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Joseph Lyons—Australia’s Depression Prime Minister*

Anne Henderson

I should say, at the outset of this function on the Senate side of Parliament House, that my subject today—former Tasmanian premier and Australian prime minister Joseph Lyons—was not all that enamoured with upper houses for much of his political career.

As a Labor premier of Tasmania, he stood up to the Tasmanian Legislative Council in the 1920s over its financial powers. On a couple of occasions he even managed to bypass the Council entirely. (How many prime ministers would like to be able to do that these days?)

As well, during Lyons’ first two years as a federal minister in the Scullin Government, he faced strong opposition from the Nationalist Party dominated Senate.

But then Joseph Lyons moved to stand with the conservatives in 1931. Thereafter, upper houses became more to his liking. Of course—that’s a long time ago and upper houses today cannot be relied upon so easily to reflect the conservative side of politics. As we know well ...

I am here to discuss one of Australia’s longest serving and most popular prime ministers. And, yet, it has taken some seventy years to get to a point of acknowledging this in the national record. As I discovered on researching his biography, Lyons has been shoved off to some remote region of forgetfulness—thought of as a prime minister who achieved little and was merely used by stronger forces to win elections.

This legacy has stalked the memory of J. A. Lyons—as he was wont to sign on documents. Yet, nothing could be further from the truth. And, from this, there are two lessons for the politically ambitious. First, don’t die in office—or at least not before you have written your memoirs and placed them prominently before the historians. Secondly, make sure that you have a loyal and scholarly fan club in place ready to honour your name and achievements. John Curtin managed that.

* This paper was presented as a lecture in the Senate Occasional Lecture Series at Parliament House, Canberra, on 24 February 2012.

Joseph Lyons served as Prime Minister of Australia from the beginning of 1932 until his sudden death in office on 7 April 1939, which happened to be Good Friday. Remarkably, he was the first of our Australian prime ministers to have a parent born in Australia. Just how imported Australian culture was, till midway into the 20th century, is something we tend to forget.

In fact, as I did the book, it was startling to remember that when Joseph Lyons became prime minister, we had only been a federation for 30 years.

This was one of the reasons NSW premier Jack Lang was so important in the financial dysfunction of 1930–31, and so destructive. The economy of New South Wales, at that time, was a huge chunk of the national economy. Moreover, the states had much more financial power than they do today.

Defeating Lang, as Lyons eventually did, was a significant achievement. This alone should make Lyons a standout. But, instead, it has been Jack Lang who has achieved folk legend as hero despite the damage he threatened all those years ago to Australia's international reputation.

Joseph Lyons was a different kind of leader for his day, a time when paternalistic, macho men ruled. Lyons was a rather self-effacing and amiable fellow from a humble background. But he was also one who could walk at ease among the business leaders of his day.

Lyons' education, working his way up and out of family misfortune as a monitor teacher in northern Tasmania, had taught him humility; his experience, in the first decade of the 20th century, of taking on the Tasmanian Education Department for its treatment of its staff had forged his temerity.

But, with the characteristic Australian working man's spirit of seeking outcomes rather than posturing, Lyons made no effort to prove his leadership in a macho way. These days we would see this as someone secure in himself.

And, like Bob Hawke, Lyons was a consensus man—one who could bring opposing groups together over negotiation. This was a trait not easily recognised in Lyons' day as something that gave strength to leadership. It was Lyons' strength to see Australia through one of its darkest decades and to keep the government united.

Lyons would often defer praise to his colleagues. Douglas Irvine, who acted as Lyons' chief of staff for some years, recalled in an interview how Lyons would often say it

was all his ‘mates’ who deserved the praise or ‘John Latham’ causing John Latham, Irvine added, to ‘swell with pride’.

This self-effacing character has cost Lyons much in the history books. In Lyons’ generation, the ambitious and macho figures that surrounded him quickly translated this trait to ‘nice guy but not effective’. It suited his rivals—on both sides of politics.

In fact, Lyons was expert at directing matters, directing policies and directing government. His survival after three federal elections—the first Australian prime minister to do so—is the proof of this.

But Lyons burnt his bridges with Labor in March 1931 by voting against the Member for Dalley Ted Theodore’s bill to print money for relief works; and, after moving to the other side of politics and helping to form the United Australia Party (UAP), the emergence of the Liberal Party under Robert Menzies meant that within a few years of his death there was no organisation to claim Lyons. And although Robert Menzies had worked closely with Lyons in the UAP, he had also been a rival.

The Lyons legacy simply died with the man. The Second World War, coming so soon after his death in 1939, and the failure of the first Menzies Government in just over two years, soon handed the prime ministership to Lyons’ old Labor rival John Curtin and later his old Labor mate Ben Chifley. This sucked up any memory of Lyons as a popular figure. And Lyons had faded somewhat in his last year, with illness and the expansion of Hitler in Europe.

In his last year as prime minister, in spite of the UAP’s surprising win at the October 1937 election, Lyons’ strength in economic leadership passed into the shadows. His government’s visionary national insurance scheme had to be shelved, opening painful party divisions just weeks before Lyons’ death.

And when Enid Lyons wrote her own well-researched and widely read account of her husband’s life and legacy, in *So We Take Comfort*, this was partly seen as a record too partisan to count.

Today, however, it is possible to look back with a fresh understanding of the Lyons years. And that is what I have sought to do.

The Lyons style of leadership is far more readily understood today—male prime ministers have even cried in public in our lifetimes. We now know and accept that a prime minister can be fallible and remain a strong leader. Lyons, in this sense, was ahead of his day.

Lyons was never threatened by a strong woman. He would drag his wife onto podiums where she performed well and, at times, even outshone her husband. He never worried; he used her attraction to pull in votes from women.

Joseph Lyons assumed the prime ministership as a popular hero after winning in a landslide House of Representatives election (not since matched) in December 1931. Christmas was less than a week away.

The story that brought Lyons to government as UAP leader is both dramatic and cautionary. And it is a tale we can appreciate more fully today, in times when most Australians better understand factors like government debt and credit squeeze and their effect on investment and employment.

The Scullin Labor Government had been in office less than two years when it disintegrated. After a landslide win against the Bruce–Page Government, days before the Wall Street stock market crash in October 1929, the financial pressures it faced quickly tested its inexperience. By March 1931, after the rabid Lang supporter Eddie Ward won the federal seat of East Sydney on 7 March, Lang Labor MPs no longer were welcome in the Labor caucus. Labor had officially split in two.

Australia had mounting debts from the mid 1920s—in fact that guru of spend, John Maynard Keynes, was one of the loudest voices in London condemning Australia’s spendthrift ways in the 1920s. And then prices for wheat and wool went into free fall leaving even more debt. Australia in fact entered the Depression before the rest of the world—one reason the Bruce–Page Government fell to Labor.

When Lyons broke from Labor, on 13 March 1931, he took with him the votes of disaffected Laborites in their thousands. During late 1930 and early 1931, such was the dissatisfaction with the Scullin Government that tens of thousands of middle-class Australians signed up to membership of citizens’ groups.

This quasi-political people movement—organised by conservative operatives and with names such as All For Australia League—latched onto Lyons as their hero. Their activities were favourably promoted in Keith Murdoch’s media outlets—along with Joe Lyons as a natural people’s leader.

These groups eventually came together under the United Australia Party in May 1931. It was a unique political precedent. Lyons was elected leader of this conservative collective in the Nationalist party room. But Lyons himself was not there—since the UAP had not been formally declared and Lyons was not a member of the Nationalist Party. The formation of the United Australia Party, soon after, absorbed the

Nationalists but it was Lyons' hope that this new political party would bridge conservative and moderate Labor differences.

UK Labour's Ramsay MacDonald, that year in Britain, would form a national government, coming himself with colleagues from Labour and linking up with the Conservatives. It was Joe Lyons' imagined goal that he could do something similar Down Under. Instead, he became the leader of the conservative opposition—the United Australia Party.

In late November 1931, after the Lang Labor MPs had helped defeat the Scullin Government on the floor of the House over a relatively minor matter, Scullin dissolved Parliament and went to the people in a House of Representatives only election. On 19 December, the UAP won a record result for the House of Representatives, a record that has not been matched in spite of the 1975 landslide.

So Australia suddenly had a Catholic prime minister leading a predominantly Protestant party, and a somewhat Masonic one—a Catholic with a Labor past. This was quite an aberration in Australian politics. The Catholic vote for Labor took a nosedive at the 1931 federal election—it was Lyons, not Menzies, who brought the Catholic vote for the first time over to the conservative side.

It is quite timely to be speaking about Joseph Lyons and the way he was so quickly thrust onto the national stage as such a popular leader. Two years before his win in 1931, most Australians would not have heard of him. To win such a victory in December 1931 meant a lot had happened between October 1929 and that election.

It had.

Labor's Depression split

Joseph Lyons had led the Tasmanian Labor Party from November 1916 until he entered federal politics at the 1929 election. During the post-World War I years and into the 1920s, Lyons had toyed with left-leaning politics and was always a pacifist. He had led Tasmanian anti-conscriptionists in the First World War plebiscites. But, with successive defeats for Labor at state elections from 1916, Lyons became more conservative with his desire to win over swinging voters.

In late 1923, Labor fell into government in Tasmania when the Nationalist government of Sir Walter Lee lost a vote on the floor of the Assembly. Lyons, called to Government House, persuaded Administrator Sir Herbert Nicholls that he could command the numbers to form a Labor government. Tasmania was in worrying debt

at the time and Lyons had railed against the inability of the Lee Government to make savings.

Lyons was by then an opponent of what economist Lyndhurst Giblin called unproductive government spending—public works that did not produce income. Once in Canberra, Lyons found that both Labor prime minister Jim Scullin and federal Treasurer Ted Theodore agreed with him to a large extent. Scullin had railed against the Bruce–Page Government for the large government debt of 1928–29.

During the latter half of 1930—and while Scullin was overseas from August—Lyons, as Acting Treasurer, kept to the script as advised by Scullin. Economies had to be found and budgets reduced. The Lang rant against the moneylenders and his advocacy of repudiating debt was as firmly opposed by Scullin as Lyons.

In the tussles with the Langites in caucus after October 1930, Scullin supported Lyons (by cable) to hold the line; he also strongly supported the huge loan conversion of December 1930, when Lyons joined with Menzies, the Victorian Young Nationalists and many of the chief financial houses of the day such as J. B. Were and Son to raise £30 million over a matter of weeks.

But, after winning the NSW election in October 1930, Jack Lang increased his influence over NSW Labor. Ted Theodore, who had been forced to stand down as Treasurer in July 1930 to answer allegations of financial impropriety when he was Premier of Queensland, had faded in influence.

As the caucus divide in late 1930 worsened, and with Jack Lang's win in NSW, Theodore returned to Sydney where he held his seat. This push by Lang affected Theodore and, by early 1931, he had moved to a more inflationary policy position—somewhere between Lang's crude opposition to the evil moneylenders and the prudence that had been his original position, along with Scullin and Lyons, throughout 1930.

The Labor government of Jim Scullin probably stands alongside the government of Gough Whitlam as the most disastrous waste of an opportunity to govern. Both had difficult financial times, but each seemed not to have grasped the need to act pragmatically rather than ideologically.

On Scullin's return to Australia in January 1931, he reinstated Theodore as federal Treasurer—even though Red Ted had not yet been cleared by the Queensland inquiry. This disturbed Lyons—a person who acted always with the highest propriety, standing aside one of his ministers in Tasmania in 1927 over a financial scandal.

Unhappy with the state of play around Theodore, Lyons resigned from the Scullin ministry soon after his reinstatement to the ministry.

However, the most divisive issue for Lyons was the fiduciary bill Theodore now planned to bring before the Parliament to print money for work relief. Lyons saw this as financial suicide—and Lyons knew that the Senate would vote it down. Lyons did not believe—and the Premiers' Plan in mid-1931 would support his judgement—that Australia could afford to print money and face the risks of inflation or financial downgrade.

Caucus had become dysfunctional as the Depression and unemployment crippled the economy. Journalist Warren Denning wrote that the din of caucus meetings after August 1930 could be heard in the corridor through padded doors.

Cabinet, as well, had thumbed its nose at Scullin's authority when, against his and Lyons' advice, the majority voted to appoint Labor figures Edward McTiernan and H. V. Evatt to the High Court. This created a by-election in January 1931 for McTiernan's seat of Parkes in western Sydney. Won easily by the Nationalists, it would be a heavy loss for Labor at a time when the party was close to splitting apart.

The Lyons years

It has been Lyons' fate to attract the interest of historians only insofar as his break with Labor and success at the federal election of December 1931. History books have then skimmed over the Lyons years as ones of quiet lost opportunities and then the story goes on to the years of World War II and John Curtin.

So, why was he forgotten? Well, he fell between the cracks. Labor would never again claim him. And with the formation of the Liberal Party in the mid-1940s, Liberal leader Robert Menzies became the figure revered by the conservatives.

But by forgetting Lyons, we lose a significant chunk of Australian political history. A lot happened for Australia in the Lyons years at the Lodge.

Lyons was a figure who could draw out the vote, could draw out ordinary people, and he was mourned hugely when he died. At the 1937 election, with John Curtin as the fresh new Labor leader, Lyons pulled the UAP back from staring at certain defeat to a win where the party hardly lost a seat.

Moreover, over seven long years, Lyons mastered a cabinet made up of divided egos and would-be leaders, and negotiated unity through struggles with policy and the financial stress of depression. Lyons' first budget managed to record a surplus. Over

his years, he pushed Australian trade partnerships into new regions, notably Japan and the US, in spite of the Ottawa Commonwealth Conference's policy of imperial preference.

Lyons, with the partnership of Stanley Bruce as High Commissioner in London, also made an impact in foreign relations. Two visits to the UK, in 1935 and 1937, established Australia's presence as a strong dominion partner. In 1935, Lyons' visit to the USA saw the Lyons couple stay with the Roosevelts at the White House, and Lyons hold significant meetings with the senior figures of the Roosevelt administration. Lyons even made the cover of *Time* magazine as he arrived in New York.

Lyons—as one of the dominion leaders after the Statute of Westminster—played a significant role in the abdication. Lyons was the strongest voice among the dominions in opposing any morganatic marriage between Edward VIII and Wallis Simpson.

In the lead up to the 1938 Munich conference, it was Lyons who made a last-minute call to Neville Chamberlain suggesting Mussolini might be able to broker yet another meeting with Hitler over his intentions in the Sudetenland. Chamberlain followed up on that advice and the Munich Agreement was the outcome. We should recall that most political leaders were appeasers in 1938—the memory of World War I had them in a bind that another world conflict should be avoided at all costs.

The Munich Agreement was welcomed with great celebration by voters—Queen Elizabeth wrote to Anne Chamberlain of her great pride in the prime minister who 'through sheer courage & great wisdom ... has been able to achieve so much for us & for the World'. Lyons was certainly with the majority on Munich at that stage.

It was Lyons, it has been forgotten, who sent John Latham to head Australia's Eastern Mission in 1934, a major diplomatic trip through Indonesia, China and Japan. It was Australia's first real attempt to engage with its northern and Asian neighbours, both in the interests of security and, above all, trade. It was also Lyons who pushed for a Pacific Pact on non-aggression through the many meetings of the 1937 Imperial Conference in London.

The years of the 1930s were also years of great strides in communications—a revolution of sorts with the development of radio and air travel. Lyons was a master at the use of both. He became Australia's first flying prime minister and his voice was heard across the nation in regular slots on radio; and he was recognisable to voters from being filmed for Movietone newsreel screenings.

But Lyons was above all an excellent economic manager. What has been forgotten—and never spoken of—is that both Australia and the UK handled the Great Depression far better with conservative economic management than the USA's New Deal of government spending.

As Joe Lyons sat with Franklin D. Roosevelt at the White House in July 1935, he could report that Australia had reduced its unemployment figures to 16 per cent from a high of 29 per cent in 1931–32. By 1937, Australian unemployment was down to 9 per cent. In the USA, in 1935, unemployment was still over 21 per cent and in 1937 remained at 17 per cent. The USA had double digit unemployment right up till it entered the Second World War.

Growth in Australia and the UK during the 1930s also outstripped that in the USA. Real gross domestic product growth in the USA between 1929 and 1940 was just 1.6 per cent, while in Australia over those years growth was 16.6 per cent and in the UK it was 24.6 per cent.

That success story in Australia has been lost with the legacy of Prime Minister Joe Lyons. These were dark and difficult years and the strength of the Lyons governments was to preside over a period of political calm amid the troubled times—both financially and in foreign relations. From the dysfunctional years preceding it—and the domination of NSW in the national economy—Lyons brought Australia's federated states to maturity in his time as prime minister.

And, in answer to criticism of Lyons that he was weak and ineffectual, it is worth recalling the words of Thomas Playford, a long-serving South Australian premier, who once said, long after Lyons was dead, 'Mr Lyons always got his way'.



Comment — The chilling thing is how many echoes there are with present circumstances and how often we forget that adage that those who fail to learn from history are condemned to repeat its mistakes.

Anne Henderson — That is all true. Lyons got on really well with Scullin. While in Britain in 1930, Scullin sent advice to Lyons and the Member for Maribyrnong James Fenton to hold the line against the Langites, through cables. When you read the history books you think that everyone knew Scullin was supporting his deputies while he was overseas but no one knew, not even some in the caucus. Then, the day after

Joe Lyons resigned in March 1931 (by voting against his Labor Treasurer, he was automatically out of the Labor Party) those cables were leaked by journalist Joe Alexander. He was banned from Parliament for about six months as a result. The Scullin Government was furious in Parliament about the leak because it showed that Scullin had betrayed Lyons. He had let people think that it was Lyons alone holding the line against Jack Lang without any support from his prime minister. When Ted Theodore wanted to introduce a more inflationary policy and print money for work relief and Scullin supported that Scullin backed the wrong horse. Once those cables came out it looked even worse. Scullin had not been loyal to his lieutenants.

But Joe got on well with Scullin. As prime minister, Lyons would sit with Scullin over a drink in Old Parliament House. Lyons got on well with Chifley. One anecdote, which L. F. Crisp recalled in his biography of Chifley, is notable. Lyons, as prime minister, turned up at the Bathurst show and Chifley was selling tickets to get into the car park. The men yarned at the gate. It was quite amusing really. Labor went feral at Lyons leaving the party, but Lyons had been a strong Labor man and I think it broke his heart to leave.

Question — You mentioned during your talk that the British financier, Sir Otto Niemeyer, came out to Australia and my recollection of that was that his advice was rather counter-Keynesian at a time when we wanted to lift things. I was wondering if you could elaborate a little bit on Lyons' relationship with Niemeyer and how he handled his advice and how that fell out?

Anne Henderson — Maynard Keynes changed his position on debt. Everyone has forgotten this, as did economists. When Keynes was berating Australia in the late 1920s for being spendthrift, he was berating Australia for doing exactly what he would have argued for ten years later. Roosevelt had a meeting with Keynes during the years of the New Deal and did not find him very inspiring. Amity Shlaes records the story in her book *The Forgotten Man: A New History of the Great Depression*. Myths multiply when you don't listen to the minutia of history. Keynes changed. And yet it has become fashionable to go on with the notion that we can spend our way out of depression. Now spending and trying to give people relief is a good thing but it isn't a good thing if at the end you are only giving relief and you not are getting anything back for it. Eventually you end up like Greece and Portugal. Credit and global financial support will keep them limping along for a while but that will probably, over a period, over a decade, give us all very low growth. Maybe we will settle for low growth and no one starving, I don't know. But it certainly isn't a magic formula.

Remember, in 1931 there was almost no credit and nations were living off loans. This is Greece now. By 1928–29 in Australia, fixed government obligations represented 70 per cent of all payments. We had to find a way to get through 1930. In 1930, there was a credit squeeze. Niemeyer came to Australia in August 1930 alongside debate over financial policy and while the Labor caucus was dysfunctional. If you read financier Staniforth Ricketson's diaries for that time, you will see that Treasurer Ted Theodore and the Australian Government knew Niemeyer was coming but it was made to look as if the head of the Commonwealth Bank Robert Gibson had no hand in it. In fact it was all set up. Niemeyer spoke only as an independent investigator but in fact it was working closely with the Australian government. But Australia had little choice but to accept the visit because most of our loans were dependant on the London bankers. Niemeyer was rather superior but also acting—he believed—in Australia's interests. Of course, populists like Labor's Member for Bourke Frank Anstey and Jack Lang assumed Niemeyer was Jewish and made anti-Semitic statements about him which were politically disturbing.

Niemeyer was an insouciant Brit 'coming to the colonies' chap. He was nice and affable and pleasant although in his diary he dismissed people with one liners whether they were political economists like Lyndhurst Giblin or political leaders like Jim Fenton and Joe Lyons. At one point Niemeyer described Fenton and Lyons as looking like rabbits with their eyes popping out in the light. That would not be surprising because they were doing Scullin's work at these meetings. Niemeyer was working out a plan for how Australia could take on an austerity package, or prove that we would be reliable customers and then be deserving of more credit. In other words, he was doing what the Europeans and the International Monetary Fund are doing to Greece now. Saying you will keep your credit rating provided you agree to cut or freeze public servant salaries, MPs salaries and public service spending. There was a program of austerity being worked out so we would be able to continue to get credit. It was shortly after that we had the 1930 conversion campaign where government had to raise the money from ordinary Australians.

Niemeyer dismissed people easily but, if you think about it, this was August and Scullin was about to leave Australia for his five month trip to Britain. Scullin had the flu, maybe pleurisy, and was in bed. A number of cabinet meetings were conducted in Scullin's bedroom in Richmond in Melbourne. He was still in his bed on the high seas. He was a sick man taking off, with a sick economy, a dysfunctional caucus and an explosive cabinet and he had left Fenton and Lyons as his stand-ins. His Treasurer Theodore had been stood aside under investigation in Queensland. Fenton and Lyons were running back to Scullin's home in Yarra Street, Richmond to get Scullin's approval, then running back to Niemeyer and saying this is what the Prime Minister will agree to. Then they would be told what Niemeyer had agreed to and back they

would have to run to Scullin. It was a circus. No wonder their eyes looked like rabbits staring at a bright light. They hardly knew which way they could go. These snippets have been used to suggest Fenton and Lyons were weak. They were not weak, just trying to juggle it all.

If you read the Niemeyer diaries they reveal Lyons trying to navigate this difficult play. At one point Lyons said to Niemeyer that it would be better if it did not appear that the Australian government was simply adopting Niemeyer's proposals. Lyons knew that if that were to be the impression given, back in caucus the Langites and the fringe dwellers like John Curtin and others would refuse to go along with it. The party would split. So Lyons was trying to say to this insouciant dandy from London, 'For goodness sake, if you want to get what you want then leave me to handle the politics of it because you will not get anywhere if you alienate my colleagues'. But of course Niemeyer wanted to be the star. You can understand some of the hesitancy in Lyons. Niemeyer saw this as weakness. In fact it was political common sense. But Niemeyer did not have to worry. He went off and visited the homes of the squattocracy. Then he went to New Zealand and played golf and wrote about it and left Australia a day after Lang won the NSW election, which was very symbolic.

I am sure there are many politicians and ministers who have had similar experiences where someone who does not have to face the people is investigating or giving advice or saying what must be done, whether it is the head of the Reserve Bank of Australia or whatever. And the MPs are asking, 'Yeah, but what *can* be done?' It is not easy.

Question — You reflected on Lyons' relationship with Chifley. What was Lyons' relationship like with the rest of his former Labor colleagues in Parliament for his prime ministership?

Anne Henderson — Lyons went back to Tasmania after he left the party in March 1931 and it was really chilly for him in Hobart. Lyons left one ALP meeting early and his colleagues voted to discipline him. But of course he was gone by then anyway. The state Labor MP Charles Culley remained a friend and would visit Lyons at Christmas but he would never let anyone know. It was devastating to the Labor followers of Lyons because they had given lots of money to his cause. Many ordinary people, however, supported him and he did win his seat of Wilmot as a conservative having been a Labor man so he had a personal following. Enid Lyons wrote that the day after Lyons gave the speech which removed him from Labor, at Spencer Street railway station the wife of a very senior Labor figure had cut her dead on the platform. It was visceral. And so the fact that Lyons could later yarn away with Scullin at Parliament House over a whiskey is interesting. In one of Lyons' letters to Enid—it would have been about 1936 or 1937—he wrote that Scullin had told him

Lyons would be stunned at how sectarian the Trades Hall Melbourne had become. There was a lot of sectarianism in the Labor Party and I guess Scullin found Lyons to be another Catholic who could understand him.

People say Lyons never fitted in with the conservatives of the UAP but, in fact, he had lots of good relationships. He was very friendly with Menzies and the Member for Henty Henry Gullet. Lyons fell out politically with a lot of them at the end because many of them felt they could do it better. But no one could get the numbers to win the leadership and, as the rivalry ate away at the party leadership in 1938, war was coming and no one wanted to admit it even though Australia was rearming on a rapidly increased scale. In Andrew T. Ross' *Armed and Ready: The Industrial Development and Defence of Australia, 1900–1945* you can see the figures. Australia's defence spending increased vastly after 1935–36, as the UK did once Chamberlain became PM. The National Insurance legislation of 1938 also split the party—a good scheme but it was the wrong time. And the Country Party was very opposed to it.

Robert Menzies and Enid Lyons are interesting at this point. Enid Lyons came to believe that Menzies had acted disloyally in the very last months of Lyons' life. In a speech Menzies gave, in October 1938 to the Constitutional Association in Sydney, Menzies was reported to have said that Australian political leadership was weak—state and federal. What Australia needed was to take example from the strong leaders of Europe, by whom he meant Mussolini and Hitler. Kristallnacht (the night of broken glass) would happen a month later. It was an unwise speech but when you go through what had happened, it is a speech given under the stress of UAP dysfunction—there had been a premiers' meeting and Lyons had been ill. Earle Page of the Country Party had taken his place. Page was unpopular and the Country Party seen as meddling in United Australia Party affairs. Bertram Stevens, the UAP NSW Premier, had federal ambitions, hoping to take over from Lyons. There was a lot of jostling as to who was setting themselves up to be Lyons' heir apparent. Menzies probably made the speech to bring the limelight back onto him as a strong voice in the party. Enid Lyons interpreted that speech as a shot across Joe's bow. Menzies always said it wasn't; it was just the way he felt. Then there was of course the strike in Newcastle in the New Year, where Robert Menzies earned the title 'Pig Iron Bob', trying to end the strike and ship pig iron to Japan. Menzies handled that badly. Lyons wanted to retire; he was very sick but continued the rounds of party and ministry meetings.

Most of the Lyons' children were at boarding school but the little ones were in the Lodge. In 1938, Enid relocated to Devonport. So the Lyons couple were ready to go. But the National Union, the headquarters of the United Australia Party, were not enamoured by the idea that Menzies could win the election which was due at the end

of 1940. Menzies was unpopular; he was too erudite and austere. They did not have an alternative candidate. In the middle of all this, on 24 October 1938, John Curtin brought on a motion of no confidence in the House just as news came that a plane had crashed into Mount Dandenong and the Member for Wakefield Charles Hawker, a senior UAP figure, had been on the plane and died.

Hawker had been seen as leadership material—I am not so sure he was. In the midst of all this, Menzies resigned in March from the ministry saying he could not continue with the lapse of the National Insurance scheme. In her memoir *Among the Carrion Crows* Enid Lyons devoted a whole chapter to what she felt had happened over the incident of the Constitutional Club speech. There was a lot of ill feeling leading up to Lyons' death, so soon after Menzies' resignation—just a matter of weeks. And Lyons died just the weekend after the UAP heavies had told Enid and Joe that he must stay on in the leadership and Joe had said he would. It was felt by some of the Lyons family that the pressure Menzies had exerted on Joe Lyons in those last months had added to the possibility that Lyons would have a heart attack and die. Many others believed Menzies' resignation was but a symptom of a government in turmoil.

Now of course you all probably know the story of what happened after Lyons' death. Earle Page assumed the caretaker prime ministership and made a speech in the House of Representatives against Menzies. Page accused Menzies of being a coward in the First World War, for not enlisting. In fact, Menzies was the third brother and the family had said he was not to go. Pattie Menzies never spoke to Earle Page again. She actually got through a whole dinner one night where she had to sit next to Page. She didn't utter one word to him. That was Pattie Menzies.

There was a huge debate over Enid Lyons' annuity following Lyons' death. She had no superannuation. Joe died with just £344 in the bank. Enid had always had the house in her name and she thought that she could earn money herself but of course her nerves collapsed and she had to retire by the end of 1940. Enid had done some broadcasting that year. She had been asked to do a column for the *Sydney Morning Herald* but declined. Enid Lyons did eventually get an additional annuity of around £500 a year for the children but it diminished as they left school. There were still around eight Lyons children at school and one had not started when Joe Lyons died.

Elsie Curtin was given a similar annuity on the death of John Curtin, but only after Enid Lyons (then a UAP MP) prevailed upon the UAP party room not to do to Elsie Curtin what the Labor Party had done to her. When the bill went through Parliament Enid Lyons said she had tears in her eyes. But by the 1960s those two women were receiving tiny pensions compared with widows of MPs who had superannuation. There is correspondence in the files petitioning Prime Minister John Gorton to do

something about Enid Lyons' and Elsie Curtin's annuities because they hardly had enough to live on; their payments having not changed since the 1940s.

Minority Report: Lessons from Canada's Minority Parliaments*

Andrew Banfield

Charles Dickens opens his classic, *A Tale of Two Cities*, by observing: '[i]t was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness'.¹ Read in a modern context, one could be forgiven for assuming he was talking about minority government. Since 2004, a series of minority governments were elected in Westminster systems. Canada initiated the trend electing a minority parliament for the first time in 25 years. Australia and the United Kingdom quickly followed, electing their own minority parliaments in 2010.

Minority governments are not particularly novel outside of the Westminster systems. Indeed, most legislative assemblies operate on some power-sharing agreement between coalition partners. Yet, when they occur in a Westminster system—Canada or Australia—they are news. This is due, in part, to the novelty of the occurrence, since it happens so rarely.

In the analysis that follows, I attempt to draw some lessons from the years 2004 to 2011 when Canada elected three successive minority governments. I begin with a discussion of the election campaigns and major events of the 38th, 39th and 40th Canadian Parliaments. I then turn my attention to potential lessons that can be drawn from this seven-year span paying special attention to: political parties, managing parliament, and the importance of the marginal seats. I argue that there are lessons to be learned from other Westminster parliaments when dealing with minority government.

Four elections in seven years

Like Australia, the Canadian Government is based on the Westminster parliamentary system. Unlike Australia, the voting system is a single-member plurality system and there is no compulsory voting. Single members of parliament are elected from 308 federal electorates and winners do not need to achieve a majority of votes, simply a plurality of votes. The electorates are distributed based on the principle of representation by population. There are four major parties that contest elections nationwide: the Liberal Party of Canada (centre), the New Democratic Party (left), the

* This paper was presented as a lecture in the Senate Occasional Lecture Series at Parliament House, Canberra, on 16 March 2012.

¹ Charles Dickens, *A Tale of Two Cities*, Bantam Publishing, New York, (1859) 1984, p. 1.

Conservative Party (right), and the Greens. There is an additional party, the *Bloc Québécois*, that only contests seats in the province of Quebec.²

Since Confederation (1867), Canadians have elected 13 federal minority governments, with an average length of 18 months. Outlined in table 1, they can be divided into three distinct time periods: 1921–30, 1957–80, and 2004–11. These periods of minority governments tend to last for seven-to-ten years, before returning to the status quo of majority government for long periods of time. Canadian minority governments are particularly illustrative of Dickens’ observations. Some of the best public policy—universal health care—occurred during the minority parliament in 1965. Similarly, some of the most divisive debates—the flag debate—also occurred during a minority government.³

Table 1: Canadian minority parliaments

PM/Party	Dates	Duration
King/Lib	1921–25	3 Y-11M
King/Lib	1925–26	8M
Meighen/Con	1926	2.5M
King/Lib	1926–30	3Y-10M
Diefenbaker/Con	1957–58	10M
Diefenbaker/Con	1962–63	10M
Pearson/Lib	1963–65	1Y-7M
Pearson/Lib	1965–68	2Y-8M
Trudeau/Lib	1972–74	1Y-10M
Clark/Con	1979–80	9M
Martin/Lib	2004–06	1Y-7M
Harper/Con	2006–08	2Y-5M
Harper/Con	2008–11	2Y-7M

(Source: Adopted from Peter H. Russell, *Two Cheers for Minority Government*, Emond Montgomery Publications, Toronto, 2008, pp. 8–9)

² See generally: Patrick Malcolmson and Richard Myers, *The Canadian Regime: An Introduction to Parliamentary Government in Canada*, 4th edn, University of Toronto Press, Toronto, 2009, chapters 9 and 10.

³ See generally: Peter H. Russell, *Two Cheers for Minority Government: The Evolution of Canadian Parliamentary Democracy*, Emond Montgomery Publications, Toronto, 2008.

For the purposes of this paper, I focus on the Martin Liberal Party minority government (2004–06) and the back-to-back Harper Conservative Party minority governments (2006–08, 2008–11). This seven-year period fits the general pattern of minority government in Canada, lasting for seven years, and then returning to the majority status quo.

2004 Canadian general election and the 38th Canadian Parliament

The election of Paul Martin's Liberals in June 2004 returned Canada to minority government status for the first time in 25 years. The Liberal Party, arguably the most successful political party in the Western world, was reduced from 172 seats to a mere 135, well short of the 155 needed to form majority government. Even with the aid of their closest ally, the New Democratic Party, the Liberals would only have 153 seats, the same number as the newly reconstructed Conservative Party of Canada⁴ and the separatist party *Bloc Québécois*. The one independent member of parliament, Chuck Cadman, would hold the balance of power.⁵ Figure 1 outlines the electoral distribution at the beginning of the 38th Parliament with seats held by the Liberal Party in red, the Conservative Party in dark blue, *Bloc Québécois* in light blue and the New Democratic Party in orange.

The Sponsorship Scandal hung over the Martin minority government. The program was originally designed to raise awareness of the Government of Canada in the province of Quebec in the aftermath of the 1995 Referendum.⁶ The program ran from 1996 to 2004, when widespread corruption was discovered and the program was discontinued. Much of the Sponsorship money was directed to 'Liberal Party-friendly' advertising firms who contributed very few deliverables. It was also discovered that some of the money that was awarded was returned to the Liberal Party of Canada in the form of donations.⁷ A judicial inquiry was called into the Sponsorship Scandal, and it became a significant factor in the lead-up to the 2006 election.

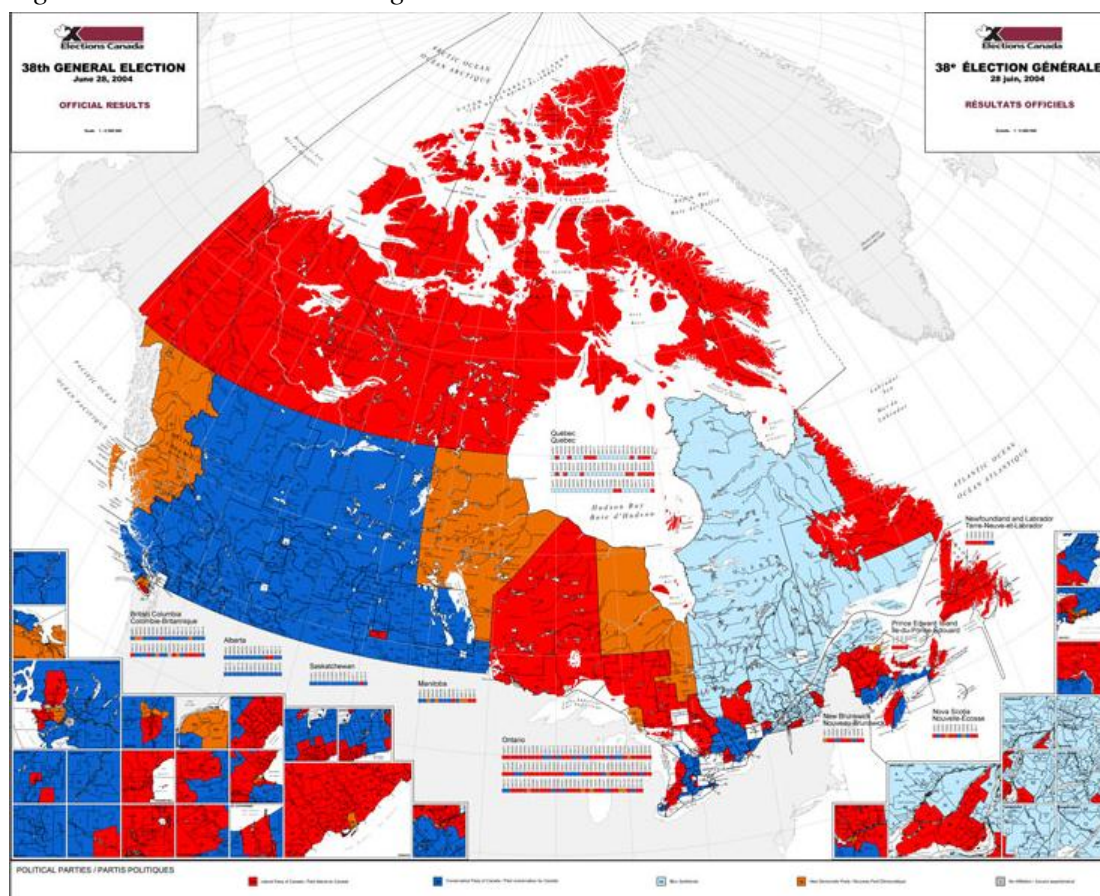
⁴ This was the first election for the newly reconstructed Conservative Party of Canada. From 1993 to 2004, Canada featured two right-of-center parties: the Progressive Conservatives and the Reform Party of Canada/Canadian Alliance. The Progressive Conservative and Canadian Alliance merged in 2004 forming the Conservative Party of Canada under the leadership of Stephen Harper. See Thomas Flanagan, *Harper's Team: Behind the Scenes in the Conservative Rise to Power*, McGill-Queens University Press, Montreal and Kingston, 2007.

⁵ Christopher Dornan and Jon H. Pammett, *The Canadian General Election of 2004*, Dundurn Press, Toronto, 2004, p. 362.

⁶ See generally: Elisabeth Gidengil, Andre Blais, Joanna Everitt, Patrick Fournier and Neil Nevitte, 'Back to the future? Making sense of the 2004 Canadian election outside Quebec', *Canadian Journal of Political Science*, vol. 39, no. 1, 2006, pp. 1–25.

⁷ Barry Cooper, 'Political order and the "culture of entitlement": some theoretical reflections on the Gomery Commission' in Jurgen Gebhardt (ed.), *Political Cultures and the Culture of Politics: A Transatlantic Perspective*, Publications of the Bavarian America Academy, Heidelberg, 2010, pp. 45–68.

Figure 1: The 38th Canadian general election



(Source: Elections Canada, 'Map of official results for the 38th general election (2004)', Elections Canada, www.elections.ca/res/cir/maps/map.asp?map=ERMap_38&lang=e).

As the details of the Sponsorship Scandal became public, the Martin Government promised to call an election 30 days after the publication of the full report. The opposition Conservative Party and *Bloc Québécois*, unsatisfied with the 30-day promise, crafted a motion calling on the Martin Government to resign. On 10 May 2005, a mere six months after the federal election, the motion was introduced and passed 153–150. The Martin Government claimed that because the motion came on a procedural point, they would not treat it as a confidence measure.⁸ Simply put, the motion was ignored.

The early survival of the Martin Government ultimately came to rest in the hands of three independents: David Kilgour, a former Progressive Conservative and Liberal, was pressing the government to intervene in the Darfur; Carolyn Parish, who was removed from the Liberal caucus because of unkind words about US President George W. Bush; and Chuck Cadman, a former Conservative who was undergoing

⁸ Andrew Heard, 'Just what is a vote of confidence? The curious case of May 10, 2005', *Canadian Journal of Political Science*, vol. 40, no. 2, 2007, pp. 395–416.

chemotherapy for cancer. It was Cadman's vote, along with Parish's that resulted in a 152–152 tie on the 2004 Budget.

The Speaker of the House, Peter Milliken, was forced to cast the deciding vote. Precedent dictates that the Speaker cast his or her vote in such a way as to keep the matter open for further consideration. Milliken cast the deciding vote in favour of the bill and allowed the bill to continue to third reading. It was the first time in Canadian history that a Speaker has used his or her casting vote on a confidence motion.⁹

After passing the budget in May, the Martin Government faced another confidence motion in November. After Justice Gomery released his findings on the Sponsorship Scandal Inquiry, the New Democratic Party introduced a motion to call an election in early January (2006) for an early February vote. It was like a confidence motion for the future. The motion was carried 167–129. The opposition parties gave the Martin Government one week to accept the motion, or they would collectively introduce a non-confidence motion to defeat the government. The government ignored the motion. On 28 November 2005, the Conservative motion of non-confidence was introduced and passed easily 171–133.¹⁰

2006 Canadian general election and the 39th Canadian Parliament

After the Christmas election of 2005 and into early 2006, the Canadian voters elected another minority government. This time, however, Canadians entrusted Stephen Harper's Conservatives with the reins of power for the first time in 18 years. The breakdown of the newly constituted 39th Parliament, outlined in figure 2, had the Conservatives with 125, Liberals 102, *Bloc* 51, and New Democrats 29.¹¹

The political landscape over which the Harper Conservatives governed was enviable. Liberal leader, Paul Martin, stepped down on election night.¹² The other opposition leaders were in not in any position to challenge the Harper Government. It would be incumbent on the Liberals and their new leader, eventually Stéphane Dion, to return to the House before another election was called.

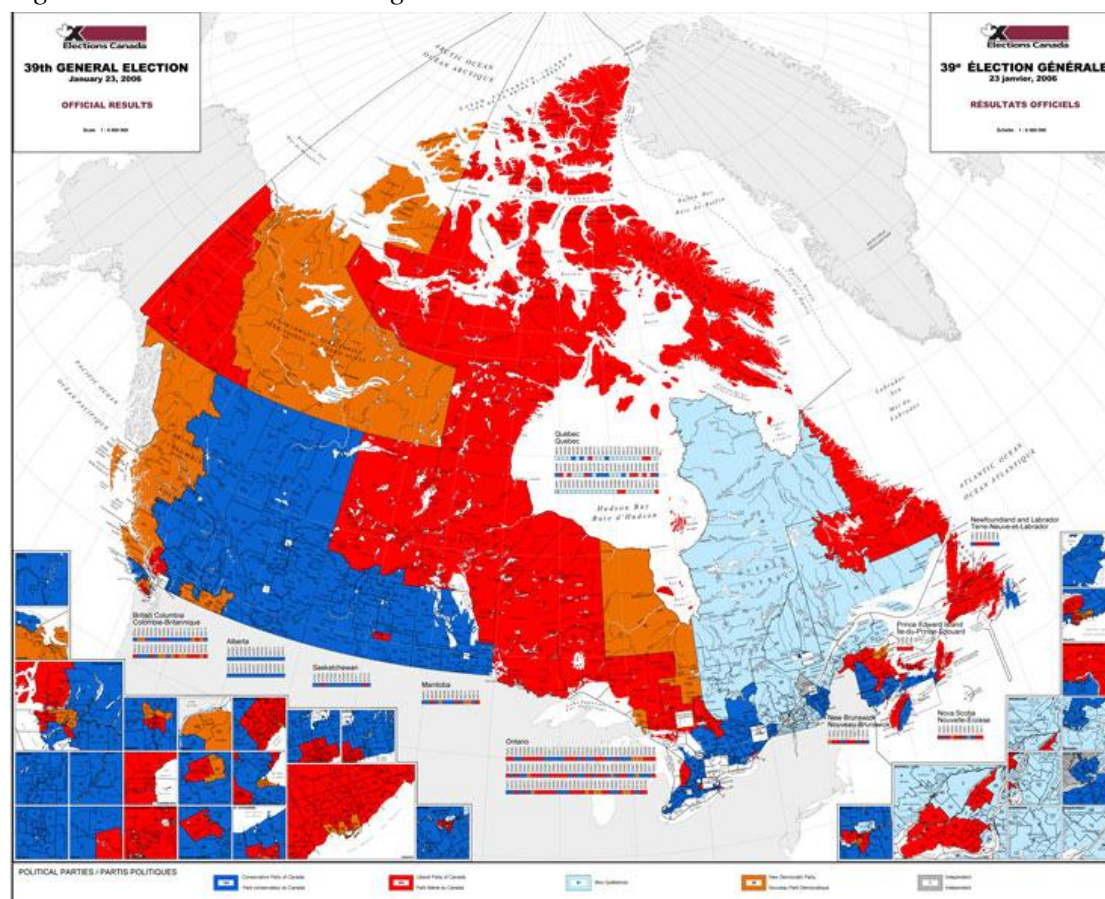
⁹ John Ward, 'Speaker's tie-breaking vote to save minority government was a first', *Canadian Press*, 19 May 2009.

¹⁰ Clifford Krauss, 'Liberal Party loses vote of confidence in Canada', *New York Times*, 29 November 2005, <http://query.nytimes.com/gst/fullpage.html?res=9E04E0DB1431F93AA15752C1A9639C8B63>.

¹¹ Christopher Dornan and Jon H. Pammett, *The Canadian General Election of 2006*, Dundurn Press, Toronto, 2006, p. 327.

¹² Russell, *op. cit.*, p. 46.

Figure 2: The 39th Canadian general election



(Source: Elections Canada, 'Map of official results for the 39th general election (2006)', Elections Canada, www.elections.ca/res/cir/maps/map.asp?map=ERMap_39&lang=e).

In 2007, Speaker Peter Milliken made a remarkable ruling when he rejected the government's challenge that an opposition motion was passed in the House that required the government to implement the Kyoto Accord.¹³ The government claimed that the motion was unconstitutional as it committed the government to new spending. As in all Westminster parliamentary systems, only ministers may introduce new spending bills. Milliken ruled that the motion was in order as it did not specifically commit the government to any new spending. The bill passed despite the government voting against it.¹⁴

When the Conservative Party came to power in 2006, they promised to run a more open and transparent government. Part of this initiative was to pass a fixed election date law: Bill C-16 An Act to Amend the Canada Election Act. It was suggested at the time that the passing of the law would take the power away from the executive branch to time an election call for their personal benefit. Parliamentary scholar Ned Franks observed that there was nothing in the new law that prohibited the Prime Minister

¹³ Allan Woods, 'Honour Kyoto, House tells PM', *Toronto Star*, 15 February 2007, p. A1.

¹⁴ *ibid.*

from advising the Governor General that Parliament should be dissolved and an election should be called.¹⁵

In the autumn of 2008, Prime Minister Harper called the opposition party leaders to one-on-one meetings at 24 Sussex Drive (the home of the Prime Minister). At the conclusion of the meetings, the Prime Minister announced that he felt he did not command the confidence of the House and was asking the Governor General to call an election in the autumn of 2008.¹⁶ In doing so the Prime Minister ignored his recently passed fixed elections bill, and did so without recalling Parliament from its summer break.

Outlined in figure 3, Stephen Harper's Conservatives were returned to power in the 2008 election with a strengthened 143 seats, although still short of the 155 needed for a majority government. The Liberals, under new leader Stéphane Dion, were reduced to just 77, the *Bloc* 49, the New Democrats 37 and two independents.¹⁷

The 'govern like you have majority' mentality that dominated the first Harper minority government was in full bloom in late 2008. In an economic update, delivered by Finance Minister Jim Flaherty, the government announced they would scrap the public subsidies to political parties. In Canada, each party is given \$1.95 for each vote they receive every year between elections. As it turns out, when you cut the primary source of income to your political opponents, they do not take the matter lightly.¹⁸

The three opposition leaders devised a plan to defeat the government either on the economic update (which would be a confidence matter), or the following day during an 'opposition day' where a non-confidence motion would be introduced.¹⁹ Generally, when a government is defeated on a confidence measure, Canadian convention suggests there would be an election. Yet, the opposition parties would not ask the Governor General to call an election mere months or weeks after the last. Instead they would ask that she allow the opposition parties to try and form government with a formal coalition agreement.

Formal coalitions are certainly not the norm in Canadian parliamentary tradition. Most minority governments attempt to govern like they have a majority of seats in the

¹⁵ CBC News, 'Court challenge of 2008 election dismissed', *CBC News*, 17 September 2009, www.cbc.ca/news/canada/story/2009/09/17/democracy-watch-case.html.

¹⁶ Michael Valpy, 'The "Crisis": a narrative' in Peter H. Russell and Lorne Sossin (eds), *Parliamentary Democracy in Crisis*, University of Toronto Press, Toronto, 2009, p. 4.

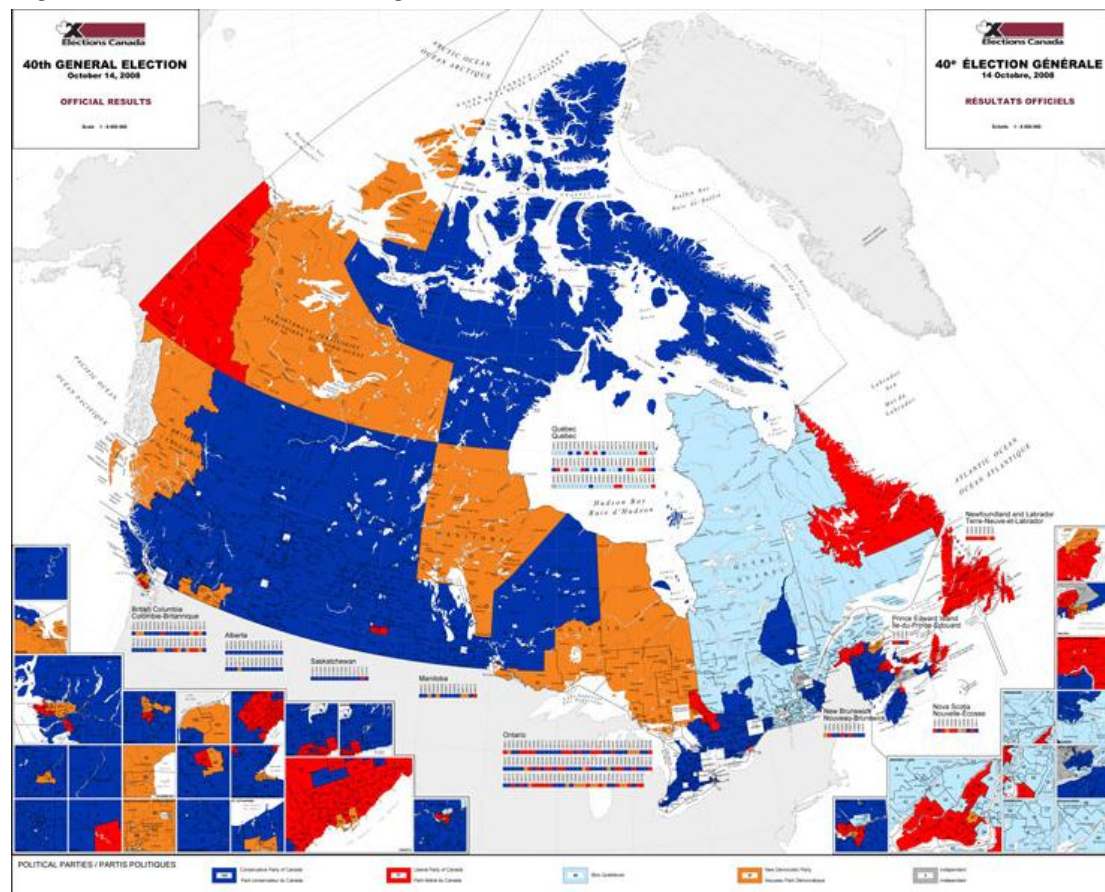
¹⁷ Christopher Dornan and Jon H. Pammett, *The Canadian General Election of 2008*, Dundurn Press, Toronto, 2008, p. 314.

¹⁸ Valpy, op. cit., p. 9.

¹⁹ *ibid*, p. 11.

House and only reach out to their political opponents in a pro forma way in order to pass confidence matters like the budget. The agreement in principle was between the Liberals and the New Democrats, where Liberal Leader Stéphane Dion would serve as Prime Minister and Deputy Prime Minister and a high-ranking cabinet post (health or industry) would be held by New Democrats leader Jack Layton. The coalition would be supported on confidence measures by the *Bloc* in exchange for increased deliverables for Quebec and a veto on provincial matters.²⁰

Figure 3: The 40th Canadian general election



(Source: Elections Canada, 'Map of official results for the 40th general election (2008)', Elections Canada, www.elections.ca/res/cir/maps/map.asp?map=ERMap_40&lang=e).

When the news of the coalition broke, the Harper Government did two things: first it pushed back the date of the budget motion one week; and second, they moved the opposition day back as well. The move to push back the date of the votes illuminates two trends further discussed below: first, it shows the increased centralisation of power in the hands of the Prime Minister's Office (PMO); and second, it allowed the Conservative Party to frame the debate over the legality of the proposed coalition.²¹

²⁰ Gary Levy, 'A crisis not made in a day' in Peter H. Russell and Lorne Sossin (eds), *Parliamentary Democracy in Crisis*, University of Toronto Press, Toronto, 2009, p. 25; Valpy, op. cit., p. 9.

²¹ Valpy, op. cit., p. 11.

The Prime Minister framed the debate not in political terms, but rather in constitutional terms. Indeed, he observed:

The opposition has every right to defeat the government, but Stéphane Dion does not have the right to take power without an election. Canada's government should be decided by Canadians, not back room deals. It should be your [Canadians'] choice—not theirs. They want to install a government led by a party that received its lowest vote share since Confederation. They want to install a prime minister—Prime Minister Dion—who was rejected by the voters just six weeks ago.²²

In the meantime, the Leader of the Opposition, Stéphane Dion, and his coalition partners wrote a public letter to the Governor General insisting that the Parliament has lost confidence in the government and invited her to call on the newly formed coalition at her earliest convenience to form the new Government of Canada.

In response to the growing parliamentary 'crisis' the Prime Minister requested a meeting with the Governor General. It was indicated in the lead up to the meeting that the Prime Minister would ask the Governor General to prorogue Parliament until early 2009. Tradition dictates that the Governor General follows the advice of her Chief Minister. Yet, in the lead-up to that meeting it was not immediately clear that she would grant the prorogation. On Thursday 4 December, the Prime Minister met with the Governor General and requested the six-week parliamentary session be prorogued. The meeting lasted more than two hours, and by convention what was discussed remains a secret. Observers suggest, however, that there was a sense of tension in the room. After the meeting Parliament was suspended until late January 2009, and the crisis was over.²³

In the aftermath of the 2008 'crisis' the next two years of the Harper minority government were relatively uneventful. There was the usual pandering of the parties, but the focus was on returning Canada's economy during the global financial crisis. There was a minor point of contention when it was announced that the Prime Minister would ask the Governor General to prorogue Parliament for the 2010 Vancouver Olympics.²⁴

Parliament resumed on 3 March 2010. On 18 March 2010, the three opposition parties asked Speaker Peter Milliken to rule on a question of parliamentary privilege. In

²² *ibid.*, pp. 11–12.

²³ *ibid.* p. 16.

²⁴ The Economist, 'Harper goes prorogue', *The Economist*, 7 January 2010, www.economist.com/node/15213212.

particular, the request was whether Parliament had the right to request uncensored documents on the transfer of Afghan detainees. On 27 April 2010, Milliken ruled that Parliament did have the right to uncensored documents. Milliken observed:

The fact remains that the House and the government have, essentially, an unbroken record of some 140 years of collaboration and accommodation in cases of this kind. It seems to me that it would be a signal failure for us to see that record shattered in the third session of the 40th Parliament because we lacked the will or the wit to find a solution to this impasse.²⁵

Rather than call on the government to produce the documents immediately, he ruled that the House leaders come to a collective solution by 11 May 2010, in order to protect the identity and secrecy of those involved.

The end of the 40th Parliament was as surprising as its beginning. The Speaker, Peter Milliken, once again delivered a landmark ruling on the question of contempt of parliament. Contempt of parliament, like contempt of court, occurs when an individual (or government) interferes with the Parliament carrying out its functions. Such interference may include: perjury before a parliamentary committee, refusing to testify or produce documents, or attempting to influence MPs through nefarious means. Contempt of parliament rulings are rare: only five cases against individuals in 144 years of Canadian constitutional history. Charges of contempt against governments are non-existent. Harper's Conservative government had not one, but two, rulings of contempt in the lead up to the 2011 federal election.²⁶

The first contempt ruling concerned Conservative cabinet minister Bev Oda, who was accused of misleading a parliamentary committee when giving responses to a denied funding application. It stemmed from a 2009 decision to cut funding to KAIROS, a church-backed aid group. Documents show that funding was approved, and it was alleged that Minister Oda directed her staff to insert the word 'not' to the 'recommended for funding line'. When asked about the handwritten insertion Minister Oda claimed that she couldn't remember whether she had signed the memo prior to the insertion. Opposition MPs on the House of Commons Foreign Affairs Committee requested that the Speaker rule on Oda's possible contempt of parliament. The Speaker ruled that 'on its face' the minister's statements had caused confusion, and she was ordered to answer the confusion at a special House of Commons committee hearing. A general election was called before she was able to testify.²⁷

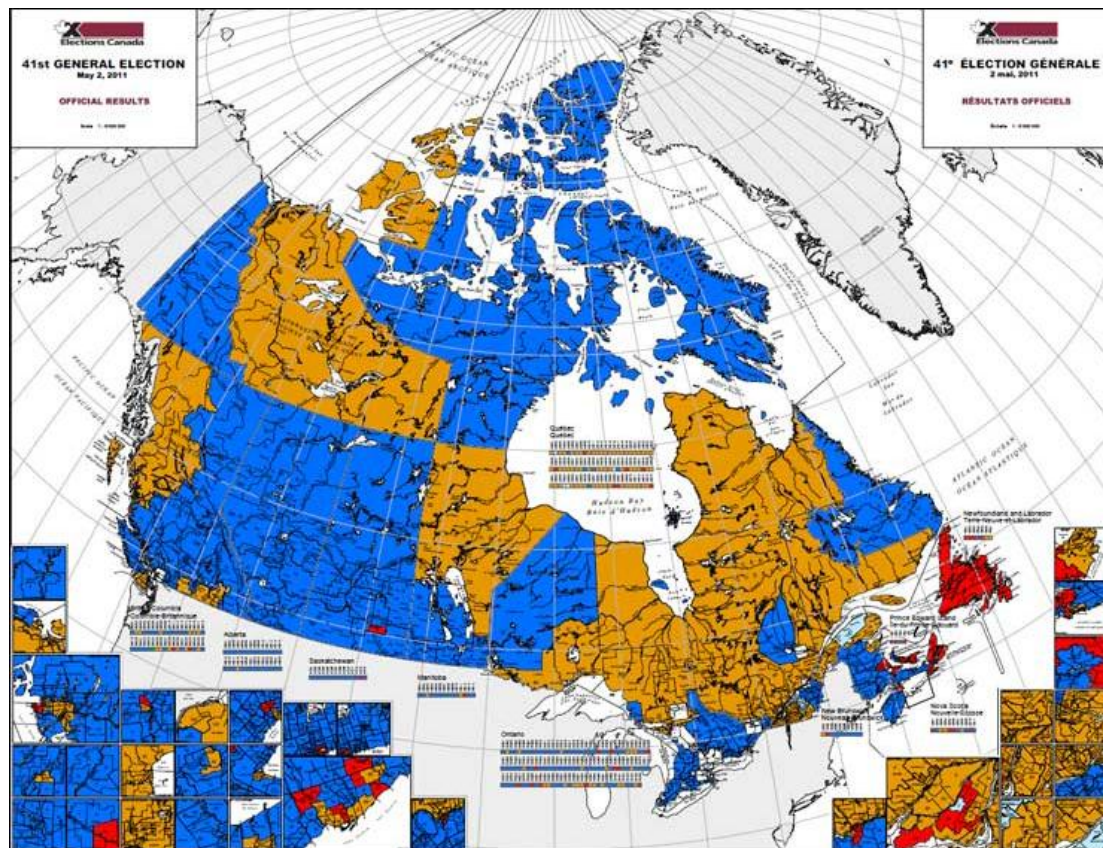
²⁵ Susan Delacourt, 'Parliament wins showdown with Stephen Harper government', *Toronto Star*, 27 April 2010, p. A1.

²⁶ Andrew Banfield, 'MPs should never let familiarity breed contempt', *Canberra Times*, 31 March 2011, p. 21.

²⁷ *ibid.*

The second charge of contempt was truly precedent-setting. Milliken ruled that the Conservative government was in contempt of parliament for not being forthright about the costs of sweeping anti-crime legislation and the full costs of the F-35 fighter jet. The Speaker concluded, ‘there’s no doubt the order to produce documents is not being fully complied with, and this is a serious matter that goes to the heart of the House’s undoubted role in holding the government to account’.²⁸ After the ruling, the House voted to send his report to the Procedure and House Affairs Committee for a contempt investigation. The committee reported back to Parliament and ruled that the government was in contempt of the House.

Figure 4: 41st Canadian general election



(Source: Elections Canada, ‘Map of official results for the 41st general election (2011)’, Elections Canada, www.elections.ca/res/cir/maps/map.asp?map=ERMap_41&lang=e).

On 25 March the longest running minority government was brought to a close with a motion that read:

That the House agrees with the finding of the standing committee on procedure and House affairs that the government is in contempt of

²⁸ *ibid.*

Parliament, which is unprecedented in Canadian parliamentary history, and consequently, the House has lost confidence in the government.²⁹

The motion passed 156–145 making the Harper Conservatives only the sixth government in Canadian history to be defeated on a motion of non-confidence. Canada was once again in the throes of a federal election: its fourth general election in seven years. This fourth election also brought an end to the hung parliaments in Canada, with Stephen Harper's Conservative Party returned to office with a comfortable majority government (see figure 4).

Lessons learned

With the election of a majority government in 2011, it is time to take stock and attempt to draw some lessons from a remarkably contentious period in Canadian political history. I suggest there are three broad lessons that can be learned about minority governments: a political party lesson, a 'managing parliament' lesson and an electoral lesson.

Political parties

There are two lessons that emerge for political parties during the minority governments of 2004–11. The first is one of setting the agenda. There is a rich literature about the importance of agenda setting in political science, but during a minority government it takes on new importance. Since the election of Paul Martin in 2004, all parties were in a constant state of election readiness. Tom Flanagan, a Canadian political scientist, and former Conservative Party campaign manager, calls the 2004–11 period the 'permanent campaign'. Canadian parties could no longer think about election once every four years; instead, they were forced to be always ready. This has a number of practical impacts on a party, including expenses such as keeping planes, busses and war rooms continuously available.³⁰ This also includes framing the debate against your opponents during the inter-election period.

The Conservative Party excelled at framing their political opponents before they had a chance to react. For example, when Stéphane Dion was elected Liberal leader, a series of attack ads rolled out framing him as an indecisive and weak leader. One memorable ad showed Dion during a leadership debate asking 'do you think it's easy to set priorities?' To which leadership contender Michael Ignatieff responded, 'you didn't get it done'. When Michael Ignatieff took the mantle of the Liberal leadership, it was

²⁹ *ibid.*

³⁰ Thomas Flanagan and Harold J. Jansen, 'Election campaign under Canada's party finance laws' in Christopher Dornan and Jon H. Pammett (eds), *The Canadian General Election of 2008*, Dundurn Press, Toronto, 2008, pp. 194–216.

reported that the Conservative Party spent \$60 000 on an advertising campaign that suggested ‘He’s just visiting’.³¹ The Conservatives suggested that the only reason Michael Ignatieff returned from his Harvard University teaching role was to become Prime Minister. They framed the debate in a sense of entitlement, a framing which Ignatieff neither fully recovered, nor refuted.

A logical extension of this is the hyper-partisan nature of parliament. The Canadian experience shows the strictly political side of policy: short-term thinking, and a ‘what have you done for me lately’ mentality. Indeed, the policy focus, rather than two to four years, is more likely to be two to four months, and a constant state of ‘how this plays’ as an election issue. Everything is seen through a lens of uncertain election timing. The ability to frame the debate and fight the election on your terms takes on an increased priority.

A second lesson for political parties is one of intra-party cohesion. The minority government situations in Canada highlighted a trend not often seen in Canadian politics: floor crossing. In both the Martin (2004) and Harper (2006) governments, we saw prominent members of the opposition benches cross the floor to take up cabinet positions. In the Martin example, Belinda Stronach (a runner up in the Conservative leadership race), was encouraged to cross the floor before a budget vote with the allure of a cabinet position. When she crossed the floor, it enabled, in part, the Martin Government to survive the budget vote outlined above.³²

The other, perhaps more shocking cross, involved David Emerson, a Minister of Industry in the Paul Martin Government. During the 2006 election, Emerson was re-elected in his Vancouver riding as a Liberal. When Stephen Harper’s Conservatives won the 2006 election, Emerson was persuaded to cross the floor and take a cabinet post in the new Conservative cabinet before the official swearing-in by the Governor General. When queried about crossing the floor Emerson responded: ‘I’m pursuing the very agenda I got involved to pursue when I was in the Liberal Party’.³³

Thus for political parties the two lessons are clear. First, is the lesson of the ‘permanent campaign’ and agenda setting. The ability to set the debate on terms that a party is prepared to fight an election over becomes paramount during a minority government. Indeed, the ability to frame your opponent in terms of your choosing is one of the key lessons that emerge from Canada. A second, equally important lesson

³¹ Bob Hepburn, ‘Overcoming the “just visiting” image’, *Toronto Star*, 10 September 2009, www.thestar.com/opinion/article/693276.

³² CBC News, ‘Conservative Stronach joins Liberals’, *CBC News*, 18 May 2005, www.cbc.ca/news/canada/story/2005/05/17/stronach-liberals050517.html.

³³ Matt O’Grady, ‘About face: David Emerson crosses the floor’, *Vancouver Magazine*, 1 April 2006, www.vanmag.com/News_and_Features/About_Face?page=0%2C2.

is the one of intra-party cohesion. Since the margins of majority versus minority government are thin, parties need to watch for the rational self-interested party member. In the Canadian case, this is seen through enticements to cabinet positions in one case before Parliament had resumed. Beware the floor crosser.

Managing parliament

A second set of lessons emerges in the management of parliament. Again, two separate lessons emerge. The first is closely related to the intra-party cohesion lesson above. In this case, successful minority governments tend to permit less access to ministers and tend to promote less open government.

In his book, *Governing from the Centre* (1999), Donald Savoie³⁴ argues that the days of ‘cabinet government’ are long gone in Canadian politics, replaced with the prime minister and a close cadre of advisers setting the course of the government. Savoie claims that this slippery slope toward ‘court government’ started under Pierre Trudeau in the 1970s and has become increasingly prevalent in the decades since. Minority government has not added to the inclusiveness of government decision-making. In fact, the centralisation of power has intensified during the two Harper minority governments.

Stephen Harper and the Conservative Party of Canada ran a very tight ship: message discipline was the mantra of the government. Conservative staffers were not permitted to talk to the media, and even MPs were not allowed to deviate from the talking points. Even ministers, with rare exception, were carefully scripted through the PMO, and were expected to stay on point.

The second lesson that emerges is to have short manageable targets when dealing with public policy. If the Canadian experience teaches us anything it is that in the early days of a mandate, parliament tends to work well. However, when the party has executed their mandate, or at least the major pillars of it, minority government tends to fail. It is said the ‘art’ of minority government in Canada is to be ‘engineering defeat on the most favorable terms’.³⁵ The government, particularly in minority government, has to find a balancing act between holding the reins of power and trying to orchestrate their defeat to return to majority government. Indeed, there are a number of occasions where the government attempted to bait the opposition parties

³⁴ Donald Savoie, *Governing from the Centre: The Concentration of Power in Canadian Politics*, University of Toronto Press, Toronto, 1999.

³⁵ James Travers, ‘Quebec tax breaks could blow up in Harper’s face’, *Toronto Star*, 22 March 2007, www.thestar.com/columnists/article/194626.

into defeating them.³⁶ When opposition parties are in disarray, as they were for much of the Harper minorities, it was the perfect time for the government to introduce legislation which would receive a difficult ride in the House. We see this in Canada, when on a number of budget bills and other confidence measures, the official opposition ensured bills would pass by having members come down with ‘budget flu’.

Elections

Finally, a set of lessons emerges for the contesting of elections. The first lesson is the importance of the marginal seat. When the reformed Conservative Party of Canada set out to contest the first election in 2004, one of its first tasks was to expand beyond its Western Canadian base.³⁷ Part of the reason the Liberal Party was so successful during the 1993–2003 period was the electoral strength in the province of Ontario. Ontario is Canada’s most populous province and hosts 103 MPs. The Conservative Party starts from a weak position in Ontario, but there is room for growth outside of the Greater Toronto Area, a traditional Liberal fortress.

This increased focus on Ontario by the Conservative Party is compounded by two factors for the Liberal Party of Canada. First, is the relatively weak potential for growth anywhere in the rest of Canada. Traditionally weak in Western Canada, the potential for growth east of Quebec is small. The second problem facing the Liberal Party is the electoral system used in Canada. Recall that Canada uses a single-member plurality or ‘first past the post’ system meaning that you do not need a majority of votes cast to secure a seat.

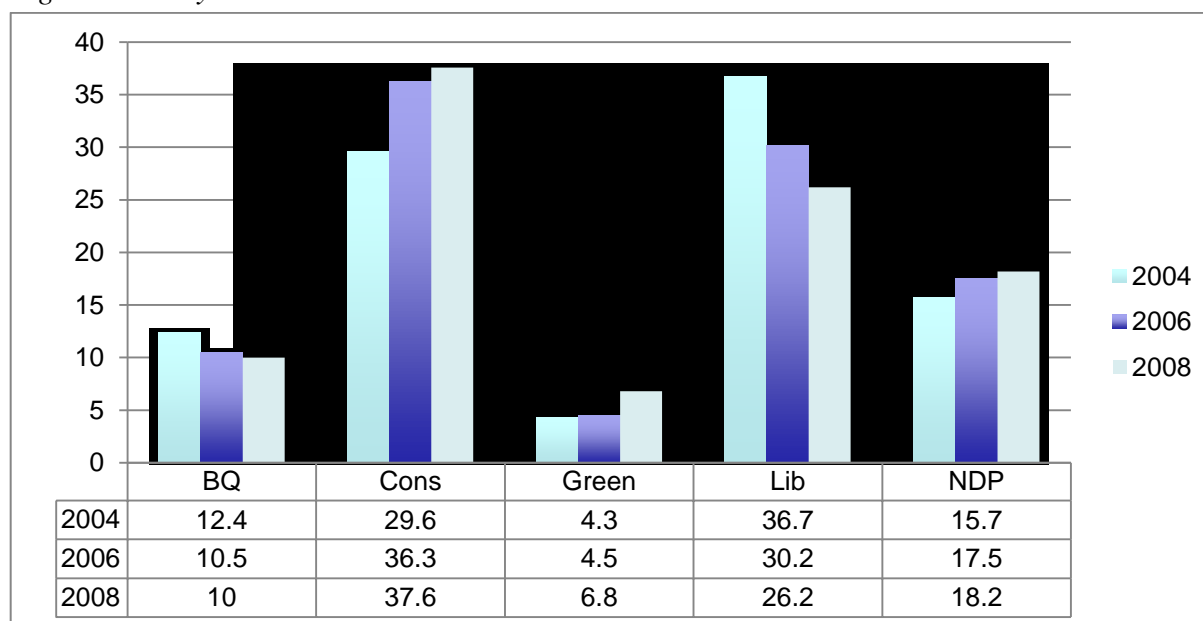
Figure 5 illustrates the change in party vote from 2004 to 2011.³⁸ The three parties that increase their vote share are the Conservative Party, the New Democrat Party, and the Greens. The Conservatives have the greatest increase of support at 8 per cent of the national vote, while the New Democrats increase only 2.5 per cent. The party most affected by the changing vote totals is the Liberal Party of Canada which sees a decline of 10.5 per cent of national vote share.

³⁶ Renata D’Aliesio and Jason Fekete, ‘PM dares rivals to force election’, *Calgary Herald*, 5 July 2009, www2.canada.com/calgaryherald/news/story.html?id=294f5585-d2ec-4f9a-98e7-d52fc7637e5c&p=1.

³⁷ Thomas Flanagan, *Harper’s Team: Behind the Scenes in the Conservative Rise to Power*, McGill-Queen’s University Press, Montreal, 2007.

³⁸ The vote total for the BQ is slightly misleading as they only run candidates in the province of Quebec.

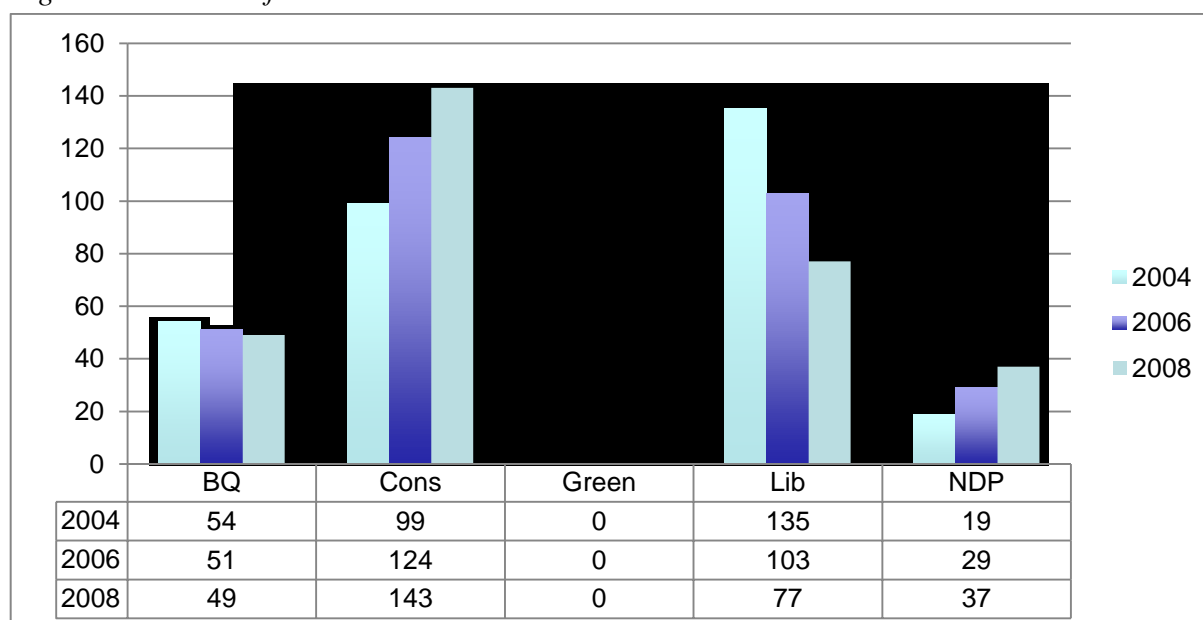
Figure 5: Party vote since 2004



(Source: Adapted from Anthony M. Sayers, 'Obstacles to Coalition Formation in the Canadian House of Commons', presentation to Mt. Royal University, Calgary, Alberta, 2011).

Figure 6 shows the resultant seat share from relatively small national vote share gains. Indeed, the Conservative Party of Canada gained 44 seats over a four-year period with only an 8 per cent increase in national vote. The New Democrats too see a dramatic increase in seats gaining 18 seats with only a 2.5 per cent vote share increase in the same four-year period.

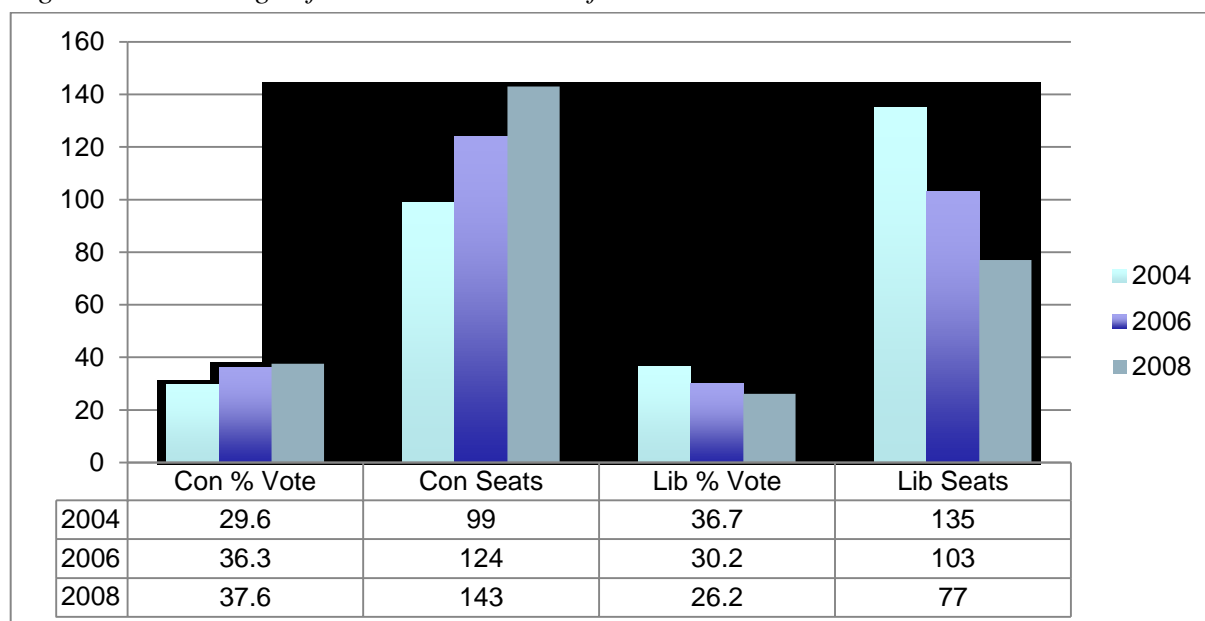
Figure 6: Number of seats won since 2004



(Source: Adapted from Anthony M. Sayers, 'Obstacles to Coalition Formation in the Canadian House of Commons', presentation to Mt. Royal University, Calgary, Alberta, 2011).

So if we put the two previous figures together in Figure 7, and focus on the two major Canadian political parties, the Conservatives and the Liberals, the lesson of marginal seats becomes clear. An increased focus on areas of potential growth for the Conservatives, compounded by the rules of the electoral system result in major seat gains for the Conservatives and New Democrats at the expense of the Liberal Party of Canada. What this means in practice is that the Liberal Party is losing support to both the left and the right with no room for growth beyond traditional safe seats. Indeed, in the election of 2011, the Liberal Party was overtaken by the New Democratic Party and reduced to third party status.

Figure 7: Percentage of votes and numbers of seats: Conservative and Liberal



(Source: Adapted from Anthony M. Sayers, 'Obstacles to Coalition Formation in the Canadian House of Commons', presentation to Mt. Royal University, Calgary, Alberta, 2011).

In sum, the lesson of the marginal seats is clear for parties wanting to return to majority government. By focusing resources on areas of potential growth, the Conservative Party of Canada and the New Democratic Party of Canada were able to increase their seat totals at the expense of the Liberal Party of Canada. Indeed, this attention to the marginal seat has set the stage for the gradual decline of the party that held power through much of the 20th century in Canada.

Conclusion

From the analysis above, the overarching lesson lies in the different way that parliaments are managed. The electoral cycles are shorter, the centralisation of power is magnified, and the focus on the winning coalition is placed at a premium. Parliamentarians are forced to engage with a system with which they are not familiar and often this results in hyper-partisanship and indeed, brinkmanship.

Yet, the Canadian lessons outlined above for parties, management, and elections, demonstrate the usefulness of Westminster comparisons. Indeed, it is easy to see in the Australian context similar compressed time frames, the reliance on polls, and the attention paid to the marginal seats. Moreover, if minority governments are the ‘way of the [Westminster] future’ as some suggest, then the experiences of the Commonwealth cousins cannot be ignored. Indeed, the Australian Senate serves as a useful example of how a parliamentary chamber can be managed when there is not a majority party.

If comparative analysis is undertaken on the form and function of minority governments in Westminster parliaments, then perhaps the next time a minority government is elected we can revel in ‘the spring of hope’ and avoid the ‘winter of despair’.



Question — You presented a theme of the rise over the last ten years of the Conservatives and the decline of the Liberals. Has this phenomena been reflected in the elections of the provincial assemblies?

Andrew Banfield — No, it warms my heart no end to know that federalism actually works. When the Liberal Party is in charge, Conservative parties dominate provincial legislatures. With the Conservative Party coming to power, Liberal parties have begun to dominate provincial legislatures. Proof that not only federalism works—and there is a check off between central and state or central and provincial—but also that Canadians, I think, and again I am speaking on behalf of all Canadians, are smart enough to go ‘Hmm, maybe we don’t want everybody in charge’. We saw a similar phenomenon during the Howard reign when state Labor parties came to power.

Question — I was intrigued when Mr Emerson decided to cross the floor to become a cabinet minister. What was the public reaction to that?

Andrew Banfield — If I recall, the general public reaction was moral outrage. Whether that was genuine or faux I am not entirely sure and it lasted for a couple of weeks until we sent Mr Emerson overseas and he was out of sight and out of mind. I think parliamentary watchers and political scientists like me paid much more attention to the Emerson floor cross than the average Canadian.

Question — I was very interested to hear your remarks about the role played by the Speaker especially during that decade after 2000. Could you describe his background and any other interesting facets of his character and behaviour?

Andrew Banfield — That is slightly loaded isn't it? Peter Milliken was a Liberal Party Member for Kingston and the Islands. Kingston is a small city. Milliken is a long-term party member and I believe his father was MP for Kingston and the Islands as well and he is the only person who I have ever read about, heard about or met that grew up dreaming and wanting to be the Speaker. He is the most well-versed individual on parliamentary practice that I have certainly come across. He lived, breathed and embodied the role of Speaker down to the house in the Gatineau Hills and he actually lived in the little apartment given to the Speaker at Parliament.

On parliamentary tradition and parliamentary procedure he was spot on with an encyclopedic memory. It was remarkable. In the House—and this is clearly my view not anyone else's view—he left a little bit to be desired in terms of Speaker. He let the rabble get a little too loud for my liking and occasionally I would have liked him to go 'Shoo' but he never did that. So if I have one complaint about Peter Milliken it is his laid-back nature.

Question — How was Peter Milliken able to secure the Speakership across both governments?

Andrew Banfield — For the Liberal Government it was really easy. He was one of the few who actually ran for it. For the Conservative Government it was pure strategy: take him out of the voting benches and put him in the Speaker's chair. Plus you need a steadying hand as we saw he played a very important role across all three of the minority parliaments. It is nice to have a steady hand on the tiller but do not downplay the strategy move to take him off the cross-bench.

Question — You talked a bit about the importance of being able to set clear and manageable targets that you can then go ahead as a government to achieve. Do you have any thoughts about how you actually go about setting that agenda and setting those targets in the context of a minority government where the government is dealing with a number of different agendas?

Andrew Banfield — I think it is really important to have a clear set of policy goals at the beginning whether those policy goals appear from the policy conference or from the election platform. It does not really matter but they have to be written down somewhere so you can fall behind them as a shield. I think the other part is that you have to be a little bit flexible on what your goals are. So if your goal is X and your

opponent's goal is B then maybe the least offensive position is Q and you can bring in one of the minor parties. So there has to be some flexibility built into it but you need to speak with one voice, saying this is what we want to do and we might not be able to do it in this parliament but if we can get half way there then we are more than half way home when we get to be in charge. I think that is the advice I have.

Question — It is not compulsory voting in Canada. Can you indicate the change in party support in Canada with a change in the number of people or percentage of people who cast a vote?

Andrew Banfield — 'No' is the short answer. When voter turnout federally was 75 per cent or 80 per cent the Liberal Party won. When voter turnout was 60 per cent the Liberal Party still won. I suspect if the voter turnout turns down to be 50 per cent the Liberal Party will win again. I think it is tenuous to draw a bright white line between voter turnout and party change. There is some interesting work being done at my Alma Mater at the University of Calgary that says even non-voters—and it turns out that non-voters are also non-survey-filler-outerers—are generally happy, at least in the Alberta context with the governing party. Voter turnout in Alberta is appalling with somewhere around 50 per cent but the governing party is closest to the median voter on all issues except government intervention, I think. 'I don't have a good answer' is the short answer.

Question — In the context of minority government, comparing Australia and Canada, would you comment on the role of the upper house in both countries?

Andrew Banfield — The upper house in Australia actually plays a role as opposed to the upper house in Canada. They are elected, they have democratic legitimacy in Australia and they provide a very good checking component. The upper house of Canada, much to my chagrin, is the last bastion of appointed party hacks. Even when Stephen Harper came to power in 2006, faced with a Liberal-dominated upper house, things might have been slowed down a little bit but certainly nothing was ever knocked back to them. So the Senate actually plays a role in managing minority parliament in Australia whereas in Canada the upper house is just the rubber stamp.

Question — We have seen at the last federal election in Canada that the Conservative Party has been able to win a majority but without Quebec seats. Do you think that we have entered a new era in Canadian politics so you can win a majority government without winning any province seats?

Andrew Banfield — Maybe. This is probably not the answer you wanted to hear. I do not know. One election is an anomaly, two elections are a trend, and three elections

are a proven fact. So I am going to fall behind my shield of ‘we need more research and talk to me in 2020’. I think the real answer is ‘perhaps’, particularly with the left splitting the vote between the Liberals and the NDP and with an increased power base movement towards the west. There is something like 35 additional seats being added in as a result of the next census and none of them for the first time will be in Quebec. Very few will be in Ontario. All kinds will go to Alberta and British Columbia. The real answer may be ‘maybe’, but there will never be a day where you can form legitimate government without Quebec involved, one or two members at least.

Question — One of the features of minority government here has been the role of independents who because the government has needed their support to form government have been able to exercise significant influence on policies in which they have particular interests. From your presentation I gather that there have not been independents in the Canadian Parliament. Can you comment on what difference that makes and why there have not been independents in the Canadian Parliament?

Andrew Banfield — In the 2004 election there were three independents, two former Conservatives and a former Liberal, all of which were booted out of caucus and had to sit as independents and they played an invaluable role in securing the budget for the Martin Government. I think part of the answer for the lack of independents in Canadian parliaments is the control of the party leader and people vote by party label. So it is ‘I’m a Liberal, my grandfather was a Liberal, his grandfather’s grandfather was a Liberal and I’m going to vote Liberal. I sort of know this guy but he is not going to do anything for me’. You have more power to your local MP inside a party than outside a party so I think that is certainly part of the story. I do not have more of an explanation than that but I think that is a good chunk of the explanation.

Question — With the change in the numbers across the country from the east to west, is there a fixed number of parliamentarians? Is there an increase in the numbers in the west as there is a decrease in the east?

Andrew Banfield — No, the seat distribution is based on the census, so there is a constitutional reason, particularly in Quebec you cannot fall below a certain number because of the founding fathers. So there is just increased addition to seats as opposed to subtraction of seats.

Question — What will the number be at the next election?

Andrew Banfield — 156, something like that. That is a big increase because there has been a big population growth.

Question — Do you think the NDP will replace the Liberal Party?

Andrew Banfield — I do not know, which is probably a remarkably unsatisfying answer. It will depend on any number of things, not least of which who the NDP select as their new leader. The real question that I think the NDP has to face going forward is: was the surge in party support a vote for Jack Layton or was it a vote for the New Democratic Party because of the surge in Quebec and the progressive left that dominates Quebec? I think you can make an argument that it was a vote for probably both but at least it is a plausible argument to be made that it was a vote for the New Democratic Party. You cannot downplay the importance of Jack Layton in Quebec. The Liberal Party are still in disarray, they still cannot raise money. The NDP is much better at raising money than the Liberals at this time. They do not have a particularly effective leader either; they have an effective interim leader but they do not have a permanent leader. ‘Maybe’ is the long short answer to your question.

The Strange Case of Privileges and Immunities*

William Buss

The flyer advertising this talk said I was currently ‘working on a book on the American influence in the making of the Australian Constitution,’ but that sounds a little bit like a lobby group trying to get the Australians to do what would be in the American interest. In fact, what I am really talking about is the framers of the Australian Constitution. When they got to the job of making a constitution, they looked around to see what was available to help them. They took a hard look at the American Constitution and it proved to be very influential—but influential in a lot of different ways. One was providing a sort of model for them to follow as they did, for example, in the case of Chapter III dealing with the judiciary. If you pick up Chapter III in the Australian Constitution and Article III of the American Constitution, you would see that there are places where you could put one set of words over the other and, except for words like the ‘United States’ and the ‘Commonwealth,’ the language would be exactly the same. So there is a real positive modelling, in this case, on the American Constitution.

At the other extreme there are a number of places where the look at the American Constitution told the Australian framers, ‘we don’t want to do that’. For example, when the Australian framers looked at what the Americans had done with family law and what it had caused, they said that is a ‘scandalous’ result and we are going to stay as far away from that as we can. So there are warnings as well as good advice.

Then there are these funny in-between cases and that is where we get to the strange case of privileges and immunities. Starting with ‘privileges and immunities’ itself, I need to insist that you just take on faith what I am going to say: ‘Privileges and immunities’ is a traditional phrase used long back into English history; it is, at the same time, very vague and yet pretty specific. It is vague in the sense that exactly which rights and freedoms are part of privileges and immunities is always something that has to be discussed and worked out. But, on the other hand, it is repeatedly clear that it is talking about fundamental rights. ‘Privileges and immunities’ means *fundamental rights*. Now, identifying those fundamental rights is not always easy, but that basic fundamental rights idea is something that I want you to accept as I go along.

* This paper was presented as a lecture in the Senate Occasional Lecture Series at Parliament House, Canberra, on 13 April 2012.

Talking about fundamental rights leads to the Bill of Rights in the American Constitution, and it is important for me to start with the constitution which the Americans ratified in 1788. Notice that is several years after the end of the American Revolutionary War because right after they won independence, the Americans did not have our current constitution; they had a thing called the Articles of Confederation, which was pretty awful. The people we think of as the American patriots and constitutional framers—like George Washington, Alexander Hamilton and James Madison—said we have got to do something about this and what they did was make the American Constitution ratified in 1788. That constitution did not have any Bill of Rights. It was only later that it was added, in 1791. What happened is that in the constitutional ratification conventions in the 13 American states, the people made it pretty clear that they wanted a Bill of Rights. So, when James Madison went to the first Congress, he initiated what turned out to be the first eight amendments of the American Constitution which are commonly called the Bill of Rights.

There are two things we have to notice about those rights: first, a Privileges and Immunities clause was not included; second, the Bill of Rights applied only to the national government. So, for example, freedom of speech, one of the rights that was included in those eight amendments, was only a guarantee against things that the national government might do to interfere with the freedom of speech. It did not restrict state or local government at all.

But, then, Article IV, s 2 of that 1788 Constitution says,

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

Here we have a Privileges and Immunities clause, but notice it is a *state* Privileges and Immunities clause. What it is really saying is that, in the United States, if you are a citizen of one state and you travel into another state, you are entitled to these fundamental rights, or fundamental privileges and immunities, if the state provides them to its own citizens. So there is a state privileges and immunities concept that is based on non-state citizens being entitled to the fundamental rights that the state gives to its own citizens.

The first 70 years under the American Constitution were often bogged down in arguments about slavery and race, and one of the big questions was whether black people—and not just slaves, but free black people—were citizens entitled to these privileges and immunities. The Supreme Court gave an answer in the *Dred Scott* case, which was *Dred Scott v. Sandford* of 1857, probably the most infamous case in the history of American constitutional law. The Supreme Court's answer was No; black

people were always understood not to be fit to be citizens and indeed the Chief Justice said, in effect, it is unthinkable that black people would have these fundamental rights.

Let me just read a partial quote from Chief Justice Roger B. Taney's *Dred Scott* opinion describing the fundamental rights of people, including black people, if they had citizenship rights to privileges and immunities. They would be able to move freely to another state, Taney said, and 'to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation' and they would have 'full liberty of speech in public and in private upon all subjects ... to hold public meetings upon political affairs, and to keep and bear arms wherever they went'.¹ So, he said, these are the kinds of things that it is inconceivable that the framers of the American Constitution would have wanted black people to have. That is not a very happy message from the highest court in the United States, and it helped to bring about the American Civil War.

The 14th Amendment came along in the United States after the Civil War and the first sentence of the 14th Amendment makes it clear that 'all persons born ... in the United States, ... [of whatever race] are citizens of the United States and of the state wherein they reside.' So that was good news.

Then, in the 14th Amendment, we have a second Privileges and Immunities clause. This is a Privileges and Immunities clause that seems to make up for the gap that was created by the original Bill of Rights. Remember I said the Bill of Rights was only applicable to the national government? But the 14th Amendment says '*No State* shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.' That certainly sounds as though whatever is included in 'privileges and immunities' is protected from interference by state governments. Now I will give you another one of those statements where I am telling you to accept something on faith: The consensus of American scholars today is that the Privileges and Immunities clause in the 14th Amendment was clearly intended to include the Bill of Rights of the first eight amendments.

That happy news lasted only as long as it took to get to the case called the *Slaughter-House Cases* (1873), a case with an all-too suggestive name. The *Slaughter-House Cases* held that the 14th Amendment Privileges and Immunities clause did not make state governments abide by the fundamental rights in the Bill of Rights. All it did was make applicable to the states certain rights which were already in the Constitution. The dissenting opinion in the *Slaughter-House Cases* said that is crazy; if that is all it does, then the 14th Amendment Privileges and Immunities clause has done nothing. It

¹ *Dred Scott v. Sandford*, 60 U.S. 393 at 417.

is a dead letter; it adds nothing to the Constitution. That has been the understanding in the United States ever since. The *Slaughter-House Cases*, in effect, read the 14th Amendment Privileges and Immunities clause out of the Constitution.

I want to emphasise the significance of that conclusion about the *Slaughter-House Cases*. It may be a little bit technical-sounding, perhaps, to say these fundamental rights only apply to the national government. But what it meant then, and for a long time after, is that the fundamental rights of black citizens were left to the protection of the states; and the states, particularly in the south in the United States, were not protecting them. So, for a very long period there was discrimination, lynching, murders that were un-remedied, a very unhappy result. It would be a little bit strong to say that the *Slaughter-House Cases* decision did this damage all by itself; but it certainly played a very significant role.

So, ending on that unhappy note, I am going to turn to Australia, starting with Andrew Inglis Clark, who brought a full constitution to the 1891 Australasian Federal Convention. Accompanying that draft of a constitution ready to go for Australia, he wrote a memorandum that said his draft was expressly based on the Constitution of the United States of America. What does that have to do with the Privileges and Immunities clause? Well, it turns out, nothing at first because Clark did not include the two American Privileges and Immunities clauses. In fact, he did not include even one Privileges and Immunities clause. And that is the way things stayed for a while.

The drafting committee, of which Sir Samuel Griffith was the chair, met before Easter in 1891 and began editing Clark's draft. Then, over the Easter weekend, Griffith took the drafting committee on a working voyage on a steamship called the *Lucinda*, which Griffith (as Premier of Queensland at that time) brought to the convention in Sydney. The most significant drafting of the 1891 convention took place on the *Lucinda* on Easter Saturday, 1891, almost exactly 121 years ago today. This occurred on what Professor John La Nauze called the beautiful Hawkesbury River, which I think is the same river that Kate Grenville calls 'the secret river' in her novel by that name. When they sailed out of the Hawkesbury River on Easter Sunday, to return to Sydney, there was still no Privileges and Immunities clause in the draft of the Australian Constitution that then existed.

Now the next thing that happened is slightly controversial but I have to go back a step. Andrew Inglis Clark was a member of the 1891 drafting committee but he did not make the cruise to the Hawkesbury River. He was sick in bed with the flu. So, as the story goes, when the *Lucinda* came back into the harbour in Sydney, they picked up Clark and at that point he added a Privileges and Immunities clause. It is a great story.



QGSY *Lucinda* at Farm Cove, 2004, by Don Braben (1937–). Courtesy of Don Braben, FASMA.

Here is a painting that was done of the event a few years ago. At the time the picture was painted no one knew where this happened, so they did some consultation with people who might have had some idea and they finally concluded that the most likely place was where the Sydney Opera House is now. So the painting is supposed to be of that location. I think the picture is intended to show Inglis Clark being rowed out to the *Lucinda*.

One final problem is that Clark himself, in anything I have ever read, never claimed that he was the author of the 1891 Privileges and Immunities clause. I think everyone who writes about this assumes that he was, and it is hard not to assume that he was the one because it is hard to imagine who else it would have been. But, in any event, at that point there was a Privileges and Immunities clause in the draft of the Australian Constitution. Remember, now, we have Clark who was very aware of the American Constitution and we have these two Privileges and Immunities clauses in the American Constitution. Which one did Clark put in the 1891 draft on the *Lucinda*? Well, most people say it is a mixture of the two and indeed when you look at it carefully it is a little bit unclear which of the two it was. But if the Australian Constitution that was drafted at that time had been approved, that clause would have been in there; but, as you probably know, in 1891 the proposed constitution was not adopted and the Australian Constitution was put on the back burner for a while.

In 1897 and 1898 the constitution came back into the picture and was finally approved in 1898 by the framers and became a British statute in 1900. But an interesting thing happened along the way to approval. In 1891 no one had raised any questions about, let us call it, ‘Clark’s clause’; but in 1897 *Clark* raised a question about Clark’s clause. That is, he was not a member of the Australasian Federal Convention in 1897–98 but he was very active and in touch with the convention and he had a new proposal, another Privileges and Immunities proposal, and he basically said that the 1891 proposal is not very good. He did not say it was ‘my proposal’; he just said that it was not very good. Then there was a big debate in the Australian constitutional convention. In that debate, the clause that Clark then preferred—that is the one he wrote in 1897—was voted down; and then finally the one that he arguably had written in 1891 but repudiated in 1897 was voted down. So at that point there was no Privileges and Immunities clause in the Australian Constitution.

A short time later, Josiah Symon, the chair of the Judiciary Committee, introduced another Privileges and Immunities clause and this one, Symon said expressly, is exactly in words of Article IV of the American Constitution. That proposal was subjected to further extensive debate, and it was finally approved (and is section 117 in the Australian Constitution); but only after they took out the ‘privileges and immunities’ words and simply said a state could not discriminate against a non-state resident. So is it a Privileges and Immunities clause, without ‘privileges and immunities’ language? Some of you are familiar with the great constitutional treatise by John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth*, published in 1900, before the Constitution even became official. Quick and Garran take an interesting view on this. They say, of course it is unthinkable that all discrimination against out-of-state residents would be prohibited; it is only those things involving ‘privileges and immunities’ to which non-residents are entitled to equal access. Quick and Garran specifically quoted an American Supreme Court Justice who, in the case from which they were quoting, was interpreting the ‘privileges and immunities’ language in Article IV of the American Constitution.

One more thing from Quick and Garran. They also said there is this other Privileges and Immunities clause in the American Constitution and that is in the 14th Amendment. We don’t have one in our Constitution; but don’t worry because it does not make any difference. Quick and Garran said that ever since the *Slaughter-House Cases* the American 14th Amendment Privileges and Immunities clause does not mean anything. And so, Quick and Garran concluded, we are just as good as they are; we have nothing like the 14th Amendment in the Australian Constitution, but the Americans have nothing either even though they have some ‘privileges and immunities’ words in there.

I want to mention one last thing about Clark, as a way of capturing the difficulty, sometimes, in understanding what is happening when you have one group of people looking at someone else's constitution and then advocating something related for their own constitution. Remember, Clark was the advocate of 'privileges and immunities' provisions and they were voted down. He thought that was a terrible result because he thought what the Americans had done was so wonderful. But he then also wrote a treatise in 1901, and in his treatise he praised the *Slaughter-House Cases*. I have never been able to understand why he praised the case that, in the United States, undermined the clause he advocated. So there is a mystery at the end of the Clark connection to privileges and immunities in the United States.

Unfortunately, there is no mystery about the fact that the racial factor was intertwined with privileges and immunities in Australia, just as it was in the United States. For example, John Quick (that is the same Quick who was the co-author of the treatise) when he was talking as a convention delegate explained the rejection of the Privileges and Immunities clauses:

We have already eliminated interstate citizenship upon the ground that it might interfere with the right of each state to impose disabilities and disqualifications upon certain races.²

In other words, we do not want anything in our Constitution that will prevent the states from discriminating on the basis of race.

In a statement by Henry Bournes Higgins, which he made right before the convention approved the non-discrimination clause that became s117 of the Australian Constitution, he explained discrimination that was and was not acceptable: 'We want a discrimination based on colour'.³ That is, it is OK to discriminate on the basis of race as long as you do not discriminate on the basis of state residence.

William Trenwith, the only Labor representative at the convention, made it clear that the framers of the Australian Constitution not only shared but were influenced by their American predecessors in linking race and privileges and immunities: 'The Americans made a mistake by declaring that the negroes should be citizens',⁴ so we do not want to go down that road. Trenwith was saying concisely what was said a lot in the course of 45 pages of the convention transcript: The Americans did not really provide racial equality, and they were misguided in trying to do so.

² Australasian Federal Convention, 2 March 1898, www.aph.gov.au/About_Parliament/Senate/Research_and_Education/Records_of_the_Australasian_Federal_Conventions_of_the_1890s, p. 1767.

³ Australasian Federal Convention, 3 March 1898, p. 1801.

⁴ Australasian Federal Convention, 3 March 1898, p. 1792.

But all of that was over 100 years ago; is it the end of racism in the United States and Australia? Well, we all know, not quite. We do not have at all the same racial climate now that we had at the end of the nineteenth century, but we have not quite got to the perfect racially neutral time. The Americans have partly improved their situation by finding another provision in the Constitution that did protect blacks against discrimination and did incorporate the Bill of Rights so that now it does apply to the states and local government as well as to the federal government. The Australians have reached a better world, if you will, not through a Bill of Rights—not through anything in the Australian Constitution that is binding on the government, state or national—but through statutes, common law and international treaties.

Finally, is a Bill of Rights worthwhile? I am not going to tell you who is right and who is wrong. I will simply say that the question whether there should be a Bill of Rights in Australia is one that continues to be debated and a national Bill of Rights is always rejected when it is proposed. There is even a view that ‘Australian Exceptionalism’ is the way to describe the fact that Australia is the only one of the English-speaking democracies (compared to Canada, New Zealand, the United Kingdom, South Africa, and the United States) which does not have anything like a national Bill of Rights. At least at this time that is the way things are. Perhaps it should be remembered that those nineteenth century decisions that provided the foundation for Australian Exceptionalism were heavily influenced by racial considerations.



Question — While you say that Australia, unlike Canada, New Zealand and the UK, does not have a Bill of Rights, we do have a High Court that has not been backward in finding all sorts of implied rights in our Constitution. Do those other jurisdictions have a body like our High Court that has been so active in that field?

William Buss — Yes, although the differences are, as you have pointed out, that in none of the other countries that I listed have they achieved what I will call ‘enlightened’ views about individual rights through some of the imaginative things that your court has done. It is even a little misleading to say that there are no Bill of Rights provisions in the Australia Constitution. There is a religious provision which is very much like the religion provisions in the American Constitution. There is of course section 117, which is this offshoot of Article IV, which is kind of an individual rights provision. But on the other hand, the Australian High Court has teased a great deal of Bill of Rights type protection, for example, out of Chapter III. That is, the

notion that there are certain things that I call the rule of law that require fairness in judicial proceedings. You can read the requirements of Chapter III, directing how the courts operate, as a source of certain kinds of individual rights.

The court has also found a so-called implied right of political communication, which is sort of like the First Amendment but more limited. Canada and the United States haven't had to do that because they have the stuff there in writing. I think that it is clear that in all countries if there is a court which has any kind of judicial review, that court is going to have difficult decisions to make that affect individual rights and of course it is always claiming it relies on interpreting the Constitution. It is not quite a dictionary exercise figuring out what words mean; it is trying to make sense out of a constitution as a whole. So even though I said 'yes' to your question, that there are activist courts, it goes up and down. I think a lot of people would say in the United States right now the court is too activist in a non-individual rights direction.

Question — One of the interesting things that is happening in regard to our Constitution at the moment is the issue about the recognition of Aboriginal or Indigenous Australians in the preamble. What are your thoughts on that?

William Buss — Let me say two things. The first is that I do not know the narrow specifics of that conversation and discussion so I do not really have a view on that. I know the history of the treatment of Aborigines in Australia which I guess is comparable to the treatment of racial minorities in the United States. It seems to me that to the extent that it would be helpful to include a declaration that probably would not have legally binding effect in the sense of deciding cases, it would be a declaration of the purpose and attitude of the country, and I would be in favour of that. You might call it a symbolic act, but I think symbolic acts can be very important.

Question — In your view as a relative outsider, and we are all outsiders apart from our first Australians, how do we improve relations with our first Australians?

William Buss — I really think I should probably not try to answer that. Let me put it this way: if I were an Australian citizen I would want to do that and only have to figure out how to do it. Gestures and symbols are important but then there are very real practical problems as well in dealing with them, that is, figuring out ways not just to say we like you or wish things were better but to make them so. At the time of your convention you had two racial problems. One was with Aborigines and I think that the framers were probably not primarily worried about Aborigines because they thought they were dying out. But they also had a problem with Chinese and other racial minorities who were thought to be taking work from Australians, so you have got different kinds of problems there.

In the United States we have racial problems that are all related to slavery and attitudes about slavery and the inheritance of that. We also have a problem with American Indians who come closer to being in the position of Aboriginal people in Australia. That is, people who are here, people whose land, let us say, was taken over—there was not a friendly negotiation by any means that resulted in all that happened. So we have all those problems in the United States and I think it is fair to say we have not solved the question of the best way to deal with native Americans or American Indians and all I can say is we have to keep trying.

Comment — I think it is one of those uncomfortable things about both of our histories. Certainly in the case of the Australian Constitution it was an overtly racist document. It did provide for discrimination and I think it is something that we find difficult to come to terms with now and to rationalise it and hence the need to keep trying.

William Buss — I wrote a quote down that I decided I did not have time to read because I was running out of time. I think we are rightly concerned about the treatment of racial minorities in the past and now and how we can do better. I think it is easy in both the United States and Australia to be moral judges of our framers and I think one has to be careful about that. I think that without approving or discounting some horrible things that people did, that they were different times and it does not mean that the Australian Constitution is a bad constitution because there were some bad motives in some parts of it. The quote that I was going to read is from Gordon Wood from his book *The Idea of Americans: Reflections on the Birth of the United States*. Gordon Wood is probably the leading American historian on the American Revolution and immediate post-revolution period. He says: ‘yet despite his repugnant views on race Thomas Jefferson still has something to say to us Americans today’. So my feeling is that one somehow has to have room for both this serious criticism and also the big picture about other things that people did.

Question — Would you like to make some sort of comment on the development framing of the US Constitution in relation to the history of Great Britain? It always seems that people I meet in the States seem to assume that parliamentary tradition started in the United States after the United States was formed whereas many, if not all, of the traditions actually had some sort of antecedents in British tradition.

William Buss — Well I am not sure I have much of a useful comment because I totally agree with your statement and I guess I would add that the American framers, most of them, were quite aware of that and really thought that the United Kingdom had the best government in the world. They wanted to do it just a little bit better. It was not at all a case of disavowing. It would be a case, I think it is fair to say, of

exaggerated notions of wrongdoing to them by the British. A lot of Britons at the time wondered how we could think we were being so badly treated by the British yet have slaves. It is not just that we exaggerated our own harsh treatment and taxation without representation and so on, but we were engaged really right up to the time of the American Revolution in a very intellectual dispute with the government of England and the basic dispute was whether sovereignty has to be totally unitary or whether a divided sovereignty was possible.

Many Americans who became revolutionaries in the end thought pretty much right up to 1775 and 1776 that this was a problem that we would be able to work out if only the British would concede that we had a certain level of independence. Now, I have never been clear about whether the British in their treatment of Australians profited from their experience with the Americans, where arguably they were too stubborn. We were stubborn of course too. I have read a lot of things that suggest, for example, in connection with the transportation [of convicts] policy that the British were pushing transportation on the Australians long after very many Australians were strongly opposed to that and it is understandable why they would be. And the British finally did back down. So I do not know whether they learned or whether just in the nature of things when you are a world power with a world empire it is inevitable that you are going to think of yourself first and your colonial outpost second.

Question — Which of the two constitutions, the American or Australian one, do you believe serves the country better? It could be perhaps too hard to compare. Secondly, is there anything that you feel particularly strongly about that you think ought to be changed in Australia?

William Buss — Well, first of all, let me just repeat, yes it is too difficult to answer that question. I do not think that Australia *ought* to have a Bill of Rights but I guess if I could transplant my views and then imagine that I am here, I probably would be on the side of the people who advocate a Bill of Rights. Do I think that is more important than everything else? No, but for example I know that there are some very active efforts right now being made to change the Constitution in connection with the treatment of Aboriginal people and that seems to me to be quite an important thing. As you probably know, the one amendment to the Australian Constitution that was overwhelmingly passed by the Australian people was the one that deleted the exception for the Aboriginal race in the treatment of people of another race. When the High Court got around to interpreting the amended clause, they concluded that the power to legislate for ‘people of any race for whom it is deemed necessary to make special laws’ does not necessarily mean ‘special laws’ in an affirmative way. Maybe it is a correct decision but it seems to me most unfortunate if that is the correct reading of the Constitution.

Question — At the time of the revolution it was not just people from England and the United Kingdom who became the United States, you also had Scandinavians, French, Spanish and Prussians. What influence did the non-English settlers have on the formation of the Constitution?

William Buss — I am embarrassed to say that I have no idea. The one thing that we do know, and I am sure you know, is that militarily speaking we got an incredible amount of help from the French. We probably would not have been able to succeed in the war without it. That did not have too much to do with there being French people in the United States, the British and the Americans together having just defeated the French in the war over the control of Canada. I do not know the answer to your question about what role these other ethnic groups or national groups might have had.

Question — Could you comment on the general unwillingness of both the United States Supreme Court and the Australian High Court to draw on international human rights instruments in cases that involve human rights issues? You will be aware that in Australia we have had one former judge, Justice Michael Kirby, who regularly drew on international human rights instruments to throw light on provisions in our Constitution where he found ambiguity or uncertainty. The other members of the court have generally rejected that approach and in the United States most of the judges with the exception of one case involving treatment of a minor, have been almost derogatory about the concept of drawing on international human rights instruments. It seems ironic that two countries which have generally high human rights standards will not draw on those international instruments.

William Buss — First of all let me start with Australia and with Justice Kirby. I am aware of Justice Kirby's position on this and I certainly agree with your statement that he was on one side of the spectrum in terms of his willingness to read into legislation an interpretation that would be more favourable rather than less favourable to individual rights because of Australia's treaty obligations. Now turning to the United States, we are an embarrassment. I think there are two things here. One is what we do with international treaties and I do not think we are particularly sensitive and responsive in doing that, certainly in my opinion less so than the Australian court. But I think far worse is the American head-in-the-sand unwillingness to look at what other countries, including Australia, are doing on any particular issue. There is a very slow movement in the direction of being more responsive to that but so far it is one or two justices. In fact I saw Justice Sandra O'Connor give a lecture [at ANU in Canberra] after she had retired from the Court and talked very strongly about the wrongheadedness of the American Supreme Court. No one suggests that they should be bound by the law and the interpretation of Australia or any other country in the world, but look at the reasoning and the arguments and ask yourself whether you

cannot learn something from that. I think that the United States has a long way to go on that effort.

Forecasting Presidential Elections: Obama, Romney, or What?*

Kenneth Mayer

Thank you for taking the time to be here. I am delighted to be here, this is my third trip to Australia. My family and I spent six months here in 2006 and I returned in November 2007 to observe the parliamentary elections. I have been trying to convince my wife to move here. She is not having any of it because it is a little far away. But when my kids, who were in high school and primary school when they were here, now they are in college and high school, when they found out I was returning, my son who studies engineering at the University of Wisconsin indicated that he wants to do an exchange, spend a year studying here. My 15-year-old daughter says that she is adamant that she will marry an Australian. So if they follow through on that, we will have to move here. I have always enjoyed coming here, I learn something every time. I have spent a lot of time studying the Australian political system and on this trip I learned something very significant, that I have discovered a scientific cure for jet lag that occurs when you fly from the United States to Australia, which was debilitating on my first two trips. This is guaranteed to work. It is actually quite simple. All you have to do is fly business class on somebody else's dime. It works like a charm.

What I will be talking about today is our presidential election but talking about it in a more general sense. Not just specifically about the presidential election but the more general problem of making forecasts of what is likely to happen when the general election is held in November 2012. I will pose the question, say some comments about the forecasting problem itself, talk specifically about the different models of forecasting presidential elections that have been developed through social science and other kinds of efforts and then talk about the implications of these models to come up with a forecast of what is going to happen in November. So the question can be put very simply—who will win the presidential election in November 2012? And like my discovery of the cure for jet lag, I have an absolute scientific answer to this question which is—nobody knows. The reason nobody knows is that it has not happened yet and that our ability to predict events that occur in the future is actually limited for reasons that make quite a bit of sense if you think about them.

Despite the fact that it is not possible to make predictions with certainty about what is going to happen in November, it is possible to express boundaries about what is the most likely or the most unlikely. One conditional probability that we can make is

* This paper was presented as a lecture in the Senate Occasional Lecture Series at Parliament House, Canberra, on 25 May 2012.

about the possibility that Sarah Palin will win approaches zero because she is not a candidate. That tells you a lot. Another conditional probability that we can express, that ‘if Sarah Palin is elected that something really bad has happened’, approaches one because that would require a kind of significant disruption that would be enormously traumatic if anybody but Romney or Obama is elected. I guess I will not get into trouble for giving investment advice, which I am not qualified to do, but if it looks like someone other than Barack Obama or Mitt Romney is going to be elected President in November, my advice is to buy as much gold as possible.

But this is what we really want to know: given the fact that we know that Barack Obama and Mitt Romney will be the Democratic and Republican candidates, who will win? And of the results of the deeper questions—by how much will they win, what will the percentage of the popular vote likely be, what will the electoral college vote count be?—what the implications would be for arguments about the legitimacy or mandate that the winning candidate will receive.

What is a forecast?

Given that the election has not happened yet, we are a little more than five months away, we have to make a forecast and I am going to get social sciencey here for a minute but these definitions will actually make some sense. A forecast or a prediction about something that happens in the future is really a conditional statement, meaning that based on what happens between now and then, much of which we do not know, we can make some predictions about likely or unlikely events in the future. But the key feature of a forecast—of an accurate forecast as opposed to a claim of psychic powers and really being able to divine the future—is we can only make forecasts based on the information that we have at any point in time. We do not know what is going to happen in August. We do have information that we can observe today and the problem then becomes one of using this information to make the best and most accurate prediction which we can express with the most confidence of what will happen in the future.

Let us parse this a little bit about what that means. ‘Conditional’ means that these predictions are uncertain; they might happen and they might not. Certain events are more likely than others but any time that you see a forecast expressed in terms of certainty is by itself a good sign that something fishy is going on. Anybody who makes a claim about what they know will happen in the future this far in advance is really lucky because given enough people making predictions it is possible that someone is going to hit the bullseye. The information that we have is our knowledge about particular events or things that we can measure. How the economy is doing, what the public opinion is about the candidates, what presidential approval is. We can

use that information to relate it to previous outcomes and put the independent and the dependant variables together, which we use our models to do.

For example, one of the models I will describe that is very commonly used in the United States is to make forecasts about presidential elections based on economic growth and presidential popularity six months before the election and we can observe what has happened in the past. Previous presidents, their popularity, economic growth: we have good reasons to think of why those two things ought to be related to how an incumbent president performs and as our models get better and more sophisticated our predictions will become more accurate. It is also an invariable feature of forecasts that the farther into the future we are attempting to make our forecasts the more uncertain they become because as a function of time there are more things that can happen between the point at which we make the forecast and the election. I will show you that if you try to make a prediction of what is going to happen in the presidential election two days before the election, those predictions actually are very accurate because there is not a lot that can happen. Things have been set. But that is not really interesting. What we would like to know is what is going to happen six months from now?

Let me give you some examples. It turns out that we do forecasts all the time in our daily life even if we do not think about them as actual forecasts. Most of the time it is just an intuitive kind of prediction about what will happen and this can range from very simple forecasts to assessments that are far more complicated and uncertain.

Investments

One of the big things that virtually everybody wants to know is how investments are going to do. Whether you are buying real estate or stocks or bonds you want to make a prediction about what is going to happen to those investments a year, five years or ten years. This turns out to be very difficult to do because there is a strong random component. But to the extent that someone is able to make these kinds of forecasts accurately the payoffs can be enormous. If someone is able to construct a model that can predict with some accuracy how the stock market or real estate prices will do, the benefit is that you become fabulously wealthy if you are correct. The reason more people do not do this is because it is actually quite difficult.

Traffic routes

When you are getting ready to go to work in the morning you think what are the probabilities of an accident or heavy traffic or some type of traffic jam and you adjust your routes accordingly. How long is it going to take to get to work? This is something that we do every day.

Where to buy a house

In the United States it actually turned out to be a very risky forecast. Millions of people bought houses in 2005 and 2006 when real estate prices had reached their peak, which we now know was a bubble, only to see the prices drop dramatically over the next three or four years. For a long time buying a house was viewed as virtually a risk-free investment that would always go up in value. That is no longer true.

Whether to plan an outdoor wedding

Is it going to rain? Now if you are trying to plan an outdoor wedding three days in advance you actually have very good information about what the weather is going to be. If you are planning a wedding a year in advance—I do not know when the rainy season is here, but I guess if you were in Darwin it would be foolish to plan an outdoor wedding in January—you try to make forecasts and that can be very difficult to do.

Which checkout line will be fastest?

The forecast we do all the time is when we are at the grocery store, we try to predict which checkout line will move the fastest and the interesting feature about this forecast is that it is always wrong.

Some things are hard to predict

Random numbers

We can also make statements about conditions or things that are inherently difficult to predict. For example, the next number produced by a true random process such as lottery numbers. In the United States they use a variety of physical processes to produce random numbers and in an ideal random process there is zero relationship between the number that is picked now and the number that will be picked next. I do not know if they do this in casinos in Australia but in the United States roulette is an example of something that is very close to a true random process, where you cannot predict what the next number will be based on the numbers that have come up recently. But in the United States you will always see a display that lists the previous 10 or 15 numbers and so people instinctively think that if five black numbers or five red numbers have come up in a row that means that the next number is likely to be the opposite. It is very intuitive but of course it is wrong because these are independent events. There are lots of biases that creep in as we think about our own ability to predict.

Chaotic systems

In non-linear systems, infinitesimally small differences in the initial conditions can over time lead to gigantic differences in the outcomes. For example, long-range weather: our ability to predict weather a few days or a week into the future is actually

pretty good; our ability to predict weather six months, a year, or climate change models which attempt to forecast what is going to happen in 10 or 20 years turns out to be very difficult. Tornado paths, in which you are trying to figure out when a tornado will form, where it will touchdown and the path that it will take, turns out to be impossible. Well not impossible, because we know certain areas have weather patterns that are more likely to produce tornados than others, but knowing precisely where a tornado will touch down and the path it will take is much less possible.

Low probability events

These are events that occur so infrequently that it is simply not easy or not possible to predict with any kind of confidence when or where they might occur. For example, commercial airline crashes. I should be careful here because I am getting on three planes in the next two days but I convince myself that I am more likely get hit by a bus in the middle of Parliament House than to die in a plane crash. Very difficult to predict. When the Concord had its only fatal accident—I think it was about ten years ago when it took off and a piece of metal that had dropped off a previous plane was kicked up and damaged the engine—it was the only fatal crash that Concord had every had in 20 years of service but it was considered such a vulnerability when it was discovered that it grounded the entire fleet permanently. Terrorist attacks are another example of things that occur with such low probability, particularly in the western world, that it is very difficult to predict when or where they will occur.

Poorly understood phenomena

There are also phenomena that we simply do not have sufficient understanding of to make any kind of confident predictions about what will happened next. Earthquakes for example. Scientists have been devoting enormous time over the last 30 to 40 years trying to come up with models that can tell us where the next earthquake will occur. Again, we can identify the places that are most likely along fault lines and so forth but when they will occur is much more difficult. It is simply because we lack an understanding of these phenomena that is sufficient to give us the ability to figure out why they happen, when they happen. Another example would be the Kardashians and in Australia I am also told that I have to make reference to Shane Warne as a poorly understood phenomenon that is impossible to predict.

Why forecasting is hard

The first reason why forecasting is difficult is our models may simply not be good enough to give us sufficient understanding of what is going to happen. There may be things that we do not know that we understand if they occur will have an effect on our predictions. With presidential elections it is very plausible to think, in fact it is true, that what happens with economic growth over the next few months will have a significant effect on the outcome. But we do not know what the figures for growth in

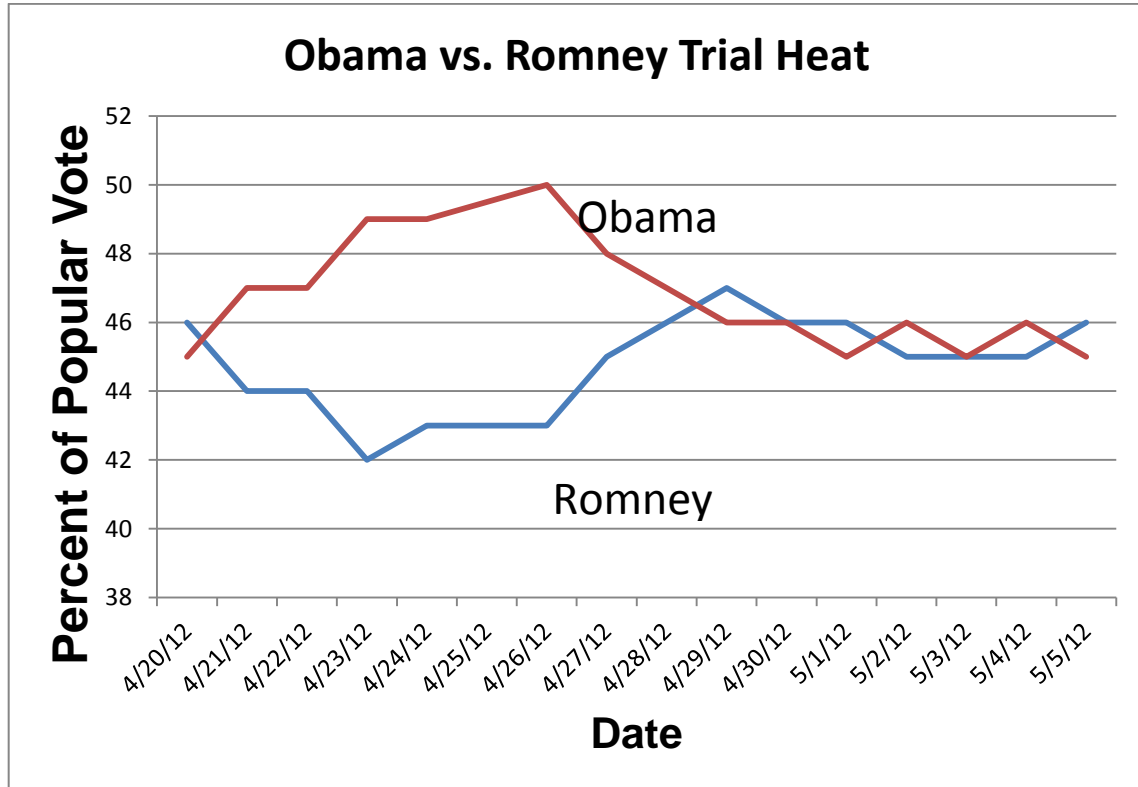
real gross domestic product will be. The figures for the second quarter end in a little over a month and we know this will have an effect but we do not know what it will actually be. So there are future random shocks, things that could happen. They may not happen but if they do they will have an effect. If they do not, they will not have an effect. But we do not know what those might be. The conditions on the ground can change in unpredictable ways.

It is also the case that there may be things that we don't know that we don't know and engineers use this kind of terminology all the time. There are certain things that you understand will have an effect on your ability to construct a particular piece of equipment, or using technology, but in many other cases things arise that you cannot predict because you don't know what you don't know.

Back to November 2012

Let us take this back to November 2012. In trying to make forecasts about what is likely to happen we can group the forecasting models into a number of different categories. We can look at trial heats (public opinion polls). If the election were held today who would you vote for? For a variety of reasons which I will talk about, these tend to be extremely unreliable, particularly this far out, although they also have the characteristic that as you get closer to the election they become much more accurate. We can look at quantitative models, statistical models that relate economic performance six months or a year in advance, to know how an incumbent might do. We can also look at how popular an incumbent is at a particular point in time and make predictions based on what has happened in the past to presidents at that level of popularity, those that might have been more or less popular. We can use 'expert' methods. Being academics we like to attach scientific terms to these models, one of which is the Delphi method, which was very popular in the 1960s, and basically it means that you surveyed experts about what they think would happen. Before I came to the University of Wisconsin I worked for the Rand Corporation, which is a consulting firm in the US, and everybody at Rand talked about the 'BOGSART' model and I did not have any idea what this meant. Finally I asked my boss what does the BOGSART model mean? He said 'Oh, that is an acronym that stands for a bunch of guys sitting around a table'. And we have the kind of model that I prefer which I will call market-based models and I think these have a lot of advantages over some of these other models but I want to walk through them and talk about their pluses and minuses.

Chart 1



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So one of the reasons that trial heats are unreliable is they are hugely volatile and they can change in ways that are extremely unpredictable. What chart 1 shows is the results of the Gallup polling company trial heat of ‘if the election were held today who would you vote for, Obama or Romney?’ And you can see that a month ago, in April, Obama had a huge lead. I guess it is not 100 points, it ranges from 38 to 52 but Obama was up by as much as six to eight percentage points which would be a fairly safe advantage for any candidate. But you can see in the last week or so of April that it closed up considerably. Why did it close up considerably? Well there were more voters paying attention. Romney locked up the Republican nomination. There are a lot of things that can change, or did change, and the numbers have bounced around with both Romney and Obama. Sometimes one has the lead; sometimes the other has the lead. A difference of one or two percentage points is within the margin of error of any of these polls so basically Obama went from a huge lead to basically a statistical tie in the space of about ten days. That does not mean that these numbers are incorrect, what it means is that they can change so quickly that knowing what the numbers show today does not really tell you much about what is going to happen or what they might show in a week or two weeks or five or six months.

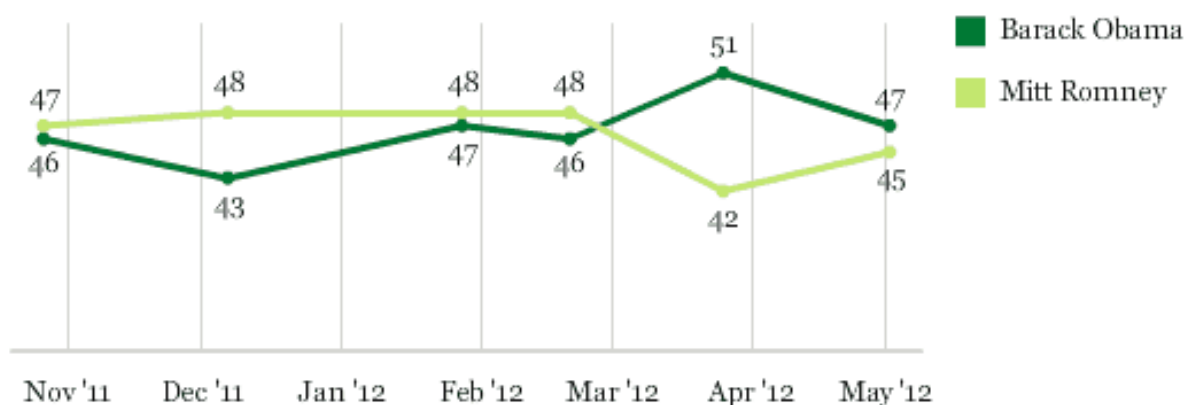
You could also look at these numbers and say, well, the fact that Obama is an incumbent and that only once in the last month or so did he get close to 50 per cent,

that is a bad sign for an incumbent. Because one of the rules of thumb that we use is if an incumbent cannot break the 50 per cent threshold, that is a dangerous sign because Obama has been in office for three and a half years, voters have been exposed to a lot of what he has done, there is a record there, people are familiar with him. Presumably there are not that many people who were undecided about Obama. With Romney it makes more sense that his numbers do not break above 50 per cent because most people have not paid attention to politics yet and there is quite a bit of rational ignorance when it comes to thinking about politics and the general public. One sign that most of the public is relatively inattentive to politics and political information is that public opinion polls for the last 30 years have shown repeatedly that if you ask a random sample of Americans which party has a majority in the House of Representatives usually you will get between 50 and 55 per cent of people giving you the right answer. There are only two possibilities. So even if people flipped a coin or randomly responded you would actually expect to get numbers in that range.

Chart 2

Presidential Vote Preferences in 2012 Swing States

Based on registered voters



Swing states include Colorado, Florida, Iowa, Michigan, Nevada, New Hampshire, New Mexico, North Carolina, Ohio, Pennsylvania, Virginia, and Wisconsin.

GALLUP'

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We can break this down a little bit. Chart 2 is also from Gallup looking at presidential vote preferences in swing states—Florida, Virginia, Ohio, Pennsylvania, Wisconsin and so forth. These are states that are considered competitive as opposed to California which is almost always reliably Democratic and Texas which is almost always reliably Republican. There is not much doubt as to what is going to happen there. So we can also look at how the candidates do in trial heats in the swing states and you see basically the same thing, that Obama a month ago was up by nine percentage points

now again he is up by two. That is again very likely to be a statistical tie. But the problem with these models is that they can change in ways that are unpredictable and that knowing what is happening now simply does not tell us much of anything about what is going to happen a month, two months or four months from now.

Chart 3

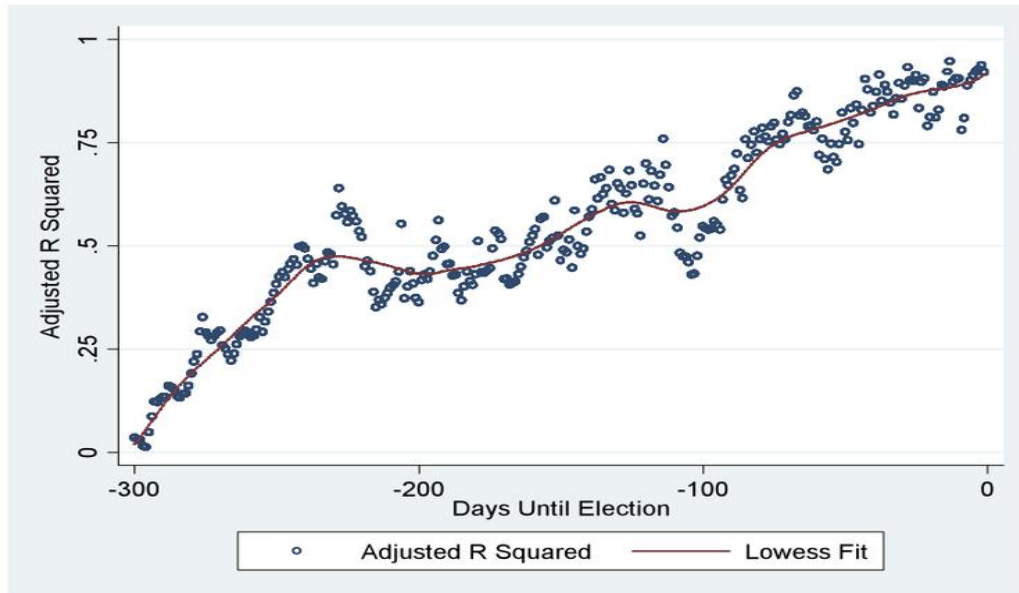


Figure 5.6. Adjusted R -squared predicting the Democratic vote from the Democratic vote division in the polls, by the date in the campaign timeline starting 300 days before Election Day. For eleven elections with polls going back 300 days, 1956-1964, 1980-2008. Daily polls are interpolated where missing. Lowess fit is with a bandwidth of .20. (Source: Robert S. Erikson and Christopher Wlezien, *The Timeline of Presidential Elections: How Campaigns Do (and Do Not) Matter*, University of Chicago Press, Chicago, 2012, p. 95).

Chart 3 is taken from an academic article that looks at the accuracy of the trial heat percentages, the candidate who the public says they are going to vote for and the correlation, the strength of the relationship, between the percentages at any point in time with the final percentages expressed. Here the x-axis is the number of days before the election going up to about a year and then going to just before the election. You can see very clearly that these numbers get better as you get closer to the election and it makes a lot of sense but it also means that six months out the relationship actually works out to be less than random. Well, not quite because we are not making a prediction of who wins, we are making a prediction about what the vote percentage will be. But the numbers this far in advance are simply not very accurate in trying to assess what is going to happen. So trial heats are interesting. It is a parlour game, but we need to have better ways of doing this.

Table 1

JOB APPROVAL ▶ ELECTION RESULTS

Year	Incumbent party candidate	Opposition candidate	Incumbent approval rating one year before election	Electoral college result	Popular vote result
1956	EISENHOWER	STEVENSON	78	WON	+15.4
1944	ROOSEVELT	DEWEY	66	WON	+7.5
1960	NIXON*	KENNEDY	65	LOST	-0.2
1992	BUSH	CLINTON	59	LOST	-5.6
1964	JOHNSON*	GOLDWATER	58	WON	+22.6
2000	GORE*	BUSH	58	LOST	+0.5
1948	TRUMAN	DEWEY	54	WON	+4.5
2004	BUSH	KERRY	54	WON	+2.4
1996	CLINTON	DOLE	52	WON	+8.5
1984	REAGAN	MONDALE	51	WON	+18.2
1988	BUSH*	DUKAKIS	51	WON	+7.7
1972	NIXON	MCGOVERN	49	WON	+23.2
1976	FORD	CARTER	44	LOST	-2.1
1968	HUMPHREY*	NIXON	41	LOST	-0.7
1980	CARTER	REAGAN	32	LOST	-9.7
2008	MCCAIN*	OBAMA	31	LOST	-7.3
1952	STEVENSON*	EISENHOWER	23	LOST	-10.9

* Approval rating reflects that of preceding president of same party.

We can also look at models of presidential popularity. Table 1 is looking at the incumbent's approval rating. Do you approve or disapprove of the job Barack Obama is doing as President in the popularity one year before the election and what happens at the election? For Obama, his popularity rating a year before the election was actually quite low, it was in the low-40s, and you can see that the lowest approval rating for a candidate who won one year before the election was Richard Nixon at 49 per cent in 1972. Going back all the way to the 1944 election, which was really the first time that these techniques had been worked out with sufficient accuracy to allow us to make good predictions, Barack Obama's approval rating was about six percentage points lower than this. This would say it has never happened, he is going to lose. But again this suffers from the same problem as the trial heats. This is like something that never happens until it happens and then you have to revise your models. This is again interesting. You can also look at candidates. George Bush's popularity rating was 59 per cent in November 1991. He wound up losing so even being more popular is no guarantee.

Quantitative models

Well what about quantitative models? Let us apply the techniques of statistical inference. We can look at a wide range of data, economic data, public approval data and look at how the data give us a sense of what is going to happen six months into the future. There is an economist at Yale named Ray Fair who is really one of the most well-known proponents of these models. He looks at the percentage of the two-party vote for the incumbent based on economic performance. There is another model that is used by the polling firm started by Helmut Norpoth which looks at economic performance and primary results, and there are other models that academics use that factor in incumbent popularity six months in advance. These turn out to be reasonably accurate in telling us what is likely to happen. These also suggest a rough road for Obama in large part because the economy in the US is technically not in recession but economic growth is anaemic, it is running in the one and a half per cent to two per cent range, not nearly enough to recover from the significant job losses that occurred between 2008 and roughly 2010 or early 2011. When you combine that with popularity, these would suggest that Obama is going to have a significant problem.

The advantage of these models is that because they have the desirable character that we can make predictions that have confidence intervals (how likely you are to be correct), we can say that this is our best guess, that the two-party vote will be 51 per cent and that the property of these inferences suggests that they are extremely unlikely to be more than a percentage or a percentage and a half away. That is actually a very useful phenomenon for these. We can make the predictions well in advance, six months or a year in advance, and they tend to be accurate.

But they also have some significant problems. They completely ignore candidates and campaigns. They simply assume that everything is determined by these variables six months to a year in advance. Even though they tend to be reasonably accurate, we also know that campaigns do matter and that it is probably a mistake to assume a level of determinism that suggests that the campaigns simply do not matter. They cannot deal with third parties. Third parties are generally not a major factor in American presidential elections but they can be. In 1992 Ross Perot got almost 20 per cent of the vote. In 2000 Ralph Nader got less than one per cent of the vote but he also got 90 000 votes in Florida where George Bush, as the result of a controversial series of decisions, was declared the winner with a margin of 547 votes. All of the statistical models suggested that the Democrats would win easily. Al Gore, in fact, won the popular vote but lost Florida and hence the presidency because that gave George Bush 271 votes in the electoral college. Even though Nader received a trivial number of votes, one and a half per cent in Florida, if Nader was not on the ballot most of those 90 000 people would have voted for Al Gore. Not all of them, but if Nader is not on the ballot our best models suggest that Gore wins Florida by tens of thousands of

votes. So that makes these models less useful when that is a possibility. And by ignoring the campaigns and the candidates we know that those make a difference and it seems to be a problem if you use a model which by assumption waives those things away.

Market-based/expert methods

Now we can talk about market-based/expert methods. Economists have long known that crowds know things that individuals cannot or do not know and depending on the size of the crowd, crowds can know things in the aggregate that encompass far more information than any individual or small group of individuals could possibly know. This is one of the arguments for why market economies are always more efficient than centrally planned economies, because the essence of a market is lots and lots of individuals. In the classic economic perfect market you have an infinite number of buyers, an infinite number of sellers, and an infinite number of possible combinations and that allows for the efficient utilisation of resources that makes everybody best off. There is no way that even the most well-informed central planner can incorporate that much information.

We do not even have to know how this works. There is a wonderful book by an economist named James Surowiecki called *The Wisdom of Crowds* where he got interested in this by noting a phenomenon that economists have known about for years that had been a very common game in state fairs in the United States, to display a steer or a cow and have people guess the weight of that animal. As an individual looks at that, the animal could weigh 1200 pounds, 2600 pounds, maybe more. An individual is actually unlikely to be exactly right but if the number of people who make guesses is large enough it turns out that the average of all those guesses is almost always extremely close to the actual weight of the animal. How is that? How could you have no one person be right or close, or not many people be close, but the average of a large number of guesses turns out to be frequently very accurate. The reason is that individuals making estimates will often produce better forecasts than even the most well-informed individual and that is in part because there are a couple of things that have to happen for this to occur. You have to have a large number of individuals and the guesses have to be unrelated so the biases and the errors will even out. The reason this works is that you have a lot of people making guesses, maybe not even using the same method but if you have enough people using enough different methods it turns out that they will average out to be roughly correct because they are independent.

One of the reasons that people in markets tend to be very efficient is that people continually update their beliefs. If anybody is familiar with the efficient market hypothesis for stock market investing, the idea is that whatever information is known

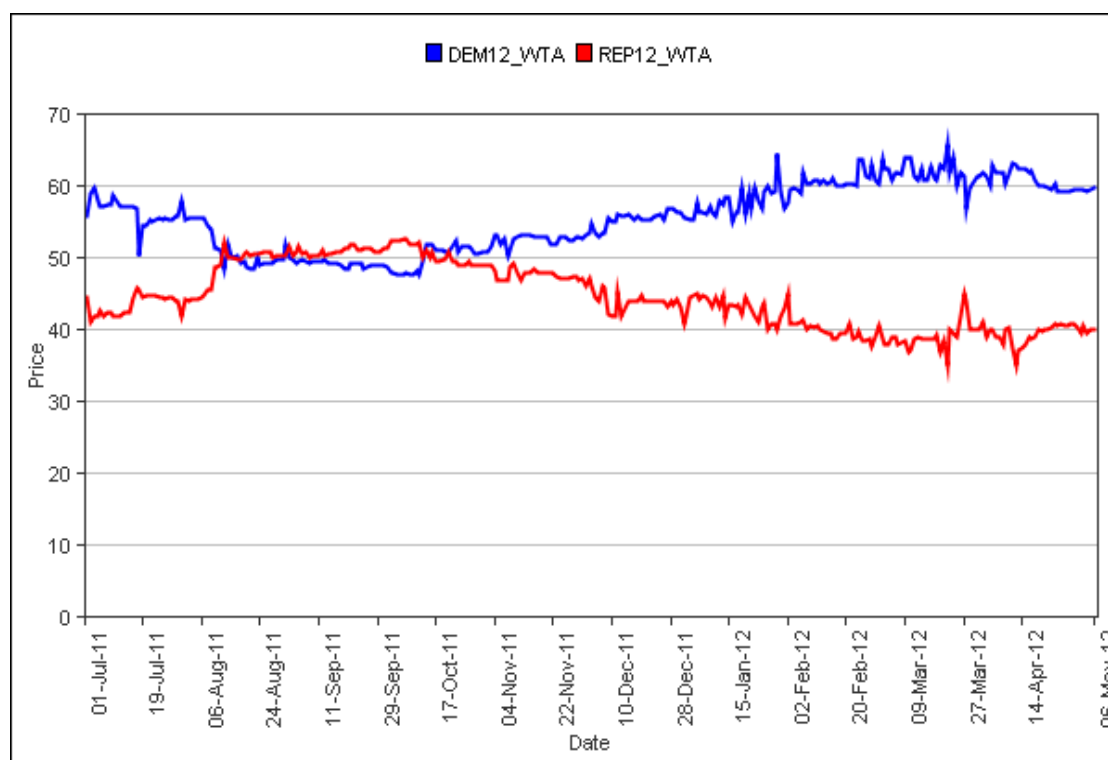
is instantly incorporated into people's assessments of the price of a commodity, a stock, or something. Once you hear a hot tip at a cocktail party, by the time you hear that it is too late. There is a wonderful story about Joseph Kennedy who actually sold all of his holdings shortly before the stock market crash in 1929. When asked how he did it, he said, 'Well, when I heard my shoeshine boy making stock market predictions, I knew it was time to get out'. The idea is that people will instantly incorporate all of the available information into their opinions and this is what a market is. It is a concentrated specialised narrow form of a market but it relies on the same mechanism which is Adam Smith's 'invisible hand'. We do not even need to know how people make these estimates, we just know that people who use different methods, in the aggregate they will tend to be accurate. The possibility in the sense of a market that people have their own skin in the game, they have their own money invested in this, gives them an even greater incentive to be efficient and informed and careful.

The University of Iowa Business School actually run something called the Iowa Electronic Markets (IEM). If you Google it you will be able to get there in one or two steps. They started this about 20 years ago and it is actually a futures market in which people can buy and sell shares in presidential candidates. As a futures market it would normally be regulated by the federal government through the agency that regulates these things called the Commodity Futures Trading Commission but they are exempt from the regulations because you can only invest up to 500 dollars, you cannot invest unlimited amounts of money. Because it is a research-oriented enterprise they do not have to abide by all the disclosure and control mechanisms that a true futures market has to abide by. But the idea behind the IEM is that you can buy and sell shares in candidates. If the candidate wins the election, each share pays off at a price of one dollar. If your candidate loses, it pays off zero, you lose everything. So whatever the price of a share is for a candidate at any point in time is exactly equivalent to the estimated probability in the market that that candidate will win. So if shares are selling for 50 cents you know that the candidate has a 50 per cent chance of winning. As it goes up or down the prices will go up or down.

Chart 4 is a graph that shows the price at which people are willing to buy and sell shares. This is the market clearing price of shares in Barack Obama and Mitt Romney and I updated this chart the day before I left for Australia. The share prices are roughly the same now and you can see that Barack Obama, his shares have been trading for about 60 cents and Mitt Romney shares are trading at about 40 cents. But you can also see that these numbers have moved around. There was a time back in September, when Obama's popularity was in the high 30s, in which his shares were trading at less than 50 per cent. And then there was a time about two months ago when his shares were trading at close to 70 cents. So this gives us an ability to give a

conditional probabilistic estimate of what people, with their own money, with their own skin in the game, who are informed, think is likely to happen.

Chart 4



(Source: Daily Price Graph, Iowa Electronic Markets, Tippie College of Business, the University of Iowa)

Now I actually think that the Obama shares are slightly overpriced. If I were buying and selling them I would probably not be willing to buy a share in Barack Obama at much above 55 per cent. The obvious question would be for you to ask, ‘Well, if you are so smart, why don’t you get into this market?’, because if I think I know something in money ball fashion and other people don’t, why don’t I put my own money in this? The answer is despite the fact that the Iowa Electronic Markets does not have to answer to the Commodity Futures Trading Commission, I have my own regulatory institution to which I have to answer to, which is my wife, and I do not think she would be very thrilled if I said ‘Hey, I just bet \$500 in a political market place’. So I am content to observe and snipe from the sidelines. If I am right it is on record that I am right; if I am wrong, who is going to remember?

The advantages of this market-based model is that these actually tend to be much more accurate than most of the other models. We can quibble about the fact that the quantitative models actually are better able to make more precise estimates six months into the future but there are lots of things that can change and there has been a lot of research on these models that shows that these are actually among the most accurate methods of thinking about what is going to happen. They are less volatile than the

trial heats where you can see wild swings in the short term, within a week or two, but they are still continually updating because the share prices are updated every day and so as soon as something happens that can affect people's assessment of the probabilities, that will be reflected in the marketplace. We know that the preferences are most likely to be sincere because people are betting with their own money. There is some evidence that people in the campaigns will try to get in and buy and sell shares to each other at inflated or depressed prices but there are enough people involved with this, several thousand typically, that having a few people trying to play games with this is unlikely to succeed because you offer to sell shares at a particular price, you offer to buy them at a particular price, you have no control over who is going to buy your shares or not so you cannot really engage in what I guess we could call 'stacked trading'. We do not need to specify the model. People might be using a variety of different models, they might be using intuition or they might be using statistical models.

So what do we do?

I think the most interesting from both an academic and from a personal perspective are the market-based models. I do this in my classes. I taught a class on the presidency and you can also buy and sell shares in presidential primary candidates, preselection candidates, and if I wanted to talk to my students about what had happened in the previous week, I would bring up the chart of prices in the IEM and I would be able to very clearly show, well, Romney won this primary, you can see his share prices spike, Santorum's share prices went up and then dropped. It is an easy way to explain what can happen. I like to use the market-based models recognising that they cannot incorporate specific events that happen because those are unpredictable. But people have taken into account those future expectations about the probabilities of something happening that could affect the share price. This discounted information is already factored in. The polls themselves are much more volatile and these continually updated crowd-sourcing kinds of expectations are generally more intuitively plausible than even the most precise statistical method because there are some theoretical problems with that.

So we know that there are a lot of things that could easily change the results. What happens in Iraq and Afghanistan in the next few months. Supreme Court decisions with respect to the Affordable Care Act (the court is likely to rule in the next month or so). In the US it is universally illegal to bet on election outcomes, but I do have a bet with a colleague about what is likely to happen with the Supreme Court. Ten bucks. In this country, ten bucks is a cup of coffee so I figured it is no problem. The economy could go up, the economy could go down, things in Greece, in Europe, the Euro, that could have a significant effect. There could be a scandal, although I know that never happens in Australia. Normally it is safe to bet on the incumbent. 'Other things being

equal' is the way we express that; this time other things are not equal. We have a very different set of circumstances that make 2012 a lot different than 2008. So in conclusion, this is what I tell my American audiences, which is that things change, that they should pay attention and that there will be a quiz in November.



Question — Could you give us some idea of the practical consequences or financial consequences of making inaccurate predictions?

Kenneth Mayer — That is a very good question because there are all sorts of conventional wisdoms about what a Democratic or Republican victory might mean for not just the economy in the long term but shorter term consequences for what is likely to happen in the stock market. So if you are making bets on the economy long term it is difficult to make money off that right away but if you know with some confidence that the stock market is likely to go up or down then you can make quite a bit of money in a week. The difficulty is that I am not aware of any models that can accurately predict what is going to happen based on a Democratic or Republican victory. If you were a business person you might think that a Republican will be much better for the economy and a Democrat would be much worse but it is actually much more complicated than that. There are lots and lots of intervening variables.

So I think the implications particularly for Australia are less economic in the short term but more in terms of what an Obama re-election or a Romney election would mean for US–Australian relations or diplomacy and there I suppose there might be a bit of a surprise but I do not think there will be major changes in that regard. I am actually involved in some efforts now trying to figure out why forecasting models have such a difficult time incorporating unexpected events. Almost by definition that is going to be difficult but there are ways to think about the volatility of forecasts based on unexpected events. If anybody has discovered a way of making money in the stock market based on a Republican or Democratic victory I am not aware of that and I would assume that the smart thing would be to keep it under your hat and make your money and be quiet about it.

Question — Two things you did not mention that we read about are things like Mitt Romney's religion and of course the race question with Obama. Will that become an issue this time?

Kenneth Mayer — The advantage of the market-based models is that it is not necessary to make any assumptions about how those things will affect the outcome because presumably the people who invest in these have already incorporated that. My sense as an observer is that things like Romney's religion are not likely to be a significant factor in the election for a couple of reasons. There are two groups in the US who would think that issue important. One is conservative evangelical Christians who are overwhelmingly Republican and are suspicious of Mormonism for theological reasons. The other group would be your classic left-of-centre liberals who would be concerned about the conservatism of the Mormon religion and other characteristics of it from a social perspective. Those are almost entirely likely to be Democratic.

The major issue for Romney, which was also an issue in 2008, was that for conservative Republicans evangelical Christians are going to be most important in the primaries because there they have other options for what they consider to be more conservative candidates. If you are a conservative evangelical Republican now, you are faced with a decision between Mitt Romney, who you may not trust for a variety of reasons, or Barack Obama who you know you do not like. It seems to me that some of those people might choose to abstain but I think it would only become significant if the election was so close in specific states that a swing of a few thousand or a few tens of thousands of votes would make a difference. The other factor is that for people for whom Romney's religion would make the biggest difference, not all of them but most of them live in states like Alabama or Tennessee, conservative states that are very likely to go Republican, or California which is very likely to be Democratic. So my sense is that it will be a factor only if the election is close.

Again, on the issue of Obama's race, it is not novel anymore and there are some people who will say to pollsters that they will not vote for a candidate because of his or her race. The actual numbers are probably a little higher than that because it is not a socially acceptable answer but these are people who would be unlikely to vote for Obama in any event, I suspect. Or they are in states where their votes are not going to be determinate. So it could make a difference but I think it is unlikely to be near the top of the issues that people are most concerned about.

Question — Do you think Obama's support of gay marriage will have any significant role in the election, and if so, do you think it will help or hinder his chances?

Kenneth Mayer — When Obama made his statement in support it got a lot of attention in the United States and it also had an effect here where the Prime Minister was asked what her opinion was. Again, that is similar to Romney's religion and Obama's race. There are people for whom that is an important issue but I would make

the argument that if I know your stance on gay marriage, I would be able to predict with very high accuracy whether you are going to vote for Obama or not. I think that there are some people where that is the most important issue, a social version of gun control which is absolutely determinative. But I do not think that is going to cause a lot of cross pressure—with one possible exception. The one group that might be cross pressured would be conservative evangelical African-Americans who would generally be extremely supportive of Barack Obama but also be concerned about gay marriage. But it is hard for me to think of why someone who was otherwise a supporter of Barack Obama, or an opponent, would change their vote based on his position on gay marriage. Again, the caveat is that if the election is razor close then any one of 500 things could make a difference. It might make a difference whether it rains in a state, which in the conventional wisdom can marginally depress turnout. If we are at a point in Florida where six million people vote and the margin is essentially a few hundred votes then all kinds of things can make a difference. But I suspect that with the benefit of hindsight it might be possible to look at the exit polls to tell us whether people used same-sex marriage as one of the most important factors. I would be very surprised if that happens.

Question — In your explanation of the market-based systems you were talking about a share trading market-based system. I was just wondering if you had any thoughts on betting markets and how useful they are in predicting elections?

Kenneth Mayer — The difference between betting markets and these market-based models is first of all that in the United States betting is illegal. But if you are here or in Great Britain or outside the US it is fair game. Not being much of a gambler—I do lose ten bucks a month at my neighbourhood poker game but that is really the extent of it—one of the differences is that betting usually involves odds making by the person who is laying the odds. I know that typically the odds maker will adjust those odds based on how the bets are coming in. If one side is receiving a lot of money, they will change the odds a little bit to get money coming in on the other side. And so there is a degree of centralisation there which makes them slightly different than market-based models. The market-based system is more of a pure market in which there is no centralised record keeping, there is nobody taking a percentage and so generally those two things will move together. They are similar except for that one difference and typically changes in the odds would correlate with changes in the share prices in the Iowa model.

Question — Who do you think is going to be Mitt Romney's running mate?

Kenneth Mayer — I imagine you can bet on that and I would be curious to see what those show. I think the importance of the Vice President to the ticket is often

overemphasised. Much of what we consider to be evidence of the importance comes from John F. Kennedy's selection of Lyndon Johnson. Kennedy was a young northerner. He picked Johnson, a southerner in a key state of Texas. Johnson had been around in the Senate a long time and brought that geographic balance, ideological balance, age balance. Balance, balance, balance. But there is lots of evidence that that is no longer the case. When Bill Clinton was elected he picked Al Gore, another southerner, as running mate and when George Herbert Walker Bush ran in 1988 he picked Dan Quayle who was really an unknown from Indiana, which is a reliable Republican state. I think the lack of importance of the Vice President comes from 2008 when John McCain picked Sarah Palin, and Sarah Palin was considered interesting for a while but had a series of disastrous public appearances and interviews and it soon became clear that that she was having difficulty with the pressure of national politics. Even counting all of that, McCain was actually leading most polls until the financial meltdown occurred in October of 2008. If that does not occur, Romney has a very good probability of winning.

Given all the traditional balancing factors, what I think will drive Romney's selection, which I suspect he will not make until August, close to the convention, will be someone conservative to address concerns that a lot of Republicans have that he is not conservative enough. But not scary conservative. Marco Rubio's name comes up, a senator from Florida who is young, very conservative, Hispanic and comes from a swing state. That is a possibility. People play the equivalent of watching the line-up of the old Soviet politburo members in Red Square on the May Day parade. Rubio made some comment at an otherwise unremarkable press briefing when he said 'when I'm the nominee ...' Was he playing games? Who knows? Another possibility would be maybe Rob Portman, senator from Ohio. People have mentioned Paul Ryan, who is a congressman from our Wisconsin, very smart, very ambitious, economically conservative. The problem with any of these names is that I can give you two reasons why they are likely but I can also give you ten reasons why they are unlikely. So things may shake out but I suspect the one thing I am very confident of is that Romney will not pick a northeast moderate Republican. I do not think there are any northeast moderate Republicans the way there were two decades ago. He is going to try to shore up his connection with the base but does not want to do it in a way that will scare off moderate voters in the general election.

Media Reporting of the Next Federal Election: What Can We Expect?*

Sally Young

As I was writing this lecture, Fairfax announced plans to shed 1900 staff and erect paywalls for its online content. The following day, Fairfax journalists made public their entreaty to Fairfax's largest single shareholder, mining billionaire Gina Reinhart, to support their editorial independence. The next day, billionaire Rupert Murdoch's News Corp made a \$1.97 billion takeover offer for Consolidated Media Holdings helping billionaire James Packer achieve his goal of exiting media in favour of casinos so Murdoch could advance his goals of greater domination in pay TV and sport. And, as I speak today, there is still ongoing speculation that up to 1000 jobs at News Ltd are at risk.

In all of this, there is a mix of the familiar—including the same media dynasties who have controlled large swathes of Australian content for decades—but also the new. And I do not mean just a new player with strong interests of her own, but also big changes inside and outside our major media companies at a time when the nature of journalism, including its democratic and economic foundations, is being reshaped. Nobody knows how this particular story will end. Not the journalists who are watching their industry transform around them, nor the owners or managers who need to decide whether to keep trying to secure the economic future of their media assets or whether to retreat, and not the analysts on the sidelines including academics who, like me, are trying to make sense of what it all means.

It may seem that I am digressing somewhat here from the topic at hand—'media reporting of the next federal election: what can we expect?'—but I am doing so for a purpose; to draw attention to the context in which we need to examine the news media in Australia. When we look at how the media report elections in particular, we also need to think quite broadly about why this might be so; what sort of factors impact upon the reporting of politics and why are certain themes and narratives so prevalent? What constitutes 'good' election reporting and how can that be encouraged in the current climate of upheaval?

Barring unforeseen circumstances, there will be a federal election next year and it must be held by 30 November 2013 but, according to Antony Green (whose word I take on such matters), is much more likely to be between August and October 2013.

* This paper was presented as a lecture in the Senate Occasional Lecture Series at Parliament House, Canberra, on 29 June 2012.

There will likely be a five—or if the Labor Party feels especially brave—a six-week campaign in the lead up to polling day. Based on past form and present circumstances, how will the news media in Australia report this campaign? And will that reporting fulfil all of the functions we might expect (and are promised) by news outlets in a democracy in an information age?

I need to explain how I came to the views that I am about to outline. A grant from the Australian Research Council allowed me to collect over 10 000 election news reports—mainly from the 2001, 2004 and 2007 federal elections—with some from 2010. These included (mostly) newspaper articles and television clips including TV news, current affairs, comedy and breakfast programs—any clips that mentioned the election—as well as some radio reports and transcripts and some material from various websites. I had the luxury of being able to conduct a five-year study of that material including using content analysis to analyse—in a quantitative manner—a sample of nearly 1000 texts. This took six research assistants about eight months to systematically code and compare using a questionnaire with over 100 questions for each news report. I also performed some qualitative analysis and a range of other methods include mapping subjects and sources in news reports.

My goal was to test the most common criticisms of media reporting of elections—that election reporting is shallow, does not focus much on policies or do a good job of explaining or analysing them, is the outcome of a ‘pack’ mentality that sees the same stories and frames reported across different media and outlets, that election reporting is obsessed with opinion polls and the ‘horse race’ of who is in front and who is behind, that it has been ‘dumbed down’, increasingly reflects entertainment values, is less about facts and more about opinions and interpretations, is the product of politicians’ and their advisers’ spin and PR efforts, is often biased but also lazy, reflecting narrow viewpoints and familiar sources.

When they set out to test popular notions about how things works, academics are often secretly hoping that their research will allow them to be a myth-buster; that they will find evidence that shatters common myths, causing people to think afresh and see things anew. What I found—and wrote about in my book *How Australia Decides*¹—made me think that some of the many criticisms are overstated, some are unfair but, alas, I cannot be a myth-buster here for many of the criticisms were indeed true—some to a surprising degree. There may be good reasons for this, or at least reasons that help explain why election reporting ends up the way it does and—returning to my theme at the beginning of this lecture—context matters a great deal. The Australian media, its systems, institutions and culture; Australian politics and the way

¹ Sally Young, *How Australia Decides: Election Reporting and the Media*, Cambridge University Press, Melbourne, 2011.

campaigning is conducted here; as well as Australian news audiences and our preferences and priorities all come into play.

With this in mind, today I would like to make some predictions of what is to come in 2013 based upon my book and on what I found in my study of election reporting. As a political scientist, I am usually wary of making election predictions—at least in terms of their results—but, when it comes to election reporting, some patterns are so evident that I am quite confident that, unless something drastically changes, we will see many of the same tendencies and themes that I saw in reporting of the 2000s repeated in 2013.

How will the media report the next federal election?

A few caveats to begin. Firstly, I am talking particularly about the mainstream media—especially newspapers (online and printed) and television news. Secondly, even so, it is true that of course not all media are the same, not all outlets are the same and certainly not all individual journalists are the same. There will be variations in how media outlets and journalists report the 2013 election and these are important. And, yet, there will also be some generally occurring patterns and, if my study of previous elections holds true, a lot more similarity in Australian election reporting than we might expect.

There will be an overarching campaign narrative with a well-defined beginning, middle and end. The campaign proper begins with the Prime Minister driving to meet the Governor-General and asking for a dissolution of parliament. TV crews will wait patiently outside Government House to capture the drive through the gates (Sky News excels at this waiting and filling in time) because this is so symbolic and represents the beginning of the campaign. Then, in the middle, are the day-to-day campaign activities, especially of the leaders. These are all building up to the climax of polling day and are usually reported in those terms: ‘what does this mean for the likely result?’ On polling day, the Labor and coalition leaders will be recorded casting their own votes in their respective electorates. This is another highly symbolic moment that will be shown on all of the TV news bulletins on election night. Once the result is known, the winning party leader gives a victory speech and the loser a concession speech; these speeches mark the acceptance of victory and defeat. This is the traditional, obvious and seemingly predetermined election narrative. I would argue that it is not predetermined, does not suffice and causes a particular kind of focus in reporting.

When deciding which topics and individuals are most newsworthy, there will be a striking degree of sameness about mainstream media coverage of the next election. When I mapped the content of TV news clips and front-page newspaper

reports across the 41 days of the 2007 election campaign, 95 per cent of the time, the five free-to-air TV news bulletins covered the same topic. Often they used the same visuals, sound bites and sometimes even the same story order as well. On 17 days (41 per cent of the campaign) a story was judged so newsworthy that every major media outlet covered it—all free-to-air TV news programs and all of the nine newspapers I studied on their front page. For more than three-quarters of the campaign, at least half of the newspapers reported the same topic on their front page. (And even this does not reveal the full extent of homogeneity because I focused on front pages and the election did not always make it on to the front page (especially for tabloids) but was covered inside the newspaper.)

The news agenda will be dominated by the two major parties' planned events, especially the leaders' policy announcements, their public statements and visuals of them out campaigning. To look at the content of election news is to see that reporting the day-to-day events of the election campaign, the news agenda is largely the product of the parties' tightly controlled campaign techniques successfully woven as they are into the narrative that news media outlets use to tell the story of the election. The method of reporting which sees the leaders followed by a bus (or plane) of accompanying journalists is also at the root of this. And this is mostly now junior reporters following while senior reporters watch and report from afar, away from the hermetically sealed bubble. This roadshow is a limited snapshot of the campaign but it is a major focus in news media and the main exceptions outside of the pre-planned, diary-style reporting will be when any gaffes are made by any of the main campaigners (which the media will gratefully seize upon) plus promotion of any media-initiated pseudo-events including opinion polls but also *The Great Debate* and any media-organised town hall meetings of the type seen in 2010.

The two major parties' leaders will be the prism through which the campaign story is told. The Labor and coalition leaders will be the only political actors who regularly get to have a say in their own words in most news reports. One or other leader (usually both for the sake of even-handedness) will be quoted (or get a sound bite) in nearly three-quarters of front-page newspaper articles and TV news reports. Their words will shape the news agenda. Their photos will be used to signify what the election is all about. The focus on them will be unrelenting and highly personalised. It will be almost as if the hundreds of other candidates running for office (or the people they represent) do not exist.

In the main, **ministers and shadow ministers** will be newsworthy when they make gaffes. Backbenchers and new candidates will be largely absent in the most accessed media, only likely to appear in TV news clips when they perform as a human backdrop, nodding away behind their leaders as they visit their electorate.

With the exception of Julia Gillard (a big exception I know), **female candidates** will be underrepresented in election coverage of all kinds—not just news but also current affairs, breakfast TV and talkback interviews. If they are included they will generally be *seen* but rarely be heard. In the 930 election reports I examined across newspapers, TV and radio over three elections, only ten per cent of news stories included a quote from a female politician.

Independents and candidates from minor parties will be similarly excluded. During the three elections of the 2000s, only five per cent of newspaper articles ever quoted any minor party politician or independent, and only four per cent of radio clips and six per cent of TV clips. This marginality is self-perpetuating as the smaller parties then struggle to attract the media coverage they need to win public support.

In other countries, including in the US, there has been an increasing **use of ‘experts’** in news coverage including pollsters, political insiders, business leaders, academics, political scientists, union leaders and people from an NGO, lobby group or religious organisation. In Australian election reporting that trend is not nearly so strong. Mostly, it will be journalists calling upon other journalists to comment—although there will also be the usual suspects of party-affiliated spokespeople. And the experts who will be called upon to give their views on the election in 2013 will overwhelmingly be male. Even in 2007, only one per cent of the experts quoted in newspaper reports were women, improving only marginally to eight per cent on TV. If history is a guide, business leaders and other journalists will be the two groups most often quoted as experts in 2013.

The public will be surprisingly absent from media reporting, most often seen as faces in a crowd or a shopping mall or their hands being shaken at campaign events. With the spotlight firmly on the major party leaders, only occasionally will some other actor steal the media limelight and, for a member of the public, the most likely way to achieve this is to fall over in their presence in front of the TV cameras.

It is a cliché but true—the horse race will be the focus. The narrative within the narrative is—‘who’s ahead?’ The proportion of news stories quoting opinion poll results increased by 34 per cent in newspapers and 33 per cent in TV news between 2001 and 2007. Even these quantitative figures do not capture just how much opinion polls permeated news coverage in the 2000s. As Rodney Tiffen has noted, journalists tend to report each new poll ‘with breathless proclamations of its importance’.² Or, as Peter Brent has remarked: ‘There must be some countries more obsessed with

² Rodney Tiffen, ‘Polls and elections: A primer for the perplexed’, *Australian Policy Online*, 16 October 2007, p. 1, available at <http://www.sisr.net/apo/electionpolls.pdf>.

political opinion polls than Australia, although they've yet to be found'.³ As the number of journalists and the resources of newspapers decline, this will probably be magnified. We have already seen over the last decade that, lacking the sort of scoops that come from either journalistic investigation or the more spontaneous campaigning style of old-school politicians, polls have become one of the few ways that news outlets can initiate a story. The polls are promoted as an 'exclusive' and one that enables newspapers to then generate their own election stories.

Regular opinion polls will be reported in a way that generates a sense of uncertainty and unfolding drama about the election result. News reports will emphasise change rather than stability, reporting on what has changed since the last poll—even if this is small, inconsequential or within the margin of error—rather than what has stayed the same. If 2013 election reporting follows that of the 2000s, opinion polls will be used to create a narrative of a close contest between the major parties—even if there isn't one—because this is far more interesting than a foregone conclusion. That may be more difficult this time around but not impossible. Even if Labor has been consistently behind in opinion polls for months, nay years, I predict there will still be, in the last few days of the campaign, a titillating sense of a potential comeback, a drawing closer, a narrowing of the gap. To take just a few examples from 2007, on the day before polling day, ABC News reported that the latest polls were suggesting 'tomorrow's federal election could be a cliffhanger' (ABC 7pm News). SBS also reported that it 'could be a cliffhanger after all'. Channel Nine 6pm News said Howard 'appears to be in sight of the impossible' and, in classic horse-race terms, was 'surging towards the finishing post'.

Compared to the horse-race focus, policy coverage will be minimal. Another cliché but one I found to generally be true of Australian election reporting: policy analysis has declined over time. There is less focus—at least in the front pages and TV news bulletins—on policies, including less discussion of a smaller range of policies and policy areas. If this holds true in 2013 it is also likely that media reports will, as they generally were in the 2000s, be reactive in their coverage of policy issues, reporting on policies once they are announced by the party leaders and then often analysing policies in terms of the horse race (will this help Labor/the Coalition's chances of winning the election?) rather than providing background or context, or exploring what the policy is actually designed to do, whether it will achieve its goals or how it compares to other policies or to those in place in other countries, for example. The parties have, of course, been partly the cause of this by using campaign strategies that see them adopt 'small targets', releasing their policies late in the campaign and using their knowledge of the news cycle to manipulate reporting by not

³ Peter Brent, 'Poll position: Making sense of opinion polls' in Christian Kerr (ed), *The Crikey Guide to the 2007 Federal Election*, Camberwell Vic., Penguin, 2007, p. 131.

providing sufficient time or opportunity for journalists' inquiries. It requires time, resources and expertise to try to head off such strategies and, in order to be proactive in reporting policies in more detail, it requires a different understanding of the news cycle.

Journalists will write themselves into the story in 2013 but not necessarily in a way that helps the public understand journalism nor the relations between media and politics. Politicians exert a high degree of control over the daily news agenda during an election campaign. The way journalists report elections is at the core of this but, rather than change the conventions of reporting—for example, broaden the focus, use a wider circle of sources, conduct investigations, move from the day-to-day focus or otherwise change the main narrative—journalists have tended to take another route. Reporting on opinion polls is one way journalists have sought to regain the initiative. Another is by writing themselves into the story, giving politicians less coverage and giving themselves more. In the 2000s, journalists became increasingly important brokers of meaning in political coverage as they paraphrased, narrated and commented on politicians' activities. This was partly about reasserting control over the news agenda but also about keeping audiences watching when politicians were seen as a 'turn off'.

This means that **the shrinking politician sound bite will continue.** In Australia, politicians' sound bites were down to 6.9 seconds in 2007. In an average TV news story in 2007, reporters and other media figures (including news anchors/hosts and other journalists interviewed as part of the story) spoke for three times longer than the politicians they were reporting on.

The metacampaign will also go on. As political spin, political marketing and PR have ramped up, journalists have (rightly) been concerned with revealing to their audiences the behind-the-scenes interactions of politics, including the 'metacampaign' that politicians conduct for the benefit of the media. The shot of the media pack gathered around the politician or their advisers in the background are some of the more obvious symbols of this. Journalists highlight how politicians try to manipulate news coverage. We therefore know a lot more about how politics is conducted today than we did forty years ago because of the willingness of journalists to write about it. At its best, meta-coverage gives citizens important information about how the electoral process actually works, highlighting what is going on behind the scenes and pointing out important shifts in how politics is conducted. At its worst, it can descend into simplistic representations and take a very cynical form.

Many journalists will bemoan how stage-managed, sterile and boring the campaign is. They have done so since 1996. This type of meta-coverage helps

journalists reiterate their professional role, demonstrate their distance from politicians and explain gaps in their reporting brought about by the effectiveness of political PR. A world-weary, cynical tone often creeps in to coverage even though it is boring to keep hearing how boring reporters find election campaigns.

Journalists will tell their audiences how politicians control and disseminate information but they will be much **less forthcoming about their own methods, tactics and motivations**. Although journalists are writing themselves into stories and turning the camera upon themselves, this is rarely done with any critical scrutiny. Self-analysis often goes only as far as highlighting the importance of the media's role but stops far short of critically interrogating it. The meta-coverage frame has therefore not reached its full potential to give audiences a full sense of how the interactions between the media and politicians work, or indeed, how those between the media and their audiences work.

There will be a focus on entertainment and potentially less election coverage. Journalists not only have to select stories from all of the material available, they also have to make those stories matter to their audiences. That is not an easy proposition. Many Australians say they are not particularly interested in political news; reporters (like politicians) have to flick the switch to vaudeville. This is amplified in an era of economic pressures in commercial news organisations and the choices often seem to be to give the audience something else instead of politics or make political coverage more 'interesting' and entertaining. Even the ABC's audience surveys in the 2000s showed increasing numbers of viewers and listeners reporting that they thought the ABC focused too much on coverage of federal politics. When I compared Australian coverage to British and American election reporting, I found our TV news clips are already shorter than comparable outlets overseas. Politics is not automatically given priority. Increasingly, it has to win its place in the news. Increasingly, audience members—who have many other leisure, entertainment and media options—scan news and stay only briefly.

2013 will be heralded 'the internet election'. There has been a tendency for every election since 1998 to be proclaimed in media reporting as '*the internet election*' and this one will be no different except the prediction may be more nuanced. Perhaps it will be cast as 'the Twitter election' or 'the YouTube election' or with a focus on social networking or on smart phones. We have certainly seen proclamation after proclamation and, while it is true that things keep changing (for example, mobile technology has the capacity to drastically alter audiences and news production), and the internet has had profound effects (particularly on news production, I would argue) the fact will remain that next year, when it comes to getting election news, TV will still be the most important medium for the majority of Australians in 2013. Radio and

newspapers will still be very important to setting the news agenda and influencing other media.

Can the internet save journalism and enhance election reporting? There is no doubt that the internet has made political news and information much more widely available but involvement by the public is still very selective and uneven. Just because political news and information become available on a new medium does not mean that people without previous interest in politics suddenly become interested. Nor does use of a different medium mean that the political news audience suddenly becomes more representative. The evidence we have (as opposed to the speculation) suggests the biggest effects of the internet have been on *news production*—the internet has changed the way news is gathered, reported and disseminated and particularly has affected the *economic models* that major news organisations rely upon. In terms of audiences—who accesses online news and especially political news, which sites they visit, what they do there—so far, much of the evidence suggests the internet has largely been ‘normalised into the traditional political world’⁴ with existing inequities continued online. This means the online political news audience looks a lot like the offline political news audience especially in terms of ‘quality’ news—older, white, male, affluent and educated. Along with the challenge of how to find an economic model for online journalism, the challenge of how the technology can help engage new audiences—as opposed to just giving the old audience new ways to get information—remains.

I hesitate to bring this point up but I can safely predict that **there will be accusations of bias**. There always are! Conservatives will point to the ABC as biased against them and perhaps Fairfax (although this may be diluted or may depend upon Gina Reinhart’s role) while Labor and the Greens will point to the role of News Ltd including its tabloids but also the *Australian*. Here, I shall just note these claims and point out that I think there are very important issues at stake before I move on from what is a hot debate and one that may yet get warmer. I want to get to the next part of the puzzle—what *should* we expect from media reporting in a complex age? What can we do to support and encourage election reporting?

What *should* we expect from media reporting in a complex age?

We expect a lot from the media and, indeed, we are often promised a lot. Yet we also know that the context journalists and others have to work in to create and distribute election news is challenging and increasingly so. If the question here really is ‘what is “good” reporting and how can we get it?’, then the answer (at least partly) is that

⁴ Stephen Ward and Thierry Vedel, ‘Introduction: The potential of the internet revisited’, *Parliamentary Affairs*, vol. 59, no. 2, 2006, p. 210.

audiences want and expect different things. ‘Good’ reporting differs from outlet to outlet. Not everyone wants a long analysis of a detailed policy every time. Not everyone wants a highly opinionated shock jock shouting down a politician or guest. Not everyone wants a sensationalised tabloid article. Not everyone wants a colourful or satirical piece that makes them laugh. But so long as somebody somewhere wants them, these formats are needed. Personally, I might prefer some news forms over others both as an audience member and a political scientist but I recognise that they all have a place. Diversity is the key. But while there is a need for multiple formats of information and storytelling, we have to recognise that different news forms are the result of different economic models and we do not want to see the forms of journalism that involve more expensive resources to allow for research, investigation, detailed information, analysis to suffer while cheaper forms abound. Even if not everyone wants long-form, detailed policy analysis, for example, it is democratically important that it still exists somewhere.

As I have said, diversity is the key but it is a big problem in Australia. Not just in terms of diversity of ownership (which is a major problem) but also diversity in terms of topics, sources and perspectives. In Australian election reporting, there is far too much homogeneity in topic selection. There is also a very limited number and range of external sources used. Cost-cutting and declines in journalism staff are going to put even more pressure on journalists to be conservative, to stick with the usual, to follow the leader, to have the story everyone else has and to rely on news wires and political PR handouts. But now is the time to be brave (if not now, when?). To go to a wider range of sources, to find new spokespeople, to be proactive and do research in the lead-up to the election, to see policy issues not just in terms of the specific policies the parties announce during the campaign but to uncover policy issues before the campaign even begins—what is at stake, what are the options, what are the costs and benefits, what proposals are being considered, who is pushing which option and why, what do affected groups need, what do they think about particular options, what is politically and administratively possible and what has worked or failed elsewhere?

I think the next thing that is particularly important is that we need in Australia more journalistic self-reflection and more transparency about how reporting works. While it is now very common in news reports to provide accounts of how politicians spin to journalists, we see very few accounts of how journalists get information or how they (deliberately or otherwise) influence political events. In the UK, we are seeing the Leveson inquiry reveal the relationship between the political and media classes in, for them, sometimes embarrassing detail but in a way that, hopefully, will be cathartic in the longer term. In Australia, we really need to know more about how media and political power intersect due to our much higher concentration of media ownership but there will be no such inquiry in the short (and probably even the long) term

because we do not have the conditions that produced the behaviour and then produced the exposés and the outcry. We do not have highly competitive newspapers, a range of owners, an independent outlet like the *Guardian* newspaper to uncover and doggedly pursue the hacking scandal or crazy-brave politicians who are willing and able to take on an incredibly powerful multinational media organisation.

In Australia, I think what we could have is more journalists being up-front about how they get information and how they craft the reports they produce. Do not pretend that information just comes fully formed or that news is complete or that the story selection is somehow just natural and self-evident. Tell us why you or your outlet pursued that story over many others. Tell us why you spoke to those two particular sources instead of ten potential other ones. Do not just tell us how politicians spin to you, tell us why you go to those events and report on them instead of something else. Tell us what you cannot report on and why not. (If you cannot say this openly in your outlets then tell Wikileaks or the ABC's *Media Watch*—for example, if your editor is directing you to slant stories to support a partisan bias). I think there is a lot to be gained by such honesty (not only for citizens but also for journalists building up relationships with audiences). But I know there are factors working against this opening up of journalism, including fears of changing a formula that will not be supported by bosses and even of losing one's job in an era of journalistic downsizing and in a country where there are few owners to work for. I also know there has been heavy resistance from outlets and individual journalists to proposed media reforms in this country which might produce greater external accountability. But I do think greater internal and external scrutiny would actually help news organisations. Audiences want to understand how their news is produced. Many audience members already suspect journalists and politicians are all 'in it together', 'too close' and a bunch of 'insiders'. Having reporters explain how journalists operate in the metacampaign of elections, having readers' ombudsmen, proper explanations of errors, sincere apologies that explain context and admit mistakes as well as giving greater insight into how journalists work would, I think, encourage more loyal audiences rather than having the opposite effect, as well as benefiting our understanding of politics and the media.

My next point is to say to journalists 'help us help you'. Let us in, not just as audience members or people who can post comments at the bottom of online news stories, or people who ring with tips, or can supply a photo off our mobile phone to accompany your story. Involve us in a more fundamental way in researching, writing and distributing content. We have seen this happening overseas where the decline of staffing and resources has led some overseas news organisations to experiment with a range of what have been called 'pro-am' partnerships. An example of this from the US is *The News-Press* in Florida which used a panel of retired community members

including retired lawyers, CEOs and accountants working on stories with staff reporters. In the UK, in 2009 during the MP expense scandals, the *Guardian* put over 500 000 MP claim forms on their website and asked readers to trawl the data looking for suspicious claims and report back. Why don't we see this sort of experimentation in Australia? Here, as elsewhere, there is a potential army of retired workers, young people, journalism students, academics, experts, NGO workers and hobbyists who could have expertise, information, skills and motivation relevant to news reporting. It might not only enhance news reporting but forge a new relationship with 'the people formerly known as your audience' and give them reasons to be loyal, to be interested, to defend you when you are down and even to pay for your(/their) content.

Civil society will increasingly have to play more of a role in shining light in dark places and the media need to facilitate that. We see examples already and the main one that comes to mind is that of the law lecturer and his students in the US who have been researching death row inmates' cases and proving that innocent men have been executed. In an election context, other groups and individuals can help news media understand policy and election implications—if they are invited. There are many people out there who deal with a wide range of issues.

When I talk about news media organisations forging a new relationship with audiences, I know I will be accused of naivety because really what I am suggesting is that managers and owners should voluntarily lose some control. And it is something they have resisted (to their peril). They resisted interactivity and blogs online, for example, until that was just unsustainable. Some outlets still restrict genuine dialogue as can be seen from the censorship they exercise in online comments under their news articles. Journalism missed the new media/internet boat in the late 1990s and early 2000s and, to simplify, it was largely because the (mainly) middle-aged white men from private schools running media organisations did not understand the internet or its potential and were not very interested in trying to. As journalism outlets face uncertain futures, they might be more willing to get more creative or they may not, going down but still in control. If journalists are to be given the freedom to try to do something different with election reporting, editors, producers, owners, shareholders—but also audiences—will need to allow that.

It is a difficult time to be in journalism and it is a difficult time for anyone who cares about its future to watch it struggle. The biggest issue for organisations at the moment is to monetise their content online. They need to give us a reason to pay for the news that, until now, they have given us for free or that we can get somewhere else for free (and here is why public broadcasting is under fire from commercial media companies in the UK and Australia). Commercial news organisations need to make websites and ipad and iphone apps that give us something new. And yet, when Fairfax announced

its job losses recently it was on the same day that it announced that it was going to erect paywalls for its online content. When job losses are conflated with charging for news online, what audiences hear is that they are being asked to pay for something that is going to be less substantial and based on fewer journalists with fewer resources. In 2013, it seems we will be asked to pay for more online content but how will news organisations convince us it is worth paying for?

We know what we currently get with election reporting; will they be willing to try something new in 2013? Journalists complain that politicians have hijacked the news agenda and it is true that politicians do have a high degree of influence over what makes the news during elections but this is only because the news media have fashioned the environment in which politicians' PR and spin flourish by telling the election story in a certain way—a narrow reactive focus, limited sources, reliance on major parties and their leaders, reliance on verbal statements and televisual campaign events. So my ultimate plea is for the news media in Australia to change the narrative. An election does not just begin as a car drives up the gates to Yarralumla. The purpose of the election is there before and after. The challenges facing Australians, the policies, the issues, the need for political representation are all ongoing. The election is not a game, a sporting contest or a horse race. These might be good devices for hooking an audience in but there has to be something more than that once the audience is engaged and that value-add is not insiders all watching each other and self-referencing. There is more to politics than how politics is played for the media and how the media reacts to that. Being reactive is not enough. Relying on the bussing method of following the leaders or reporting that trail from the sidelines of secondary sources is not sufficient. Reporting what she said/he said is not enough. The election goes on all around us and the challenge is—in the current context—how to support election reporting that provides what a democracy needs in a complex information age. I think many journalists are well aware of these challenges and I hope that, in 2013, enough changes that they are given the chance to try and address them.



Question — You mentioned how poll-driven the news is and how much coverage there is. Has there been any research done at the consumer end about how much actual interest there is in the amount of political and parliamentary coverage we have?

Sally Young — It is an interesting point because you will often get journalists and media organisations saying ‘We would love to do something different but people will not buy it. I would love to have a detailed analysis of immigration policy and really

put a lot of research into it but even if I did it, people would not necessarily read it, or watch it, or listen to it'. So one of the interesting things about the field that I work in is that not a lot of research has been done on audiences and what they want. I think there is a presumption that the media organisations know because they know when circulation declines or ratings decline. TV news and current affairs, for example, watch minute by minute of when audiences go on or drift off and they say when politicians come on you just see it dive. So I think a lot of it is presumption and hunch about what audiences want. A lot of it is not backed up by research or any detailed analysis.

Question — You referenced Australia's lack of a newspaper like the *Guardian*, and the *Guardian* is a paper that does not have a paywall so what are the differences about the *Guardian* that allow it to function as it does?

Sally Young — There is a lot of talk about how the *Guardian* is in financial strife as well and it does not have any magic formula for monetising online content either. Because it is a non-profit body it does not have to answer to shareholders and do cost-cutting in the way that we have seen, for example, with some other media organisations. But it does have resources to do what it does and I think it does a very good job but there are different circumstances there that we do not see in Australia. A body that is purely designed as an independent foundation or independent non-profit organisation, does not have to have those commercial pressures. It is an interesting example of what could be possible but we have not seen any white knight in Australia willing to look at that news model.

Question — Do you think it is specific to the organisation of the *Guardian* or do you think it also relates to a difference between Australian and British media culture?

Sally Young — I think all of those things come into play. There is a different culture in terms of newspaper in the UK for example. You only need to walk into a newsagency in the UK and there are many titles there whereas in Australia in many cities we only have one major metropolitan newspaper. There is a competitive element there. There is a different economic underpinning to the *Guardian*. It has a loyal audience. It is still struggling with some of those questions of how to make profit and how to survive in the long term and there is a lot of discussion within the *Guardian* about how they are going to face some of those challenges as well. It does not have any particular solution yet. It has a lot of traffic on its website. It gets international audiences in a way that many online newspapers do not so it has got a capacity but even so it is still trying to work out those details.

Question — You talk about citizen journalism, and the potential for that to play more of a role in election reporting. A lot of the commentary that has been going on in the last week or so in relation to the changes at Fairfax and News Ltd has talked about how citizen journalism can never be a replacement for ‘real’ journalism because journalists have particular expertise in information gathering and in seeing through spin. I wonder from all the thousands of hours of media reporting that you have actually watched whether you think that is really the case, that journalists do have some core set of specialist skills which means they can do better or can do different things than citizen reporters can?

Sally Young — I think that journalists do have specialist training and skills. What is interesting about journalism training is we are seeing a lot of people really wanting to do journalism studies, for example masters in journalism at universities and so on. There are a lot of people that want to go into this field even as the professional model is collapsing around it. There are particular skills that journalists have. A lot of it is about experience. Someone who has worked in journalism for many years and knows the players and knows the context—surely there is a value to that. I think what is interesting about the experimentation that is going on overseas is that you are pairing people up, people who have got a lot of experience and who have worked in journalism a long time with people who have not and might have a fresh pair of eyes and a different set of skills to bring to it. I heard someone speaking a little while ago saying that citizen journalism is the answer: the professional model is dying, we cannot expect to pay journalists, the money is not there, the advertising revenue has gone, that model is not going to work anymore and we are going to have to rely on citizens to do journalism. I think that is problematic. Citizens can do a lot of different types of things but organisations are important here. You still need some sort of resource for that and we cannot expect people to do it for the love of it. There is a professional element to this. People need to get paid for this content as well. There needs to be some sort of model that can support that. Let citizens play a role but still have an economic underpinning that is going to make this viable into the future.

Question — You have spoken about allegations of bias in the media. More recently there have been suggestions that the media sometimes become substantive players, perhaps in relation to the allegations against the Speaker, the ‘utegate’ affair and perhaps the *Australian*’s campaign over the schools proposals. In your predictions for the next election, do you think there will be an issue of the media becoming substantive players in the sense of running campaigns rather than merely reporting?

Sally Young — There are two things I would say about that. One is the media and journalists have always been players. If you look back at the fifties and some of the things reporters were doing then, they were not just reporting from the sidelines, they

were actively involved in the political behind-the-scenes goings on. I think that has always been there. I read before I came in that Rupert Murdoch had said today that newspapers are a business and businesses need to be viable or they do not exist. Now that is a bit of a worry for papers like the *Australian*, for example, that reportedly don't make a profit. So if they are not making a profit, what are they for? It used to be said that they are in the public interest—this is part of democracy, they are a fourth estate, they hold power to account, they do all sorts of democratic functions—but they also needed that commercial underpinning. I think as that economic model has shifted, what some of the papers are doing, and some of the owners are doing, is using them very obviously as a tool of political influence and running particular campaigns and I think we are seeing more of that gearing up as the profit mechanism goes down. And I think for some of them it is revealing what they are really about.

Question — During the Queensland election campaign the *Courier-Mail* journalists basically boycotted the campaign bus and said we are not going to play that game. As a result there seemed to be a bit more substantive analytical journalism in the reporting from that paper. Do you think that there is any likelihood that sort of tactic will be pursued in future and if so what might be the effect of it?

Sally Young — It is quite possible because that has been happening in the US quite a bit as well. There have been campaigns to get off the bus. The senior journalists here seem to have retreated quite a lot from that; not many of them travel around in the bus anymore I believe. In the US there has been more of a move away from that in a sense that the election really does not happen there up on a stage for the TV cameras; the real action is going on elsewhere. The trick is to get to what is the real action and I think journalists can do that in a number of forms. I think that we will see more calls to get off the bus because readers are quite aware, because journalists are telling them, for example in newspapers, that these events are set up: 'We went to a barbeque and they weren't real sausages, they didn't even cook them, they just unfolded it, TV got the shots and everybody left'. Once you start telling us that is happening then we say to you, 'Why are you going?' The trends we are seeing overseas are that it does help when journalists say, 'Well, we are not going to go to this stuff. While you are setting up this barbeque and I am supposed to get shots of it, other stuff is going on that is perhaps far more important and gets a better sense of the campaign and the issues at stake'. I think a change like that is the sort of thing that would be a good experiment to try.

**‘This is a Procedure on Which We
Should Not Lightly Embark’: Orders
for the Production of Documents in
the Australian Senate, 1901 to 1988**

Paula Waring

When confronted, on 12 May 1960, with the first motion for an order for the production of documents in the Senate for nine years (and seventeen years since the last successful order¹), Leader of the Government in the Senate William Spooner was adamant that such orders were obsolete. While acknowledging that the procedure had been used ‘in the early days of the Senate’, Spooner maintained that the preparation of facts and figures ‘entailed a good deal of work for the departments concerned’ and that:

there would be considerable difficulty and embarrassment in returning to the old procedure and, as a result, disclosing not only for the information of the Senate but publicly, for the newspapers and for all who may care to read, advice that from time to time is tendered to a Minister and either rejected or accepted by him, in the ebb and flow of the conduct of government.²

‘This’, Spooner concluded, ‘is a procedure on which we should not lightly embark’.

The motion attempting to revive orders for production of documents was put by a Tasmanian government senator, Reg Wright. That he was a government senator is not as surprising as it might first appear. Elected in 1950, maverick Senator Wright had by 1960 crossed the floor on thirty occasions (thirty-one, including the vote on his motion for the production of documents on 12 May)³ and went on to make a career of defending the powers of the parliament against the executive. Although his motion was on a relatively trivial matter—calling for the papers relating to the construction of the post office at Sorell in Tasmania—Wright considered the procedure ‘an essential and inherent right of the Parliament ... a right that we hold as representatives of the people ... to scrutinize administrative action by the perusal of public documents’.⁴

¹ The last successful order, made on 30 June 1943, related to the payment of travelling allowances to officers of the Commonwealth Public Service. An unsuccessful order had been moved on 17 October 1951 relating to the double dissolution of that year.

² Senate debates, 12 May 1960, p. 962.

³ Rob Lundie and Deirdre McKeown, ‘Crossing the floor’, unpublished table compiled by the Research Branch, Commonwealth Parliamentary Library.

⁴ Senate debates, 12 May 1960, p. 961.

Although Wright's motion was not successful in 1960, use of the procedure would be re-established in 1965. This paper charts the fluctuating use of the power to order the production of documents in the Senate from its confident beginnings in 1901, through its dwindling use from 1915 and the twenty-two year period of complete disuse between 1943 and 1964, until 1988, the start of its resurgence as a common mechanism for holding governments to account.

The constitutional basis for orders for production of documents

In Australia's colonial parliaments the practice of ordering the production of documents was well-established.⁵ When the Australian Constitution was enacted, the Parliament was given the power to order documents required for its information. Section 49 of the Constitution provided that until otherwise declared, the powers, privileges and immunities of both houses of the parliament 'shall be those of the Commons House of Parliament of the United Kingdom' in 1901. Contemporaneous authorities on the powers and practice of the House of Commons reveal a rich history of the House calling for and obtaining documents from both public and non-government bodies.⁶

From its formation the Australian Parliament made immediate use of this power. From 1901 the Senate temporarily followed the standing orders of the South Australian House of Assembly before the adoption of the Senate standing orders in August 1903.⁷ Standing order 344 of the new standing orders (renumbered SO 353 in 1909, SO 358 in 1922 and 164 in 1989), which stated that 'Accounts and Papers may be ordered to be laid upon the Table', was based on the standing orders of the Victorian and South Australian legislative assemblies.⁸

Orders for return in the new Commonwealth, 1901–14

The first two orders for the production of documents, or orders for return as they were then known, were moved on 31 May 1901. It was an inauspicious start, with none of the documents being produced in response to the orders. The first order, which required statistics on aged and destitute persons in the states, was raised in debates in the Senate by the minister responsible some two years later with the lament:

⁵ Lynn Lovelock, 'The power of the New South Wales Legislative Council to order the production of state papers: revisiting the *Egan* decisions ten years on', *Australasian Parliamentary Review*, vol. 24, no. 2, p. 199.

⁶ Rosemary Laing, 'Orders for the production of documents: origins and development of the power', *Procedural Information Bulletin*, Department of the Senate, no. 247, 14 February 2011, pp. 7–12.

⁷ Rosemary Laing (ed.), *Annotated Standing Orders of the Australian Senate*, Department of the Senate, Canberra, 2009, pp. 4–7.

⁸ *ibid.*, p. 471.

I regret that I have not been able, up to the present time, to make a return to that order. It is a very intricate one. A great deal of information is required to be obtained and, if the Government are not in a position to go on with a system of old-age pensions, it can hardly be said that it is a matter of urgency.⁹

The second order, requesting copies of all agreements in force between the state and Commonwealth governments and the Eastern Extension Telegraph Company relating to the management of the telegraph cable between Tasmania and the mainland, fared a little better. With no response after two years, a second order along the same lines was moved¹⁰, and over the following months a number of documents were tabled in the Senate¹¹ although not, it appears, in direct response to the order.

In the first year of the new Commonwealth, 29 orders for return were agreed in the Senate. It would take until 2002, another 101 years, for this number of orders to be exceeded in a single year. Between 1901 and 1914 the Senate agreed to an average of 14 orders a year. The subject matter of many of the orders reflected the major legislative concerns of the day: defence (including a request for a paper in 1904 confirming reports that the governments of Japan and China were 'casting longing eyes upon the northern portions of Australia'¹²); customs and excise (especially the value of goods, revenue collected and duty paid on products); the administration of the territory of Papua; banking; seemingly endless orders on postal and telegraphic services and the big public infrastructure project of the time, the Kalgoorlie to Port Augusta transcontinental railway. Orders for return in the earliest years also reflected the other great policy initiative, the White Australia Policy, including requests for details on 'Asiatics' imported into WA; kanaka and coloured labour in Queensland; numbers of 'coloured aliens' in each state; and labourers, by nationality, engaged by the Australian pearling fleet who were returned to their homes in 1904.

A significant number of orders in the early years of the Senate were of a statistical nature asking, for example, for the number of women employed in federal and state departments; details of appointments, transfers and pensions of civil servants; unemployment numbers; arrivals and departures and the like. The high number of orders in these early years may be explained in part by the work in progress of the Parliament in setting up public service procedures and reporting mechanisms. Some statistics requested, such as electoral returns, were later tabled in the Senate by the government as a matter of course. Others such as statistics relating to population and

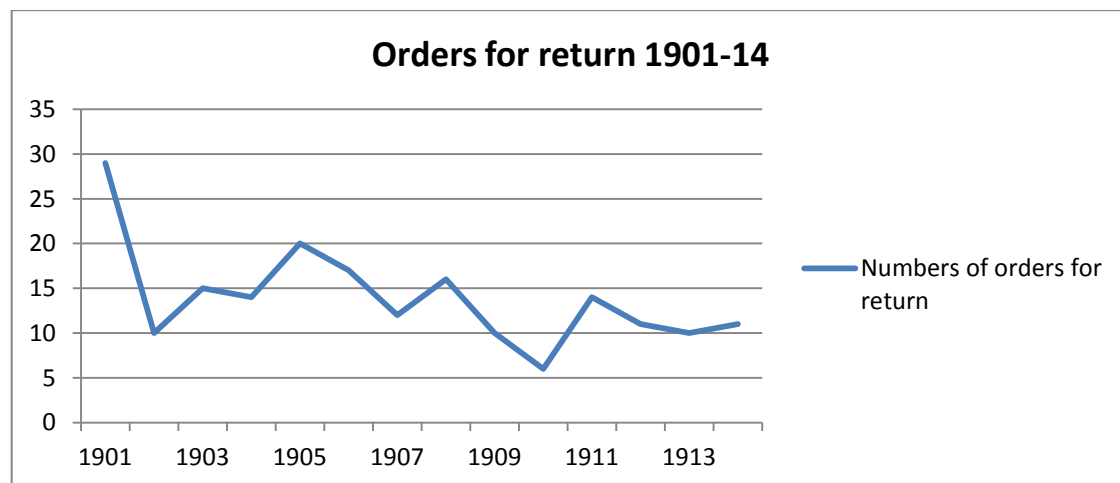
⁹ Senate debates, 2 September 1903, p. 4464.

¹⁰ Senate Journals, 28 May 1903, p. 9.

¹¹ For example, Senate Journals, 24 July 1903 p. 87; 19 August 1903, p. 133; 24 August 1903, p. 149.

¹² Senate debates, 7 September 1904, p. 4328.

employment would come to be reported regularly through yearbooks, government gazettes and annual reports.



Not all orders, by any means, were statistical. Some were for original documents such as the orders for correspondence relating to a proposal to deport Boer prisoners to Tasmania, the Trans-Australian Railway, the proposed federal capital site and the suppression of *Reynolds' Newspaper*. Copies of government contracts, agreements and reports were also supplied on occasion. However, the relatively factual and non-political nature of the orders at this time can be illustrated by the fact that the House of Representatives also ordered the production of documents. Between 1901 and 1917, after which the practice fell into disuse, the House agreed to over 120 orders for returns.¹³

Motivations for ordering documents in the Senate, where they can be discerned from the debates, were many and varied. Senator Neild's 1904 order for all papers connected with the selection and approval of the Commonwealth flag came with an explanation that valued parliamentary oversight and the importance of maintaining the public record:

I may say at once that there is absolutely nothing behind my motion. But I feel that we are under some little disadvantage, as it was understood that the papers in question were to be laid before Parliament. The selection of a Commonwealth flag is a very important matter, and it has apparently been left to judges whose qualifications have been seriously questioned. I have no other desire than to have an opportunity of seeing the papers, and to

¹³ *House of Representatives Practice*, 5th edn, Department of the House of Representatives, Canberra, 2005, p. 591; House of Representatives, *Votes and Proceedings*, 1901–17.

understand what has led to the selection being made without any reference to Parliament. I think that Parliament ought to have been consulted ...¹⁴

Another order, moved by Neild later that year, for correspondence relating to the conduct of the General Officer Commanding the Military Forces of the Commonwealth, was in response to material published in the press. On that occasion he explained 'it is desirable, in a matter of importance as affecting the public interests, that there should be no garbled representation of correspondence'. The remedy for this, he argued, was to table the source material in full.¹⁵

Senator Chataway's rationale for the order for return he had moved on natives employed in Papua in 1910 was to ameliorate public service reporting shortcomings:

If we are going to govern Papua or the Northern Territory efficiently, I would suggest that the annual reports upon those Territories must be presented to us within a reasonable time after the close of their financial years. The annual report upon Papua for the year ended 30th June last has not yet reached us, and, but for the return which I asked the Government to supply, nothing would be known in reference to its progress or administration.¹⁶

The potential, and also the limitations, of access to documents to illuminate allegations of government corruption and maladministration was also realised early. In December 1913 a railway contractor, Henry Teesdale Smith, was granted an earthmoving contract (the term of which conveniently ran for the exact length of the long summer parliamentary recess) for a section of the transcontinental railway west of Port Augusta. When Parliament sat in April 1914, the Labor opposition attacked the decision for the secrecy over the tendering process, the lack of competitive tendering and the exorbitant rates paid to Teesdale Smith.¹⁷ On 16 April the Senate, which was not controlled by the government, ordered that 'all papers relating to the letting of the contract' be laid on the table of the House. When these were tabled on 7 May the Senate further ordered 'all papers in connexion with the resignation of Mr. Deane [who had engaged Teesdale Smith] as Engineer-in-Chief of Commonwealth Railways and the appointment of his successor'. On 3 June 1914 the matter was referred to a Senate select committee which six days later advised the Senate¹⁸ that it could not proceed further with the inquiry due to its inability to obtain the necessary

¹⁴ Senate debates, 26 May 1904, pp. 1584–5.

¹⁵ Senate debates, 14 September 1904, p. 4682.

¹⁶ Senate debates, 25 November 1910, p. 6822.

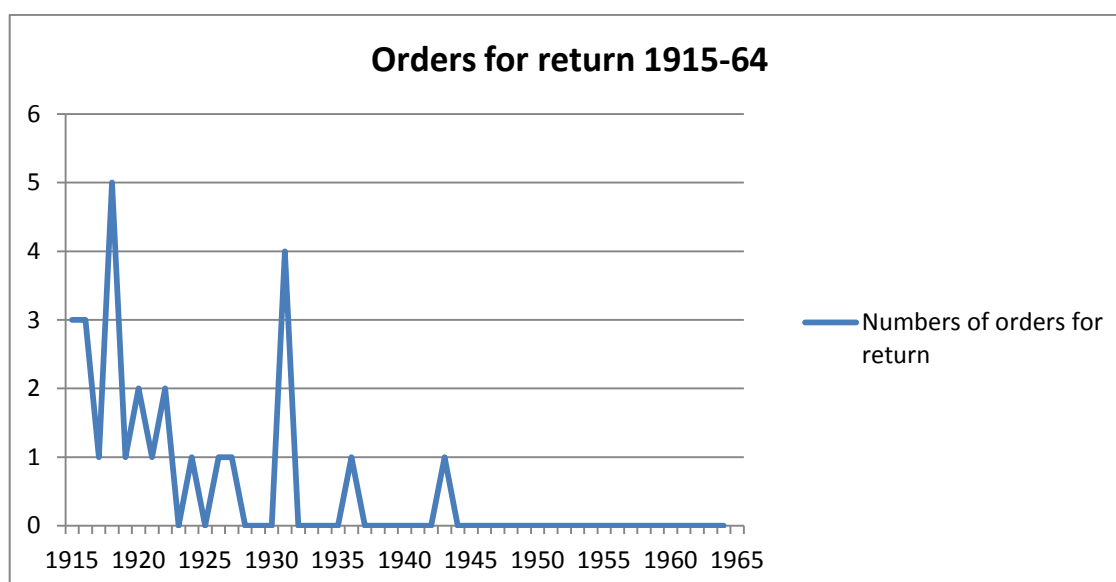
¹⁷ David Burke, *Road Through the Wilderness*, New South Wales University Press, Kensington, NSW, 1991, pp. 120, 132–42.

¹⁸ Parliamentary paper S2, 1914.

documents from the department. The inquiry was ultimately thwarted by litigation by Teesdale Smith against the Commonwealth and the 1914 election.¹⁹

Decline and fall, 1915–64

Throughout the years 1915 to 1964 the number of orders for return each year ranged between zero and five, with 36 years out of 50 having no orders at all. The growing requirement for documents to be tabled pursuant to statute may account for some of the decline in numbers of orders in both houses over time. The *Export Guarantee Act 1924*, for instance, required the tabling of quarterly reports from the minister on any assistance granted in relation to the export and marketing of primary produce, while the *Commonwealth Bank Act 1951* required that papers documenting any difference of opinion between the government and the bank board over policy be laid before each house of Parliament within a specified time.



Another factor in the reduced number of orders appears to be the use of alternative methods of obtaining information. In particular, the practice of informally requesting documents in questions was commonplace. In June 1923 Nationalist Senator Harold ‘Pompey’ Elliott, in a question on notice, sought information from the Minister for Defence in the Nationalist government on the discharge of Warrant Officer J. R. Allen from the permanent military forces. In his question he also added ‘Will the Minister place on the table of the Senate the file relating to this matter?’ The minister agreed. Some weeks later Elliott succeeded in establishing a select committee into the matter (while the Nationalists held a majority in the Senate, six Nationalist senators voted with the ALP). During the inquiry it came to light that the Defence Department had withheld what Elliott considered ‘a most vital file’. This prompted Elliott to take the

¹⁹ Senate debates, 26 June 1914, p. 2611.

novel approach of moving that the House of Representatives be requested to reduce the proposed vote for the Department of Defence by £1 in order to bring attention to the department's failure to 'recognise the authority of the Senate' and 'obey its directions'.²⁰

Returns for order did, however, serve opposition senators from time to time as additional leverage to obtain information not forthcoming in questions in the Senate. In October 1931, in response to a question by Lang Labor Senator James Dunn concerning the application by a former paid organiser for the Labor Party for a hotel licence at Jervis Bay, the leader of the Scullin Labor government in the Senate replied, 'It is not proposed to take steps to obtain the information desired by the honourable senator'. Realising that he 'must have dropped a brick', Dunn pursued the matter further in adjournment debates and in a second question on notice before moving an order for return that all papers and copies of testimonials relating to the application be laid on the table. The papers were made available to senators later that day.²¹

Orders for returns were used as an accountability mechanism during this period by government as well as opposition senators. This practice has precedents in 'unopposed returns' in the House of Commons which were initiated by ministers to make accounts and other documents of interest available to the public.²²

In July 1915 an order was agreed by the Senate on a motion by a government senator that all papers and reports be laid on the table in connection with the denial of a request by the community of Mount Balfour in Tasmania to have its (reportedly squalid) post office moved to a more central location. The papers tabled by the Fisher Labor government on 12 August led to the Senate appointing a select committee into the matter, which found that the Deputy Postmaster-General of Tasmania had misled the federal minister and noted that his 'most improper' behaviour deserved 'severe censure'. The expense and small-town nature of the 'great Balfour controversy' and its 'high-souled, self-sacrificing, justice-loving and fearless Senate committee' were duly sent up by the local newspaper in mock-epic style.²³

Similarly, in 1924 Nationalist senator Walter Kingsmill moved that all papers be laid upon the table relating to the closure of the Federal Forest Products Laboratory in

²⁰ Senate debates, 28 June 1923, p. 419; 2 August 1923, p. 2016; 22 August 1923, p. 3274, 3303.

²¹ Senate debates, 20 October 1931, pp. 831, 871, 875; 29 October 1931, pp. 1323–4; 10 November, p. 1525; 12 November 1931, pp. 1630–31; *Canberra Times*, 21 October 1931, p. 3.

²² *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 24th edn, LexisNexis, London, 2011, pp. 133–4, 352. The author also acknowledges the assistance of the Clerk of the Senate.

²³ *The North Western Advocate and the Emu Bay Times* (Tas.), 18 November 1915, p. 4.

Perth and the removal of its functions to Melbourne. As a government senator, Kingsmill's motion was motivated partly by his close personal interest in the issue and partly by what he considered to be the 'gross injustice' to the state of Western Australia and the evils of 'insidious and pernicious centralization'. Apparently a matter of complete indifference to the opposition, six other Nationalist senators contributed to the debate on the motion, which was carried with amendments. Kingsmill reflected that it was 'important that we should study this little incident of mal-administration in order to avoid mistakes in future'.²⁴

Nevertheless, some examples of the value to oppositions in obtaining documents were also apparent. An opposition motion for correspondence and reports relating to the import duty on Oregon timber was agreed to by the Senate on 19 March 1931. Nationalist senator Sir Hal Colebatch, in proposing the motion, explained that the present duties had been in operation for sixteen months, against the recommendation of the Tariff Board and without the Parliament having had the opportunity to scrutinise them. He suggested that the increase in tariff advantaged a small number of importers who had large timber stockpiles. Labor senator John Barnes, Leader of the Government in the Senate, replied that he was only too happy to table the documents to 'assure the Senate that in framing its tariff schedules the Government acted in the interests of the people'.²⁵

The opposition was also successful in obtaining documents in 1943 that showed that Prime Minister Curtin had authorised that determinations made by the Public Service Arbitrator concerning travel allowances should apply only to returned soldiers and trade unionists. This was, however, to be the last successful order for return initiated by either government or opposition until 1965.

Revival years, 1965–88

The resurgence of orders for return was of a gradual and sporadic nature between 1965 and 1988, with a total of only 14 agreed to by the Senate. The longstanding use of this procedure to inform debate and legislation and as a mechanism to obtain information not forthcoming in questions in the chamber certainly continued during this time. In 1987 an order for return was first used to obtain answers to questions asked during estimate hearings.²⁶ In September 1988 the Senate adopted an order of continuing effect to provide remedial action for questions on notice which remained unanswered after 30 days. From November 1988 orders for return began to be used to

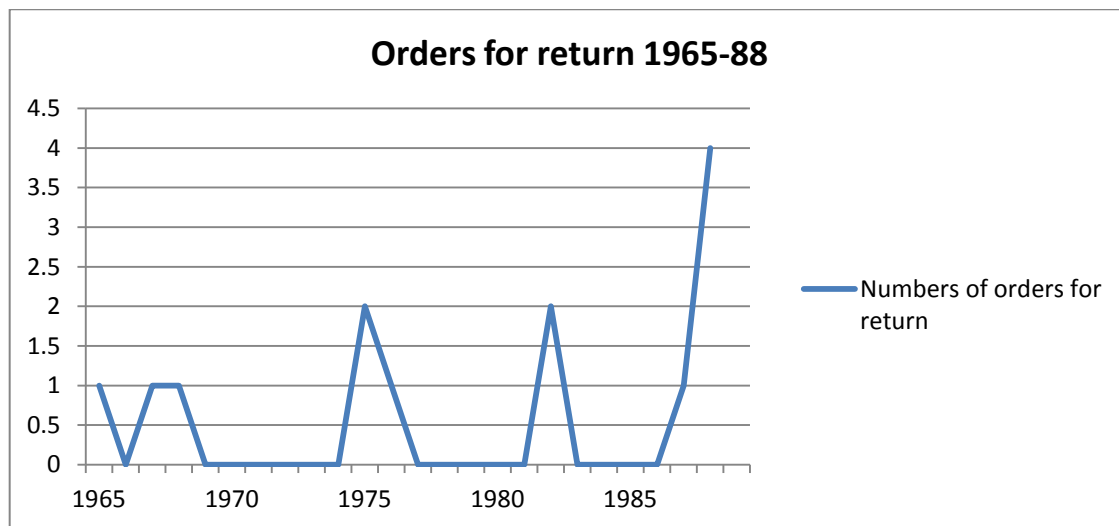
²⁴ Senate debates, 8 May 1924, pp. 481–6; 3 July 1924, pp. 1819–29.

²⁵ Senate debates, 19 March 1931, p. 403.

²⁶ Senate debates, 16 September 1987, p. 112.

obtain answers to questions on notice and explanations from ministers for the failure to provide answers.²⁷

The most distinguishing feature of orders for return at this time, however, was the marked increase in their use for government accountability and parliamentary oversight. Three orders sought to make the legislative activity—or inactivity—of the executive more open to the scrutiny of parliament. In 1965 a motion by Senator Reg Wright, that instruments in writing made pursuant to the *Housing Loans Insurance Act 1965* be laid on the table, was agreed to by the Senate. Unlike regulations, instruments in writing are not automatically tabled in Parliament and are thus not subject to disallowance. This, according to Wright, 'puts the Executive in an uncontrollable position'. Wright was thus able to use the power of orders for returns to bring the instruments in writing applying to this particular Act to the attention of the Parliament.²⁸



The VIP planes affair brought the Senate's power to demand official documents, and the consequences of the government's attempts to conceal them, to greater public attention than ever before. In 1966 and 1967 the Holt Government was repeatedly questioned about costs incurred and passengers taken on board RAAF VIP aircraft by ministers and other members of parliament. Replies to questions and statements by the Prime Minister were evasive and incorrectly maintained that passenger records had not been kept. In October 1967 the Senate passed a motion ordering that the government table all relevant documents. Cabinet initially resisted the Senate's demands but after continued pressure in the Parliament and in the media, Senator John Gorton tabled the passenger manifests and flight authorisation books on 25 October 1967. The tabling of the documents exposed Holt's mistruths, but defused a crisis for

²⁷ Senate Journals, 28 September 1988, p. 952; 23 November 1988, p. 1144.

²⁸ Senate debates, 25 November 1965, p. 1850; 12 May 1966, p. 1036.

the government. In the final analysis, the process of covering up the information did far greater damage to the government than the information exposed.²⁹

Following the VIP planes affair orders for returns were used increasingly to investigate suspicions of government maladministration or impropriety. In subsequent years documents were ordered relating to the purchase of F111 aircraft from the United States in 1968, the overseas loans negotiations and the purchase of Hobart Trades Hall in 1975, government administration of tax avoidance and evasion laws in 1982 and the administration of Aboriginal affairs in 1988.

During the 1980s there was a growing recognition of the fact that large numbers of Acts of Parliament had received royal assent but had never come into effect by proclamation.³⁰ The need to establish the magnitude of the problem was addressed in September 1988 by an order for return. The resulting document detailed 57 Acts and the reasons that each had not been proclaimed. In debate on the return to order, Senator Macklin noted that ‘what we have in fact done, by the mechanism under which Bills are drafted, is hand over effective legislative powers to the bureaucrats’ who were having ‘the final say in respect of the legislation passed by the representatives of the people in these chambers’.³¹ The Senate subsequently agreed to its first order of continuing effect for the production of documents on 29 November 1988 which required twice yearly reporting on the non-proclamation of Acts. Now, under standing order 139, this has become an annual requirement.

Failure to provide documents

In nearly 85 per cent of the orders for return throughout the study period ministers have complied with requests for documents. Sometimes ministers in fact have actively encouraged them in preference to questions on notice. For instance, when Senator McGregor was asked by Senator Chataway in 1912 for information on the numbers of aged pensioners found dead or destitute in the states, he asked for the information to be presented as a return so that it could be put to the relevant department in a formal way, noting that there would be ‘no opposition offered to the motion’.³² Putting an order for return to the Senate was used ‘to decide whether or not there was ... a

²⁹ Ian Hancock, *The V.I.P. Affair: The Causes, Course and Consequences of a Ministerial and Public Service Cover-up*, Australasian Study of Parliament Group, Belconnen, ACT, 2004.

³⁰ Anne Lynch, ‘Legislation by proclamation: Parliamentary nightmare, bureaucratic dream’, *Papers on Parliament*, no. 2, July 1988, pp. 4–16.

³¹ Senate debates, 24 November 1988, p. 2774.

³² Senate debates, 1 August 1912, p. 1520; 2 August 1912, p. 1614. Another example is the request for information on employees of the Commonwealth working 40 hours a week or less (Senate debates, 6 May 1936, p. 1248).

sufficient volume of opinion in support of the provision of the information that was requested'.³³

Of the 36 failures to comply with orders for return, three-quarters occurred in the years 1901 to 1908. In half of the total cases there was no evidence to be found in the Senate debates for the reasons for the failure to provide documents. Where reasons were provided they included that the information was available elsewhere (such as having been tabled in the House of Representatives³⁴) and that the information requested was unobtainable, either because the relevant statistics had not been kept³⁵ or because they were impractical to supply.³⁶ A 1906 return asking for the unimproved value of privately owned land in the states was an early example of the perils of requesting documents not controlled by the Commonwealth. After three months Victoria and Tasmania announced that they did not have the statistics from which they could compile a return, New South Wales claimed that they did not have staff available to compile the material until a later date, South Australia and Western Australia sought reimbursement from the Commonwealth for the high cost involved in compiling the information while Queensland 'merely acknowledged the Prime Minister's circular of the 26th July'.³⁷

The fact that documents requested related to matters subject to court cases or inquiries were factors in their non-supply in two early cases. In one instance in 1908, in a controversial matter where the failure of the postal service to deliver a registered letter resulted in a Labor candidate for the Queensland state seat of Bowen missing the nomination deadline, the government reneged on providing the documents even after the investigations were completed.³⁸ Documents were also not tabled in connection with the case of A. Hart, who took legal action against the Brisbane Post and Telegraph Department in 1905. In this case the volume and physical inaccessibility of the documents also came into play and the order ultimately failed because the Senate did not pass a further motion for return after the case had concluded in 1906.³⁹ It was not until 1982 that the conduct of legal proceedings became the central issue in a refusal to produce documents. Concerted efforts by the opposition to obtain documents on the government's consideration of possible legal action against those

³³ Senate debates, 12 May 1960, p. 962.

³⁴ Senate debates, 4 June 1903, pp. 521–2; *Votes and Proceedings*, 9 June 1903, p. 19.

³⁵ For example Senate debates, 31 July 1903, p. 2910; 23 November 1905, pp. 5641–3; 7 December 1905, pp. 6375–6.

³⁶ Senate debates, 23 November 1905, pp. 5644–5.

³⁷ Senate debates, 18 July 1906, p. 1425; 11 October 1906, p. 6435.

³⁸ Senate debates, 9 April 1908, pp. 10392–3.

³⁹ Senate debates, 23 November 1905, p. 5644; 16 August 1906, pp. 2894–903.

involved in ‘bottom of the harbour’ tax schemes were thwarted by the government’s view that the disclosure would be harmful to the administration of justice.⁴⁰

National security concerns were cited as a reason for documents to be withheld in 1968. Years of delays and cost blow-outs in the purchase of F111 aircraft from the United States finally came to a head in September when, after a five and a half hours debate, the Senate ordered documents relating to the purchase arrangements by the Australian Government be laid on the table of the Senate. While a number of papers were tabled, the government affirmed that it would not disclose documents ‘with a security content’ nor confidential documents between the governments of the US and Australia without the ‘full consent’ of the US Government.⁴¹

Claims that advice tendered to government was confidential led to two orders for returns being explicitly refused. In June 1914 the opposition sought and was refused advices from the Prime Minister to the Governor-General over the terms of the request and reasons given for the double dissolution election of 1914. Reasons given for the refusal were that the conversations and correspondence were ‘absolutely confidential’ and it has ‘never been the custom’ to release such information. Arguments that there had never been a federal double dissolution to establish precedent fell on deaf ears. The ALP opposition was able to use its massive majority in the Senate to take further action in the form of a direct appeal to the Governor-General for the information they required. The Governor-General declined to comply with the request. When the Fisher Labor government took office after the double dissolution election it tabled, on 8 October 1914, the communications that took place between the Governor-General and the government.⁴²

In 1984 the confidentiality of advice from public servants to ministers became the issue. In March of that year Democrats senator Don Chipp moved that documents containing advice from the Commissioner of Taxation to the Treasurer concerning provisions contained in the Income Tax Assessment Amendment Bill (No. 5) 1983 be laid on the table. Senator Chipp’s concern was that clause 5 of the bill would result in ‘one of the most evil things that a Parliament can introduce’—retrospective legislation. While debate was adjourned without the Senate agreeing to the order, four days later a letter was communicated to the Senate in which the Treasurer refused to table the documents, which also included cabinet material, and referred to the ‘long

⁴⁰ These events were written up at length in J. R. Odgers, *Australian Senate Practice*, 6th edn, Royal Australian Institute of Public Administration (ACT Division), Canberra, 1991, pp. 908–10.

⁴¹ Senate debates, 17 September 1968, pp. 695, 703; 26 September 1968, pp. 1028–9; J. R. Odgers, *Australian Senate Practice*, 4th edn, AGPS, Canberra, 1972, p. 519.

⁴² Senate debates, 10 June 1914, pp. 1921–2; 12 June 1914, pp. 2088–102; 17 June 1914, pp. 2145, 2169; 24 June 1914, pp. 2419–20; 8 October 1914, p. 12.

established convention' of not disclosing the advice of a public servant.⁴³ Ultimately, while the order for return failed, the issues were widely debated and clause 5 was negated in the committee stage of the bill.

Punitive actions against ministers who have refused documents were rare. In 1905 the Senate ordered a proposed agreement between the Commonwealth and Burns, Philp and Co for a mail services contract for the Pacific Islands. When the return was refused, due to the Prime Minister's view that an unsigned agreement should not be tabled, an urgency debate took place on the 'want of due attention' of the minister in regards to 'requests for information by honourable senators'. Four days later the document was tabled.⁴⁴ After the failure to obtain documents relating to the bottom of the harbour tax scheme in 1982, the opposition gave notice of a motion censuring the government, among other things, for failing to comply with the Senate's directions. The notice of motion lapsed when Parliament dissolved in February 1983.⁴⁵ It was not until 2005 that standing order 164 was changed to provide a formal mechanism for dealing with non-compliance.

Majorities in the Senate

The link between government majorities in the Senate and executive accountability has been the subject of numerous studies.⁴⁶ During the period of government majority in the Senate from July 2005 to November 2007 there was only one order for the production of documents, a sharp decline from numbers in the twenties and thirties in the preceding years.⁴⁷ Looking back at the period 1901 to 1988 it is also instructive to examine the correlation between majorities in the Senate and the success of the Senate in ordering and obtaining documents.

The golden age for the production of documents in terms of sheer numbers of orders coincides with the 1901–10 period when party allegiances were loose and none of the three major parties held an outright majority in the Senate. However, the numbers of orders still remained at a substantial level through the ALP Fisher Government's majority in the Senate from July 1910, the loss of the Senate majority by the Liberal Cook Government from July 1913 and the September 1914 return of the Fisher Government's Senate majority. What is significant to note is that the two most

⁴³ Senate debates, 2 March 1984, p. 288; 6 March 1984, p. 482; Senate Journals, 27 March 1984, p. 737.

⁴⁴ Senate debates, 15 December 1905, pp. 7054–8; 19 December 1905, p. 7313.

⁴⁵ Odgers, 6th edn, op. cit., pp. 910–11.

⁴⁶ For example, Harry Evans, 'Having the numbers means not having to explain: The effect of the government majority in the Senate', *Papers on Parliament*, no. 52, December 2009, pp. 151–63; Patrick Weller, 'Parliamentary accountability for non-statutory executive power: Impossible dream or realistic aspiration?', *Public Law Review*, vol. 16, no. 4, pp. 314–24.

⁴⁷ Evans, op. cit., p. 156; *Business of the Senate*, 2005–07.

politically controversial cases, the Teesdale Smith contract and the double dissolution advices from 1914, both occurred during the period when the government did not have a majority in the Senate.

From September 1914 until June 1962 government majorities in the Senate were the norm and numbers of orders for the production of documents reduced to a trickle before ceasing completely. Until the introduction of proportional representation for Senate elections in 1949, these government majorities were very large, some reaching over 90 per cent, which may help explain why divisions on motions ordering the production of documents were so rare. Once again, the most politically sensitive accountability issues⁴⁸ occurred during times of non-government majorities. However, during three of the periods where governments had lost their majorities in the Senate⁴⁹ there is little evidence of oppositions taking advantage of the change of circumstances to obtain government documents.

Former Clerk of the Senate Harry Evans has characterised the Senate of the second decade and beyond as ‘a changing institution’. He argues that while the founding senators were supporters of a strong, assertive Senate, later senators abandoned the Senate’s federalist principles in favour of the ‘hegemony of Westminster over Australian institutions’, tighter party discipline, executive government domination and, in the case of the ALP, a policy to abolish the Senate.⁵⁰

During the periods of government control between 1914 and 1962 there were some notable accountability motions that failed to gain the support of the Senate. In June 1933, concerned that a public service appointment was ‘made for political purposes in payment for services rendered’, the opposition moved a return for papers relating to the appointment. The United Australia Party government maintained that appointment reports to the Public Service Board were ‘absolutely confidential’, dealt with the ‘most secret organization of the Foreign Office’ and that it was ‘not in the public interest that these papers should be laid on the table of the Library’.⁵¹

⁴⁸ The Jervis Bay hotel licence, October 1931; Oregon timber import duty, March 1931; and travel allowances for public servants, 1943.

⁴⁹ The periods were 14 November 1916 to 30 June 1917, 19 December 1949 to 28 April 1951 and 1 July 1956 to 30 June 1959.

⁵⁰ Harry Evans, ‘The senators, the Senate and Australia, 1901–1929’ in Ann Millar (ed.), *The Biographical Dictionary of the Australian Senate*, vol. 1, 1901–1919, Melbourne University Press, Carlton South, Vic., 2000, pp. 2–3, 5.

⁵¹ Senate debates, 15 June 1933, pp. 2383, 2386, 2389–90. Between 1907 and 1931, 14 orders for returns were laid ‘on the table of the Library’ rather than the Senate. Papers laid upon the table of the Library remained the property of the government department and could be returned after use. This practice was favoured in some circumstances due to the difficulty in reproducing voluminous documents. The practice died out with the general decline in orders of any sort. By the time of the resumption of orders in the second half of the twentieth century, advances in copying technology had made the practice obsolete.

Also unsuccessful was an October 1951 motion calling for the tabling of the advices tendered by the government to the Governor-General relating to the 1951 double dissolution. The motion was defeated 31 votes to 26, albeit with a government recognition that it would be 'proper that in due time that material should be made available'. With government control of the Senate and without a change of government, the documents were not tabled until May 1956.⁵²

From July 1962 to December 1975, the Democratic Labor Party (DLP), Liberal Movement and independents held the balance of power in varying combinations. When combined with a growing sense among government and non-government senators of the responsibility of the Parliament to monitor the executive and the increased Senate effectiveness brought about by the introduction of the Senate committee system in 1970, the independents and minor parties now possessed the ability to explore the accountability possibilities of standing order 358 to its full potential. The division ordering papers on the VIP planes affair in 1967, for instance, was won with support of two independents, two DLP senators and three Liberal floor crossers.⁵³ This occasion marked the first time in the federal parliament that a motion for an order for the production of documents had been put to a vote and won despite government opposition.

When government control was reimposed from December 1975 to June 1981 the government was able to use its majority to clamp down on the release of information on the tendering processes for government computing equipment⁵⁴ and the questionable dealings of Asia Dairy Industries. The latter controversy related to allegations that Asia Dairy Industries (HK) Ltd, a subsidiary of the Australian Dairy Corporation which marketed Australian dairy produce throughout south-east Asia, had evaded paying taxes to the Thai Government and violated Australia's international treaty obligations.⁵⁵ On 2 April 1980 and 28 August 1980 the opposition moved that a secret report of the Auditor-General on the activities of Asia Dairy be tabled. While the motions were unsuccessful, portions of the report were leaked to the shadow minister for primary industry who tabled them in the Senate on 19 August 1980 and the matter was the subject of a report by the Senate Committee on Finance and Government Operations in 1981.⁵⁶

⁵² Senate debates, 17 October 1951, pp. 737–41; 24 May 1956, p. 981.

⁵³ Senate debates, 5 October 1967, p. 1266.

⁵⁴ Senate debates, 7 March 1978, pp. 383–6.

⁵⁵ P. N. Grabosky, 'The Asia Dairy case', *Wayward Governance: Illegality and Its Control in the Public Sector*, Australian Institute of Criminology, Canberra, 1989, <http://aic.gov.au/publications/previous%20series/lcj/1-20/wayward/ch12t.aspx>.

⁵⁶ Senate Standing Committee on Finance and Government Operations, *The Australian Dairy Corporation and Its Asian subsidiaries*, AGPS, Canberra, 1981.

From July 1981 the Democrats held the balance of power. With the credo ‘keeping the bastards honest’, the Democrats were able to use their combined voting power to contribute to the continued rise in the use of standing order 358 for the purpose of government accountability.

Conclusion

While government majorities in the Senate had a marked effect on the slump in the numbers of orders for the production of documents after the First World War they cannot fully explain the discontinuation of the practice—even for non-political, informational purposes—after 1943 or the continued low numbers in the 1960s, 70s and 80s.

Certainly some change in the political culture prompted an end to statements from government senators such as that made by the Vice President of the Executive Council, Senator O’Connor, who remarked in 1901 that the ‘Government have no desire to withhold information in any document in their possession’⁵⁷ or Senator Dawson who maintained in 1904, ‘I have absolutely no objection to every document to which I, as Minister, put my signature ... being laid upon the table’.⁵⁸

Some clues may be found in Senator Spooner’s arguments against Senator Wright’s motion in 1960 for the order for return on the Sorell post office in Tasmania. Spooner stated on the one hand that ministerial advices and departmental files should be exempted as a class, thus thwarting the use of the measure for accountability purposes. But he also maintained that the right should only be used ‘in circumstances which justify its use’, such as ‘a matter of major public importance or a set of circumstances in which there was wrong-doing or something of that kind’, thus denying its use in a non-political context to maintain the public record or inform debate or legislation.⁵⁹

Even with the assistance of minor parties and non-government majorities in the Senate, as an accountability measure orders for the production of documents in themselves can be an imperfect tool. It is one thing issuing an order and quite another obtaining the documents. However, orders for the production of documents can be worth moving even when unsuccessful. In Senator Gareth Evans’ words:

It is only by access to these documents that it will be possible ... for an objective view to be reached as to where the merits and the truth lie. If the

⁵⁷ Senate debates, 28 June 1901, p. 1799.

⁵⁸ Senate debates, 15 Sept 1904, p. 4682.

⁵⁹ Senate debates, 12 May 1960, pp. 962–3.

Government has anything to hide, I can understand its continued reluctance to make these documents available. If the Government believes, however, that its Ministers and senior officials have acted throughout reasonably and with a proper sense of responsibility to the public at large, the Government should not hesitate for one second to put these documents in the public domain to enable the truth of that perception to be established once and for all.⁶⁰

The compelling logic of public perception is difficult for any government to ignore.

⁶⁰ Senate debates, 8 September 1982, p. 713.

