the ‘contradiction’ as one between federalism and responsibility. Though I admit that this is not quite right, I claim the justification of artistic license. In addressing subjects like these, clear and simple formulations are hard to find and harder to discard.

Second, while many authors of the Constitution undoubtedly thought of the Senate as the House of the states, and even more of them probably spoke of it in those terms for convenience, there is an alternative conception of the Senate which needs to be noted. In his *A Federal Republic* (1995), Brian Galligan has been the most eloquent advocate of an understanding of the Senate which we may summarize by describing both houses of the Commonwealth Parliament as being Houses of the People, both being directly elected, but elected in different ways.

[T]he Senate is not less democratic or legitimate than the House of Representatives; the two houses are simply constituted according to different principles of representation of the people, one being federal and based on State electoral constituencies, and the other being national and based on local, single-member electorates. The two houses of parliament are both directly elected by the people but on different constituent bases. (Galligan 1995: 74)

Here Galligan takes issue with Quick and Garran (1901: 414), in whose view the authors of the Australian Constitution confronted the same problem as had the framers of the US Constitution: ‘how to reconcile the creation of a strong national government with the claims and susceptibilities of separate, and, in their own eyes, *quasi*-sovereign States.’ The solution, according to Quick and Garran:

was found in a Parliament partly national and partly Federal. The national part of the Parliament is the House of Representatives—the organ of the nation. The Federal part of the Parliament is the Senate—the organ of the States, the visible representative of the continuity, independence, and reserved autonomy of the States, linking them together as integral parts of the Federal union.

So the Senate, they conclude, is ‘the Council of States in the Federal Parliament’.¹⁰⁸ Galligan rejects this analysis, arguing instead that the

108 ‘The Senate is not merely a branch of a bicameral Parliament; it is not merely a second chamber of revision and review representing the sober second thought of the nation, such as the House of Lords is supposed to be; it is that, but something more than that. It is the chamber in which the States, considered as separate entities, and

Senate is just as much part of the national government as the House, the only difference being in the basis of representation. The essential point to Galligan is that the members of both houses are directly elected, albeit in different ways. Quick and Garraan's characterization might well apply to the US Senate before the 17th Amendment and to the German Bundesrat today, but not at any time to the Australian Senate. Precisely because the Senate is directly elected, it does not, he might argue, represent the States as such and so cannot be 'the Council of States in the Federal Parliament'.

Perhaps the core of Galligan's argument is that 'parliamentary responsible government was incorporated into the federal constitution, not vice versa.' (Galligan 1995: 7) Elsewhere, he (1997: 23) has asserted that 'Australia's constitutional system is fundamentally federal and republican rather than parliamentary and monarchic. ... That is not to say that the parliamentary and, to a lesser extent, the monarchic parts are not important but rather that they are subservient to the overarching federal and republican parts.' Putting aside the question of its republican and monarchic elements, Galligan's exposition (and especially his 1995 book) are a valuable corrective to the more frequent assertions that the essential characteristic of Australian government is responsible parliamentary government. However, I should think it suffices to stress the centrality of both elements.

Galligan's key contribution may be in emphasizing that federalism was neither an after-thought nor a secondary concern for the Constitution's authors. They did not construct a system of responsible government and then attach to it, as an ill-fitting appendage, a federal structure and a constitutionally potent Senate. Anyone who has proposed or might propose abolishing the Senate should not view that proposal as a way to clean up or simplify or streamline the structure of Australian governance. Such a proposal would be even more radical in its effects than a proposal to scrap the forms of responsible government in favor of a directly-elected president and an American-style system of separate institutions sharing the powers of the Commonwealth government.

In any event, whether it is accurate to say that the Senate was intended to be the House of the States, observers of the Parliament in practice are virtually unanimous in stressing that whatever the Senate

corporate parts of the Commonwealth, are represented. They are so represented for the purpose of enabling them to maintain and protect their constitutional rights against attempted invasions, and to give them every facility for the advocacy of their peculiar and special interests, as well as for the ventilation and consideration of their grievances.' (Quick and Garraan 1901: 414)

may be, a House of the States it is not. Fifty years ago, Partridge (1952: 175) opined that 'the Senate has proved to be a falsely-conceived institution. The chief assumption about the structure of our polity which dictated its design (the assumption that there are distinct and decisive State interests which could be separately represented) has turned out to be false.' Cody reports interviews with small state Senators who:

characterised equal state Senate representation as a discernible benefit to their states. Their defence of equal representation was largely negative, much like Australians' justification for an upper house. That is, in both cases the Senate prevents undesirable outcomes through reaction to government policies and practices more than it facilitates desirable outcomes through proactive policy initiation of its own. Senators conceded that the Senate's operation does not give small states great power, but they contended that their states would enjoy still less party room leverage if the Senate and its party caucuses were majoritarian like the Representatives. (Cody 1996:105)

Such assertions must be weighed with care in the absence of independent empirical verification because we would hardly expect small state Senators to say anything different. And Cody himself concludes that 'small states derive remarkably limited benefits from equal state representation.' This is about as much as we can say today for the Senate as the House of the States.¹⁰⁹

The primary reason, of course, is the strength of party discipline and the importance of that discipline for decision-making in the House and, to only a slightly lesser extent, in the Senate as well. As we already have seen, the strength of parliamentary parties in the Commonwealth is no new development; it is largely a product of the emergence of the ALP and the 'fusion' of non-Labor forces in the election of 1910. What made this development so consequential was the strict discipline that the Labor Party imposed on its Representatives and Senators, a discipline that had ripple effects:

¹⁰⁹ Referring to Canada, Evans (1997a: 4-5) notes 'the extreme alienation of the outlying provinces, particularly the western provinces, caused by the domination of government by the centres of population. ... Such serious alienation has not occurred in Australia, and a primary reason for this is that the federal structure of the legislature, unlike the non-federal structure of the legislature in Canada, has altered the representational system by forcing majorities to be geographically distributed.' This was a more persuasive argument before the crystallization of Australia's party system in 1910. In this context, it probably is fair to observe that the concerns the small states expressed in the Conventions about the prospect of being dominated by the large states was, in most respects, more a fear of domination by the twin population centres of Sydney and Melbourne.

The other looser-knit groups organised around free trade and protection, which had dominated colonial politics through the federation period and in the early Commonwealth parliaments, were forced to realign into a Liberal 'fusion' and adopt comparable disciplined practices. Disciplined party politics reinforced the logic of parliamentary responsible government and was in turn reinforced by it. The Senate became a party house and played second string to the House of Representatives where the government did battle with the Opposition. (Galligan 1995:8)

Senators could not be loyal and disciplined members of their party and, at the same time, be willing to give first priority to the interests of their states. According to Souter (1988: 67), politics in the Senate 'were a mixture of State and party politics from the very beginning.' Regarding the first Senate, which pre-dated the emergence of two disciplined party blocs, he concludes that:

The Senate on this maiden voyage had nailed its colours to the mast. It had insisted upon its right to press requests; had tried unsuccessfully to establish the right of ministers to address either house, an innovation which would have been quite at variance with British parliamentary tradition; and in the last weeks of parliament declined to concur in resolutions of the 'other place' that a conference be held between the two houses to consider the selection of the permanent seat of government. At such a conference, Senator Simon Fraser ... reminded his colleagues, representatives would outnumber senators two to one. (Souter 1988: 80)

The first Senate also asserted its standing with respect to bills making appropriations. According to Moore (and *Odgers' Australian Senate Practice* 2001: 292–293), the Senate immediately made clear its dissatisfaction with the House's apparent claims to primacy that were reflected in how the first supply bill in 1901 was drafted:

As soon as the Bill reached the Senate, objection was taken that no estimates formed part of the Bill, and that it contained nothing upon which the Senate could exercise its judgment in the exercise of its constitutional powers. In this view the Government acquiesced, and on their suggestion the Senate made the first exercise of its power under sec. 53 by returning the Bill to the House with a request that the House would so amend the Bill that it might show the items of expenditure comprised in the sums which the Bill purported to grant. The House accepted the position, the Bill was laid aside, and a new Bill introduced. (Moore 1910: 145–146)

That bill also asserted that the appropriation was being 'made by' the House of Representatives. When the Senate objected to this formulation, the House amended the bill to state instead that the appropriation 'originated in' the House.

Yet as early as 1905, one observer, H.G. Turner, felt justified in calling the Senate 'merely an appendage, necessary to give statutory

force to the decisions of the party which dominated the other House' (quoted in Souter 1988: 125). Souter concludes that 'the party system had come to dominate the intended "States" House as well as the House of Representatives.' By 1909, he reports (1988: 117), 'the "States" House' had lost some of its former zeal for States' rights,' and a constitutional amendment concerning Commonwealth grants to the States was 'passed by the upper house pretty much on party lines,' even though 'its provisions involved a substantial transfer of power from States to the Commonwealth.' 'In practice,' Hutchison (1983: 145) finds, 'the Australian Senate has since 1901 rarely been seen as *a*, let alone *the* forum, for the promotion and protection of state interests.' She continues:

Bodies such as the Premiers' Conferences and the Loan Council, and direct negotiations between federal and state ministers and public servants, are the real medium of federal-state interaction. There are only about 20 occasions on which one can document a purely states' rights, rather than partisan, reaction to legislation.

Since strong disciplined parties emerged so soon after the Constitution took effect, are we to conclude that its authors simply failed to anticipate this development? Certainly not all of them (Irving 1999: 74). It was J.M. Macrossan of Queensland at the 1891 Convention who predicted that the strength of party would overcome the interests of the states in the Senate:

We have been arguing all through as if party government were to cease immediately we adopt the new constitution. ... The influence of party will remain much the same as it is now, and instead of members of the senate voting, as has been suggested, as states, they will vote as members of parties to which they will belong. I think, therefore, that the idea of the larger states being overpowered by the voting of the [smaller] states might very well be abandoned; the system has not been found to have that effect in other federal constitutions. Parties have always existed, and will continue to exist where free men give free expression to their opinions. (*Convention Debates*, 17 March 1891: 434)

Isaacs concurred, arguing in 1897 that 'men do not vote according to the size of their States,' and Higgins found evidence for this position in Lord Bryce's observation that, in the United States, 'There has never been, in fact, any division of interest or consequent contest between the great States and the small ones.' (*Convention Debates*, 26 March 1897: 173–174; 25 March 1897: 100)

Deakin took much the same view at Sydney in 1897:

I have always contended that we shall never find in the future federation certain states ranked against certain other states, or that party lines will be

drawn between certain states which happen to be more populous and those which do not happen to be so populous. ... What is absolutely certain is that, as soon as this federation is formed, parties will begin to declare themselves in every state. Every state will be divided. ... There exists in each colony a party that can be considered liberal, and also a party that can be considered conservative. Is it not, then, inevitable, that so soon as the federation is formed, the liberal parties in the different colonies will coalesce and throw in their lot with each other; and that the conservative parties in the different colonies will do the same, irrespective of state boundaries There will not be any question of large or small states, but a question of liberal or conservative. (*Convention Debates*, 10 September 1897: 335)

So, Deakin concluded:

The contest will not be, never has been, and cannot be, between states and states. ... it is certain that once this constitution is framed, it will be followed by the creation of two great national parties. Every state, every district, and every municipality, will sooner or later be divided on the great ground of principle, when principles emerge.

In this event, 'Contests between the two houses will only arise when one party is in possession of a majority in the one chamber, and the other in the possession of a majority in the other chamber.' (*Convention Debates*, 15 September 1897: 584)¹¹⁰

We cannot know for certain how widespread their views were. La Nauze (1972: 119), however, refers to the 'unrepresentative character' of the arguments that both Macrossan and Deakin had made. When confronted with these arguments, 'the delegates were unconvinced. They remained fixed on the idea that the principal political divisions in the Commonwealth would be based on the states ...' (Reid and Forrest 1989: 12) And it should be remembered that, as the debates took place, the ALP was still very much in the process of development, leading Galligan (1986: 101) to conclude that:

Deakin and his colleagues failed to follow through their insight ... and so did not anticipate the acute problems that might arise if the federal bicameral legislature were controlled by opposing parties. If Deakin and his colleagues anticipated parties, it was not the disciplined parties that were to dominate Australian politics after 1910 and force the constitutional crisis of 1975.

110 During the Adelaide debates earlier in the year, he had said that, 'From the first day that the Federation is consummated ... the people will divide themselves into two parties [W]hichever way parties may move, one thing is certain, namely, that their division into the more populous States on the one side, and the less populous States on the other side, is the last possible eventuality of a thousand eventualities which are more likely to occur.' (*Convention Debates*, 30 March 1897: 297)

Here is a plausible basis for explaining why the authors of the Constitution fought so doggedly over whether the Senate should be allowed to amend money bills but had few if any qualms about empowering the Senate to veto each and every one of those same bills (and all others). In an earlier analysis of the events of 1975, Galligan (1980b: 252) argued that ‘Those who framed the Constitution did not envisage a deadlock over supply since they were unfamiliar with disciplined political parties.’ They could understand why a particular provision in an appropriation bill might be opposed by a single Senator, or by all the Senators from the same state, or even by all the Senators from a group of (small) states. But if they did not envision the Senate being dominated by intense competition between two disciplined party blocs, it is not surprising that they thought it unlikely that Senators or the Senate would want to defeat, in its entirety, a bill for the essential purpose of keeping the existing wheels of Government turning. Galligan (1980b: 255) elaborates:

The Australian Constitution which was the mature fruit of nineteenth-century practices and beliefs was not designed to cope with the bipartisan [i.e., two-party] politics that polarised the nation along class lines immediately after federation. The legislative system took for granted a liberal consensus and faction or pluralist politics. It presupposed the parliamentary practices of the day in which majorities were formed from loose coalitions of relatively autonomous members. The founders took for granted a system in which personalities and issues dominated, and debate and compromise determined outcomes The rapid rise of the Labor Party to national prominence after federation partly undermined the ideological consensus that the Constitution presupposed and made its working problematical When the two houses of a bicameral legislature are controlled by opposing and disciplined parties, the system is prone to deadlock.

This argument makes untestable assumptions about how the authors envisioned the future shape of parliamentary politics. However, it has the compelling advantage of allowing us to explain their decision by reference to calculations that they could make as experienced political animals, instead of or in addition to relying on more ethereal arguments on the same point such as the one, quoted earlier in this chapter, that Barton made.

Did the perhaps-not-widely-enough-anticipated and all-too-soon-to-be-realized growth of strong parties preclude the Senate from serving as a House of Review, if not the House of the States? That question is more difficult to answer because the notion of the Senate as a House of Review has proven to be so amorphous. Both in the contemporaneous debates and the contemporary literature, there is a frustrating

imprecision in discussions of what a House of Review is to review, and to what end (e.g., Wright 2001). Some discussions imply that a House of Review is concerned less with the wisdom and workability of proposed legislation than with the implementation of legislation already enacted; to use American terms, that a House of Review focuses on oversight at the expense of its legislative powers. Other discussions, however, at least imply that characterizing the Senate as a House of Review is a way of describing how the Senate should exercise its legislative powers. This alternative sense suggests that the Senate acts as a House of Review if and when it assesses how well government legislation is designed and drafted to achieve the government's own objectives, not whether those objectives are desirable and whether enactment of the legislation, in the judgment of Senators, would be good for Australia. If so, then it would be appropriate for the Senate to make polite suggestions for what, by the government's own criteria, would be improvements in its legislation, but certainly not to try to defeat or unduly delay that legislation.

Let me illustrate the problem with applying this concept to the Senate by referring to two often-cited scholarly efforts that take on the subject directly: Fusaro's 1966 article on 'The Australian Senate as a House of Review: Another Look,' and Mulgan's 1996 article on 'The Australian Senate as a "House of Review".' What does each author mean by a House of Review; how can we tell if that is what the Senate is and what the Senate does? What does or would or should the Senate review? And what is or would be or should be the purpose and product of this review: to clarify, to elucidate, to publicize, to evaluate, to modify, or even to reject?

In other words, assuming that whatever the Senate reviews is something the government supports, is it appropriate for the Senate as a House of Review to interfere with or even prevent the government from doing what it wants to do or continuing with what it already has begun to do? Or should the Senate accept that the government has the right, if not the unquestioned power, to determine the general lines of policy, and that the appropriate role for a House of Review is to illuminate the implications and consequences of government policy and perhaps to suggest changes that will enable the government to achieve its policy goals more efficiently, effectively, parsimoniously, or fairly? It should be obvious that different answers to these questions can produce quite different concepts of what it actually does or should mean for the Senate to be that House of Review.

In the earlier of these articles, Fusaro adopts a concept of review that encompasses both legislative proposals and executive actions. He makes clear that his primary focus is on cases 'in which the senate has

changed or attempted to change legislation sent to it from the lower house,' but also asserts that the Senate's 'power to review the acts of the executive' is another 'aspect of review' (Fusaro 1966: 384). So 'review' can refer to the exercise of the Senate's legislative powers and also to the activities of the Senate in monitoring and sometimes attempting to influence, restrain or control the government's executive actions. 'Review' is both prospective and retrospective: it applies both to government proposals and to government actions. (For the retrospective aspect of review, I will use the American term, 'oversight.')

With regard to prospective, legislative review, how is the Senate as a House of Review to be distinguished from the Senate as a House of Lawmaking? Fusaro's answer is that 'review' of proposed legislation is 'legitimately constructive,' not 'politically obstructive' (385). In looking at the Senate in relation to the first double dissolution in 1914, he asks whether the Senate's record was 'one of legitimate review, or one of political obstruction.' How are we to distinguish one from the other? Fusaro uses both quantitative and qualitative criteria. The percentages of House bills that the Senate amended or rejected were not large enough to constitute a record of obstruction (386). Evidently more important, though, is the fact that the double dissolution made possible by what qualifies as the Senate's 'review' of legislation (because it was not 'politically obstructive') led to the defeat of the government:

When a party succeeds in winning support for itself, as labor [controlling the Senate] did in 1914, democratic practice has the effect of bestowing upon it the cloak of righteousness. While the senate's behaviour might thus have been obstructive in the eyes of the Cook government its actions can hardly be called anything but legitimate, either constitutionally or in its representation of the popular will. (Fusaro 1966: 386)

By clear implication, then, legislative review is to be distinguished from legislative obstruction not (1) on the basis of how many bills the Senate failed to pass in the form the government had proposed them, nor (2) on the basis of how much impact on the government's program the Senate had in amending or rejecting government bills, but instead (3) on the basis of whether or not the public's verdict at the subsequent election favoured the party controlling the government and the House or the party controlling the Senate.

Fusaro also looks at the experience of the Scullin Labor Government following the 1929 election, when he also confronted a non-ALP Senate. After presenting the same kind of data on the numbers of bills that the Senate amended or rejected, he goes on to observe that 'The varied tactics used by the senate, although at times the obvious results of party hostilities, were nevertheless constitutionally in line

with the chamber's reviewing power.' Those tactics included, in the case of the Central Reserve Bank Bill of 1930, referring the bill to a committee and then agreeing to a motion in the chamber that the bill be read 'this day six months'—'a parliamentary tactic which, in effect, killed the measure' (see the discussion of this motion in Chapter 7). So, it would seem, the Senate was acting as a House of Review when it first delayed and then killed what would seem to have been a bill of some consequence.

Fusaro discusses other bills that the Senate rejected on party votes, but finds those actions to be compatible with the Senate acting as a House of Review. After recognizing the inescapable influence of parties in Parliament, he judges that 'There is, nevertheless, a function of review which takes place when one party, which represents a sizable portion of the electorate, succeeds in influencing the legislative proposals of another party. ... Thus, the senate controlled by the opponents of the Scullin government was in fact acting as a house of review.' (388) Fusaro also finds this conclusion confirmed by the fact that the percentage of government bills that the Senate rejected 'does not in itself seem overbearing,' and, more important, by the fact that the Scullin Government was defeated at the next election, just as the Cook Government had been in 1914.

[W]hile the vote did not mean that the people approved of all of the activities of the senate, the support given to the general policies of the party which had controlled that body since 1929 was certainly not a repudiation of the party's use of the senate's constitutional power of review *to try to implement its program*. (389; emphasis added)

Therefore, legislative 'review' in the Senate encompasses rejection of government bills on a party basis and as a way (perhaps the only available way) for the party controlling the Senate to try to promote its own legislative program. Can the Senate know at the time it is acting whether it is acting within Fusaro's conception of it as a House of Review? Not if the primary basis for answering that question is: 'Was the upper house following a publicly approved policy?' (392) Whether Senate action qualifies as appropriate prospective 'review' can only be answered retrospectively—after the next election.

Later in his analysis, Fusaro suggests other dimensions of prospective legislative 'review': that 'a proper function of the house of review' may be 'to educate the public on current issues before the parliament, and to delay controversial measures until the public has had ample time to form and express an opinion,' and perhaps also to amend or defeat legislation 'to safeguard the principles of the constitution' (394). And he concludes that 'much of the criticism [of the Senate]

stems from the fact that the concept of review may be too narrowly defined.' (398) That is not a problem if we accept the definition, or definitions, that emerge from his analysis. Instead, we have three other problems. First, Fusaro offers us no way to distinguish, at the time the Senate is acting, between the Senate as a House of Lawmaking and the Senate as a House of Review. Second, the distinction he does make can be drawn only after the fact. And third, this distinction is based on inferences about public support for the Senate's actions that derive from the results of the next election. His distinction ultimately does not rest on the quantity or even the quality of the Senate's actions themselves. Consequently, we emerge from Fusaro's analysis with a muddier understanding of the concept of a House of Review than when we entered it.

If Fusaro demonstrates how imprecise the concept can be within a single paper, Mulgan's more recent and more careful analysis reveals how much variability there is to be found in the way different analysts define the concept, even if the definition that each uses is satisfactorily explicit, clear, and limited. Mulgan notes the different ways in which different analysts have used the phrase:

A number of detailed studies of the Senate's effectiveness as a house of review have concentrated on the Senate's legislative record and in particular on the extent to which it has amended legislation received from the House of Representatives [Fusaro's article being one example]. Others, however, have a wider view of review, understanding it to cover general scrutiny of the executive... . Such scrutiny includes not only the Senate's legislative function of reviewing government bills but also the detailed examination of government decisions and administration ...

There is also disagreement about how far the Senate's role as a house of review allows it to go in confronting the government. Given a connection of review with the principles of Westminster-style responsible government and with the archetype of the House of Lords, it is commonly assumed that the Senate will not press its powers, whether of legislative revision or executive scrutiny, beyond a certain point. Thus Souter ... defines review as 'exercising its power in order to monitor and restrain the government of the day, but not to expel it from office'. Those who identify review with the revision of legislative detail clearly imply that review does not seriously challenge the government's authority or its major policies. On the other hand, effective review may not be possible without some degree of confrontation and frustration of the government of the day A distinction has been drawn between a 'strong' and a 'weak' sense of review, though the boundaries between the two may be hard to define and the distinction may collapse ... (Mulgan 1196: 192–193)

One thing the various conceptions of 'review' have in common is 'an ancillary role for the Senate as a "second" chamber, a role which

cedes initiative, if not power, to the lower house. In this respect, describing the Senate as a house of review can make it compatible with one of the defining assumptions of Westminster-style responsible government ... that executive government is effectively in the hands of ministers supported by a majority in the lower house ...' (Mulgan 1996: 192) Prime ministers, government leaders in the House, minor party Senators, as well as editorial writers among others, all have distinguished between the Senate as a House of Review and the House of Representatives as the House of Government or the house in which governments are made and in which the government governs. Mulgan (1996: 196) concludes that 'All sides ... appear to recognise that the Senate's review function involves scrutiny of the government within limits set by respect for the government's mandate and its right to govern based on its majority in the lower house.'¹¹¹

Beyond this, however, ambiguities and uncertainties abound. Returning to his attempt to summarize different conceptions of the Senate as a House of Review, we are left (as he fully appreciates) with more questions than answers. What is that 'certain point' beyond which the Senate should not press its powers? Who defines it and how do we know when the Senate approaches or passes it? If it is not appropriate for the Senate as a House of Review to expel the government from office, is it in order for the Senate to do anything short of that in 'exercising its power in order to monitor and restrain the government of the day?' What does or does not constitute a serious challenge to 'the government's authority or its major policies'? How confrontational can the Senate be and how much frustration can it cause the government without overstepping its bounds as a House of Review? Most generally, what is the goal and purpose of the Senate as a House of Review in 'reviewing government bills' or engaging in 'detailed examination of government decisions and administration ...'? How forceful should a House of Review be? Is the Senate functioning well as a House of Review if governments consistently ignore the results of its review of government bills, decisions, and administration?

Mulgan makes a compelling case that, as a concept, House of Review remains unspecified, and that the only defensible answer to whether the Senate is a House of Review is 'yes, no, or maybe,' depending on what definition each analyst has in mind.¹¹²

111 He continues: 'Disagreement arises, however, on the issue of where these limits are to be set.'

112 Mulgan complicates the picture even more, and perhaps necessarily so, by linking the imprecision of 'house of review' as a concept with the equally fuzzy concept of electoral mandates, which is discussed in Chapter 9.

The term 'house of review' thus allows for a wide variation of Senate activism. On the one hand, it may be used to try to restrict the power of the Senate to override the government supported by the lower house; on the other hand, it may be used to assert the right of the Senate to scrutinise such a government effectively. ... [The concept enjoys] an inevitable flexibility ... which forms part of the ideological battleground between governments and their political opponents. Both subservience and resistance to government can count as the exercise of review ... (Mulgan 1996: 197–198)

However the boundaries around the concept of a House of Review are drawn, for Mulgan (unlike Fusaro) they are crossed when the purpose and effect of 'review' is to force changes in government plans and policies. 'Review' 'involves holding government accountable to Parliament and the electorate and implies an adversarial relationship between those scrutinised (the government) and those scrutinising (those outside the government), *with the government retaining ultimate responsibility for decisions, whatever pressure it may have been subjected to through the process of scrutiny.*' (Mulgan 1996: 198; emphasis added) So he distinguishes between 'two contrasting models of the Senate's role vis-a-vis the government of the day: one as an agent of accountability and review, the other as a partner in policy making.' 'Review' does not 'cover the part that the opposition parties and independents in the Senate play in negotiating with governments over policy and sharing in responsibility for decisions.' (Mulgan 1996: 202)

Yet as he recognizes, the distinction between review and policy-making is not easy to maintain because 'Subjecting governments to the process of scrutiny may lead to a change of policy outcome ...' (Mulgan 1996: 199) Indeed, if that were not the case, if the process of scrutiny of legislation or administration did not change policy outcomes from time to time, it would serve no serious governmental function. It would continue to serve an educational function with a presumed electoral payoff for the scrutinizing parties, but that hardly seems a satisfying *raison d'être* for the Senate. Furthermore, that function might be performed equally as well by the media with its modern penchant for investigating and its greater ability to disseminate and publicize its findings.

Let us now, finally, return to the question with which all this began: if the development of a strongly disciplined party system in the Commonwealth Parliament effectively ended whatever hopes or possibilities there may have been for the Senate to function effectively as a 'House of the States,' did that same development also prevent the Senate from becoming an effective 'House of Review'?

One answer that reasonably flows from this discussion is that 'it all depends.' It all depends on what we have in mind when we talk about a House of Review. However, we can go further than that. Whether we think of prospective or retrospective review, or whether we have in mind 'strong' review or 'weak' review, we can conclude that the development of disciplined parliamentary parties made effectual review unlikely, so long as the party of government also had a majority in the Senate. Underlying this conclusion is the argument that no government party has any real incentive to have its programs and policies, actions and decisions, subjected to critical scrutiny. If there is to be such scrutiny, let it be behind the closed doors of the government, the Cabinet room, or the party room but not in the light of day, where it can only cause the government political embarrassment and electoral damage.

So I would wager that the inexorable transformation of the Senate into another House of Parties undercut the prospects for the Senate acting as an effective House of Review almost as much as it destroyed expectations that the Senate would be where the less populous states could protect themselves from threatened depredations from the New South Welsh and Victorian hordes. We saw the reason in Table 3.1, which showed that there were only two brief periods between the 'fusion' of the anti-Labor parties and the implementation of proportional representation for Senate elections when the government lacked a majority in the Senate as well as in the House. And with only three exceptions, all the elections between 1910 and 1946 (the last election before the switch to PR), governments controlled the Senate by wider margins than the House. Under these circumstances, it was entirely unrealistic to expect the government's disciplined Senate majority to allow the Senate to be used more than sporadically as a forum for critical reviews of its own legislation or performance.

On the other hand, and on the basis of exactly the same kind of calculations, a Senate with a non-government majority is much more likely to develop the institutional capacity to review government legislation and administration. It surely is no coincidence, for example, that the Senate strengthened its committee system after the pattern of non-government Senate majorities had emerged. Now that control of the Senate rests in the hands of non-government majorities, the current challenge, and one that Mulgan attempts to meet, is to determine how much review is enough, how searching and challenging and demanding it should be, and when prospective and retrospective review by the Senate begins to intrude on the rightful powers and prerogatives of government.

When the issue is defined in this way, it becomes clear why the concept of the Senate as a House of Review has remained so unclear. This concept cannot be specified without also specifying the appropriate place of the Senate in the Australian constitutional and political systems. In a sense, the Senate as a House of Review is useful as a residual notion—as a conceptual container that can hold a variety of contents. If the Senate is not a House of the States and if it should not try to act as a House of Lawmaking, much less a House of Government, it surely must be (or must be suitable to act as) a House of Something. The idea of ‘review’ has enough elasticity (‘flexibility’ is the word Mulgan prefers) to allow analysts of disparate opinions to agree that ‘review’ is what the Senate does or should do, without necessarily engaging in the messy task of trying to reach agreement on what they mean.