ESSAY

A Parliamentary System of Government in a Federal State — The Australian Experience

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As United States Presidents clash more frequently with Congress and as the United States deficit grows larger, proposals arise for modification of our governmental system. This Essay examines the governmental system of Australia, which combines federal and parliamentary elements. Recent developments in Australia's Parliament and High Court provide instructive focal points for this comparative study.

When the United States Constitution was drafted, separation of powers was seen as essential to freedom. Madison said during the ratification campaign: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[1] He referred to "the danger from legislative usurpations, which, by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations."[2] He added: "An *elective despotism* was not the government we fought for. . . ."[3]

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[1] THE FEDERALIST NO. 47, at 336 (J. Madison) (B. Wright ed. 1961).

[2] THE FEDERALIST NO. 48, at 344 (J. Madison) (B. Wright ed. 1961).

[3] *Id.* at 345 (emphasis in original).

Today, however, the separation of government powers has created an increasingly cumbersome governmental system. Creating coherent governmental programs is almost impossible. Legislation results from an elaborate system of compromises within and between the houses of Congress and between Congress and the President. Legislative programs may be carefully planned and introduced into Congress, but typically they emerge after much time with little of their original coherence remaining. For example, in 1985, a President who had achieved a majority of the votes in forty-nine of the fifty states had only a limited ability to have his legislative programs enacted. Even the President's budget proposal was rejected by both houses; the budget bill that was ultimately passed satisfied no one and did not address the major problems of controlling the growth of the nation's debt.[4] Such government by compromise may be inadequate to overcome the major governmental problems that must be solved as we move into the twenty-first century.

Parliamentary systems of government begin to appear attractive.[5] For example, because British Prime Minister Thatcher controls both the administrative and legislative branches of her government, she can advance a budget or a governmental program with the confidence that it will become law within a reasonable time and in substantially the form in which she advances it. If her legislative programs fail to satisfy the public, her party will lose the next election and another prime minister will take over. Recently, prominent United States citizens have begun to see the British scheme of government as more desirable and have spoken publicly about changing the structure of our government to resemble the British parliamentary system.[6]

We in the United States need to understand how parliamentary systems function. We need to know the changes that would be necessary in

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[4] *See* Sacramento Bee, Aug. 2, 1985, at A1, col. 1.

[5] American political scientists were early advocates of the British system of parliamentary government. *See* Epstein, *What Happened to the British Party Model?*, 74 AM. POL. SCI. REV. 9 (1980).

[6] The Committee on the Constitutional System (chaired by Lloyd Cutler, Washington lawyer and former counselor to President Carter; former Treasury Secretary C. Douglas Dillon; and Senator Nancy Landon Kassebaum) has been speaking publicly about changing the structure of the United States government to make it more like the British parliamentary system. For an account of the initial meeting of the Committee, see Flaherty, *Is the U.S. Ready for a Parliament?*, 66 NAT'L L.J., Oct. 10, 1983, at 1. *See also* Cutler, *Party Government Under the American Constitution*, 134 U. PA. L. REV. 25 (1985) (recently published discussion of many characteristics of the United States political system examined in this Essay).

our governmental structure to give our President sufficient power over the Congress to ensure enactment of administration proposals. For this purpose, however, England is not an entirely satisfactory model. Its parliamentary system grew out of a centuries-long process designed to take power from the Crown and vest it in Parliament.[7] It is physically a very small country. More importantly, it does not have a federal system. One of the questions to be answered is whether a parliamentary system and a federal system can co-exist.

Australia provides a better model. Australia was formed by six English colonies coming together to establish a central government largely autonomous from England. The Australian colonies did not want to turn all governmental power over to their new central government; they looked to the United States for a model of a federal system. The colonies enacted a constitution that established the central government and divided powers between that government and the states. They created a court system with jurisdiction to enforce the constitutional division of powers. They provided a Parliament with two houses of almost equal jurisdiction: the house of representatives, its members representing states according to population, and the senate, with an equal number of members from each state. The Australian system enables the prime minister and the ministry to control both the legislative and administrative branches of government. Only the judicial branch was made independent. Australia, then, has faced the problems of operating a parliamentary system of government in a federal state structurally resembling the United States.

This Essay's purpose is to provide a detailed description of the Australian system of government[8] and to use that description as the foundation for a brief discussion of the ramifications of establishing a parliamentary system in the United States. The Essay is divided into three parts. First, the essential elements of parliamentary systems are discussed briefly. Second, the Essay will describe the Australian system,

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[7] Full devolution of power from the Crown to Parliament did not take place until 1841, when Sir Robert Peel formed a government that lacked the confidence of the Queen. But the struggle to arrive at that point extended over centuries. For an interesting account of this struggle, see C. ROBERTS, THE GROWTH OF RESPONSIBLE GOVERNMENT IN STUART ENGLAND (1966).

[8] Two matters of terminology should be mentioned: (1) Australians typically refer to their system of government as a system of responsible government rather than as a parliamentary system. However, this Essay will generally use the latter term. (2) The technical name for the central government in Australia is the Commonwealth of Australia. In this Essay the central government will normally be referred to as the federal government rather than as the Commonwealth.

contrasting it at key points with the United States system. Third, the Essay will examine briefly the changes that would be necessary to convert the United States government into a parliamentary system.

I. Principal Elements of a Parliamentary System

The major portion of this Essay is a fairly detailed description of the Australian system of government. To put that description in context for the reader, this section outlines the key elements of parliamentary systems and contrasts those elements with the United States' system of government. In looking at a parliamentary government in operation it is difficult to know what elements of this system of government are essential to the functioning of the parliamentary structure. A brief view of the elements generally present in parliamentary systems based on the British model should enhance an understanding of how much of the Australian system would need to be copied if we sought to introduce a parliamentary system in the United States.

The key elements of a parliamentary system are the following:

(1) A ceremonial head of government (a king, queen, governor, or president) performs ceremonial duties but has little or no independent governmental power. The government acts in the name of the ceremonial head but the latter acts only as the prime minister directs. England's Queen and Australia's Governor-General are examples of ceremonial heads. In contrast, the President of the United States is the head of the executive branch of government with independent powers and also performs the functions of a ceremonial head of government.

(2) The country is governed by the political party (or coalition of parties) that has a majority of the members of parliament. The key issue in elections is which party should run the government. The emphasis in campaigning is on the personalities of the leaders of the contending parties and the policies they present for governing the country. The principal question facing the voter in a parliamentary election is which party will command a majority. A candidate's individual merits or policies are usually only marginal issues.

The United States is vastly different. The President is selected though a national election in which his policies and the policies of his political party are major issues. But members of Congress are elected separately. Their election has no impact on who will be President, although it may affect the President's ability to govern. Members of Congress tend to be elected on the basis of their individual personalities and their positions on various issues. This structural difference from parliamentary systems has tangible effects. For instance, President Reagan, a

Republican, carried forty-nine of the fifty states in the 1984 election; in the same election, a substantial majority of members of the House of Representatives were elected as Democrats.

(3) Periodic elections are required every so many years (five in England, three in Australia) but may be called earlier. If a prime minister loses control of Parliament and cannot ensure the achievement of key governmental goals, an election will be called to resolve the issue.[9] The prime minister may also call early elections to take advantage of situations that might improve chances of reelection.[10]

In the United States elections occur at definite times. The President is elected for a term of four years. Members of the House are elected for two years and members of the Senate for six years.

(4) The prime minister and the ministers[11] must be members of Parliament and are selected by the party (or coalition of parties) having a majority of members. Typically the party leader is chosen as prime minister and the selection of members of the ministry is performed by procedures established by the governing party.

In the United States, the President is elected and he chooses the members of his cabinet subject to approval by two-thirds of the Senate. Neither the President nor any member of his executive branch may be members of Congress.

(5) The prime minister and the ministers, with the approval of the members of the majority party, perform both administrative and legislative functions. Ministers are heads of government departments. The prime minister and the ministry also control the legislative branch.

The United States system substantially separates administrative and legislative functions. The President's legislative power is limited to vetoing legislation that can then become law only if passed by two-thirds of the membership of each house of Congress. Congress has no direct power over administration but has some indirect powers. Presidential

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[9] A prime minister may also lose control within his own party and be replaced on a party vote without calling for a general election. The new prime minister would still have a majority of the votes in the Parliament.

[10] For example, Prime Minister Thatcher, whose five year term ends in the spring of 1988, is rumored in the press as likely to call for the election in June of 1987 rather than October because unemployment figures are usually lower in the spring than in the fall. Webster, *Thatcher is Advised to Call Poll in June 1987*, The Times (London), Nov. 23, 1985, at 2, col. 8.

[11] Usually the prime minister determines that a portion of the ministers shall serve as members of the cabinet. The cabinet then becomes the key body. For convenience in this Essay, I have used the general term ministry without distinguishing between the cabinet and the ministry.

appointments of Cabinet members and of other key government officials must be approved by a two-thirds vote of the Senate. Congress controls the appropriation of money necessary for the carrying out of executive functions. Congress also uses its committees to investigate and report on administration activities.

(6) The primary function of the Parliament is to enact into law the government's legislative program. Private bills introduced by individual members of Parliament rarely are enacted. The legislative program and the bills that carry it into effect are designed within the governing party. The prime minister and the ministry decide which bills are to be introduced and the form they should take. Ministers must consult sufficiently with other members of the governing majority to ensure votes for passage. Typically, bills pass as introduced; few changes are made as the bills pass through Parliament. The governing party normally decides behind closed doors the legislation it wishes to advance and drafts appropriate bills.

The United States' legislative processes are completely different. Individual members of Congress introduce bills based on ideas coming from a variety of sources. Legislation proposed by the President, like all other legislation, must be introduced by a member of Congress. Congress screens all legislation. Both houses hold committee hearings in which they consider the legislation's merits and often substantially change its language. The bills that Congress ultimately approves come from numerous sources. Even legislation proposed by the President may be rejected and, in any event, suffer substantial revision through the legislative process.

(7) The power of governments to run the legislative process in Parliament is attributable to strong party systems. Members of Parliament are expected to vote to support positions taken by their party. They may have an opportunity to argue against legislation within party discussions but are expected to vote for the legislation when it gets to the floor. Party control over the selection of candidates is an effective method of ensuring party loyalty. A member who votes against a government bill may not be selected as a party candidate for the next election and so will be retired from Parliament.

The United States places no similar restraints on members of Congress. In almost every state the candidates who run under party labels for the House and the Senate are selected by the voters in primary elections. The parties have limited ability to determine who is selected in a primary. Also, there is no mechanism in Congress to ensure party loyalty. Members of a particular party in Congress often express widely differing viewpoints. On almost every issue (other than choosing

the leadership of the house) some members side with the opposing party.

(8) A parliamentary system in a federal state tends to move towards central administration. Members of Parliament affiliated with the governing party can protect local interests only within party consultations. They may not vote in favor of local interests at the expense of party loyalty. Thus, in a parliamentary system, states tend to have few political protections. The parliamentary system has special problems if the federal state contains two houses of Parliament with similar powers whose members are elected at different times. A prime minister is able to control members of his party in one house. The situation is different when the prime minister does not also control the upper house.

The United States is different, of course, because members of Congress are not tightly controlled. Members of Congress may be elected because of positions they take on issues relating to local desires, and they will vote to support those desires even if they must vote against legislation supported by their party. Members of Congress are true legislators, not ratifiers of their party's legislative proposals.

Which of these typical elements of a parliamentary system are essential to its functioning is not clear. However, it is clear that the prime minister and the ministry must have the power to compel enough of the members of their party to vote for legislation to ensure its passage. The ability to introduce a legislative program and have it enacted in the form proposed within a reasonable time requires that Parliament be controlled. The more power Parliament has over the legislative process the less able the prime minister is to get legislative programs enacted. If Parliament is weaker, the prime minister is stronger. Matters of government that are not required to accomplish control may not be essential to a working parliamentary program.

In the next section this Essay will examine the Australian parliamentary system and its impact on Australia's federal system. In the last section the Essay will suggest what changes would be necessary to move the United States usefully toward having a parliamentary component.

II. The Australian Parliamentary System

A. Drafting the Australian Constitution

Australian settlement began in 1788 when a party of sailors, soldiers, and convicts were brought to what is now Sydney.[12] Similar convict

[12] There are, of course, innumerable histories of Australia. For a fascinating account of the early days, emphasizing the impact of distance and isolation, see G. Blainey,

settlements occurred in Tasmania in 1803 and Brisbane in 1824. Victoria, South Australia, and Western Australia were settled by free settlers, although convicts were brought to Western Australia for two decades beginning in 1850. The colonial governments during these early years were severely authoritarian. Gradually, however, the proportion of free settlers increased when the sending of convicts ended in the mid-1800's, thus building pressures for some form of local self-government.[13] By 1860, five colonies, widely scattered and varying in population from about 30,000 in Queensland to over half a million in Victoria, had gained self-government.[14] Adopting the British model, they had managed to secure substantial local autonomy. Their colonial charters formally gave executive power to the Queen, exercised through her representatives, the governors. However, the substance of power was vested in locally selected representatives, requiring that the governors act only on the advice of ministers selected by local assemblies.

The colonies, unlike the American colonies a century earlier, had no major disagreements with Britain. They accepted the supremacy of Parliament and were heavily dependent on Britain, both economically and militarily. Physically isolated, with intercommunication almost wholly by sea, the colonies had less economic and social interaction with one another than they did with England. No major external threats created strong pressures toward unity. As a result, federation did not occur until 1901, climaxing nearly fifty years of discussion and two major constitutional conventions.[15]

THE TYRANNY OF DISTANCE (1966).

[13] Much of the material here on the Australian experience is derived from J. QUICK & R. GARRAN, THE ANNOTATED CONSTITUTION OF THE AUSTRALIAN COMMONWEALTH (1901). This remarkable book was originally printed in 1901. (A reprint was issued in 1976 by Legal Books, Sydney). Quick was a member of the Victoria delegation to the constitutional convention in 1897-98. The authors were able to reflect in detail the conflicts involved in the drafting process and the expectations and intent of the drafters. The first 261 pages of the book provide a broad historical introduction and summarize the drafting process. The remainder of the book (some 640 pages) consists of an elaborate section-by-section annotation of the constitution designed to show the origin and purpose of each section. For a more modern treatment, see J. LA NAUZE, THE MAKING OF THE AUSTRALIAN CONSTITUTION (1972); W. MCMINN, A CONSTITUTIONAL HISTORY OF AUSTRALIA (1979).

[14] Western Australia, with a population of 15,000 in 1860, did not achieve self-government until 1889.

[15] "[A]ustralia was a federation that arose not through any compulsion born of war or foreign domination, but because the people of six colonies with a similar background in race, language, culture, political organization and common heritage came to perceive the advantages of national unity." J. MCMILLAN, G. EVANS & H. STOREY, AUSTRALIA'S CONSTITUTION: TIME FOR CHANGE? 39 (1983).

A convention in 1891 prepared a draft constitution, but the states were not prepared to accept it. Another convention, consisting of delegates elected by the states, met in 1897; it adopted a final draft in early 1898. The citizens voted on the draft but it did not win a sufficient vote to be carried. In January 1899, the premiers of all the states met and agreed upon amendments to the draft. This draft was submitted to the people in all states except Western Australia and was approved in all five voting states.

That constitution, like other such documents in the British dominions, took the form of recommending to the Queen that the constitution be enacted into law by the Imperial Parliament. After several months of negotiations between Australian representatives and British officials, the constitution was passed by the Imperial Parliament and assented to by the Queen on June 13, 1900. The constitution was approved in a July referendum held in Western Australia and took effect January 1, 1901.

In drafting their constitution, the Australians had three major problems to resolve. First, what kind of government should the new nation have: a parliamentary form, borrowed from England, or a separation of powers form like that of the United States? Acceptance of the British model seemed inevitable. Since Australia was not asserting its independence from Britain, it was clear that the best form of government would be one that would be approved in London, that is, one in which the Queen ruled through her representative, the governor-general. In order to ensure maximum local autonomy, however, it was appropriate to vest the real executive power in a prime minister and a cabinet selected by Parliament. The governor-general would be empowered to act only on the advice of a government so selected.

The decision to vest real executive power in a prime minister and cabinet was not spelled out in the constitution. In fact, the constitution explicitly vested the executive power in the Queen, "exercisable by the Governor-General as the Queen's representative."[16] No mention was made of a prime minister or cabinet. However, three provisions were inserted in the constitution that effectively mandated the development of a parliamentary system. The governor-general was given power to dissolve the house of representatives prior to the expiration of its regular three-year term. This facilitated selection of a new government after a predecessor had been defeated in the house.[17] The governor-general was required to appoint an executive council and to exercise most of his

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[16] AUSTL. CONST. § 61.

[17] *Id.* § 28.

powers "in Council," that is, with the council's approval.[18] And finally, no member of the council (no minister of state) was permitted to serve more than three months without becoming a senator or member of the house.[19] The first government in 1901 was established in this manner, with the governor-general appointing a prime minister. The latter organized a cabinet and secured the approval of the first Parliament.

The second major problem was the adoption of a federal system. The colonies did not want to give complete control of the country to a new national government. They wanted their separate governments to continue providing basic governmental services. Fearful of always being outvoted by the relatively populous New South Wales and Victoria, the four smaller states resisted entering into a national government that would give the larger states dominance. It was at this point that the drafters looked to the United States system for a model. Powers of government were to be divided between the nation and the states in a written constitution difficult to amend.[20] The national government would be one of specified powers with all others reserved to the states. A high court was created with jurisdiction to resolve disputes over the meaning of the constitution, but no bill of rights was included.[21] The small-state/large-state dispute was settled by dividing the national parliament into two houses: a house of representatives and a senate. Seats in the house of representatives were allocated to states according to their population. Each state had an equal number of senators. Members of the house and senate were to serve three and six year terms, respectively.

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[18] *Id.* §§ 62, 63.

[19] *Id.* § 64.

[20] Amendments have been particularly difficult. Under § 128 of the constitution, only Parliament (meaning the government of the day) can propose an amendment, which must be ratified within six months by a vote of a majority of the electors voting in a majority of the states. Over the years, out of 38 proposed amendments submitted to the voters, only eight were approved. *See* J. McMILLAN, G. EVANS & H. STOREY, *supra* note 15, at 22-35; HOUSE OF REPRESENTATIVES PRACTICE 26 (J. Pettifer ed. 1981) [hereafter HOUSE PRACTICE]; *Negative Results of the December 1984 Referendum to Amend Constitution*, 59 AUSTL. L.J. 195 (1985).

An Australian Constitutional Convention organized in 1972 has had little success in getting its proposals for amendments put forward by the government and, when put forward, adopted by the voters. For its work on amendment procedures, see AUSTRALIAN CONSTITUTIONAL CONVENTION, CONSTITUTIONAL AMENDMENT SUB-COMMITTEE REPORT TO STANDING COMMITTEE (1984).

[21] The constitution requires acquisition of property by the Commonwealth to be on "just terms" (AUSTL. CONST. § 51(xxxi)); guarantees trial by jury for persons indicted for a Commonwealth offense (*id.* § 80); and guarantees the free exercise of religion (*id.* § 116).

Because the small states wanted equal powers for the upper and lower houses and the large states wanted the lower house to have total power to impose taxes and appropriate revenue, a compromise was reached. Exclusive power to initiate bills of taxation and appropriation was vested in the house. The senate was denied power to amend proposed taxation and appropriation bills but was empowered to reject these bills completely or return them to the house for revision.[22]

However, this was not enough to satisfy the needs of a parliamentary system. The senate's power to defeat legislation could curb a prime minister's ability to win approval of government legislation even when the prime minister's own party held a house majority. Recognizing this, one constitutional convention delegate declared: "No Government could carry on if it needed majorities in both Chambers; and if it were only responsible to one — if one Chamber were to predominate — the whole principle of Federation would be gone."[23]

After much discussion, the convention arrived at a complex solution: if the senate rejects or fails to pass a house-approved bill or passes it with amendments not agreeable to the house, and if, after an interval of three months, the house and the senate are still at odds over the bill, the governor-general may dissolve both houses. The dissolution is followed by an election in which the entire membership of both houses is replaced. These double dissolutions have occurred in 1914, 1951, 1974, 1975 and 1983. If, after the election, the two houses again reach an impasse over the bill, the governor-general may convene a joint sitting of the houses. The bill will be put to a vote, and an absolute majority will determine whether the bill becomes law.[24]

A third problem stemmed from the desire to create free trade among the states. This necessitated transferring the power to impose duties and associated excise taxes to the federal government. These were a major source of colonial revenues, with the larger share going to Western Australia and the lesser to New South Wales, a free trade colony. Overall, about seventy-five percent of state tax revenues came from customs and associated excise taxes on locally produced goods not subject

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[22] *Id.* § 53. It is assumed, however, that the senate should not reject money bills. It has never done so, although in 1975 the senate did defer consideration of the budget for a period long enough to dry up funds, precipitate the dismissal of a prime minister, and secure an election. The general notion appears to be that a government should be forced to take the responsibility for its tax measures and live with the results at the following election.

[23] As summarized in J. QUICK & R. GARRAN, *supra* note 13, at 166.

[24] AUSTL. CONST. § 57. Only one joint sitting has been called, following the 1974 dissolution.

to customs.[25] Initially, the federal government received far more money than it needed, while the states were deprived of the large share they needed to fund their operations. The framers, unable to devise a plan that would secure adequate independent sources of revenue for the states, left to the future the problem of creating a permanent system.

The following constitutional provisions were made:

(1) Upon the establishment of uniform duties of customs, required within two years,[26] the power of the states to impose "duties of custom and excise" was to end and [27] "trade, commerce, and intercourse among the States . . . shall be absolutely free."[28]

(2) For ten years and thereafter until the federal government otherwise provided, at least three-fourths of the federal government's duties of custom and of excise shall be returned to the States.[29]

(3) After five years from the imposition of uniform customs and excise, Parliament might provide for the payment to the states of the surplus revenue of the Commonwealth.[30]

(4) The federal government was given authority to "grant financial assistance to any State on such terms and conditions as the Parliament thinks fit."[31]

Thus, from the very beginning in Australia the states performed most of the governmental services but the federal government collected most of the taxes.

B. Selection and Control of Parliament

Since 1904, Australia has developed a very strong parliamentary system of government. The prime minister and the ministry control both the administrative and legislative branches of government. The Austral-

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[25] *See* R. GILBERT, AUSTRALIAN LOAN COUNCIL IN FEDERAL FISCAL ADJUSTMENTS 12 n.5 (1973). In those days the states earned substantial revenues from business undertakings such as railroads. They also began to use income taxes early: three states had them by 1895 and all six by 1907. *See* K. RYAN, MANUAL OF THE LAW OF INCOME IN AUSTRALIA 1 (E. Hayek 2d ed. 1968).

[26] AUSTL. CONST. § 88.

[27] *Id.* § 90.

[28] *Id.* § 92.

[29] *Id.* § 87.

[30] *Id.* § 94. The Commonwealth government prevented this section from having any effect by passing statutes beginning in 1906-07 that place surplus current revenue into trust funds against future expenses. In 1908, the High Court upheld this apparent violation of the duty to give surplus funds back to the states. New South Wales v. Commonwealth, 7 C.L.R. 179 (Austl. 1908).

[31] AUSTL. CONST. § 96.

ian Parliament is a model of planning and efficiency. Only legislation introduced by the government is enacted into law. Bills introduced by private members are rare and are almost never passed. To understand this smoothly running system, it is necessary to examine Australia's political parties and electoral processes.

1. Political Parties

Highly disciplined political parties are the key to a successful parliamentary system.[32] Party leadership must be able to rely on party members in parliament to vote as instructed. A more disciplined party allows less opportunity for argument over enacting the party's program into legislation.

Political parties run the government in Australia.[33] Governmental decisions are made within the party leadership and the legislature is a place in which legislation is enacted but not formulated. The weaker the legislature is (the more it is controlled by the parties) the easier it is for the leaders of the government to get their legislative program enacted. For several decades the power in the national government has alternated, vesting either in the Australian Labor Party (ALP) or a coalition of the the Liberal Party and the National Party of Australia (LP/NPA). At the time of this writing, ALP controls the national government and four of the six state governments. LP/NPA has run the national government for all but seven years since 1949. Occasionally third parties have emerged. Some have had substantial influence in the senate but almost none in the house. Since 1950, only one house member was not a member of ALP or LP/NPA.

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[32] Many books have been written about the parties and their role in Australia's government. A few recent ones are illustrative. D. JAENSCH, THE AUSTRALIAN PARTY SYSTEM (1983); J. JUPP, PARTY POLITICS — AUSTRALIA 1966-81 (1982); LABOR — DIRECTIONS FOR THE EIGHTIES (J. North & P. Weller eds. 1980); MACHINE POLITICS IN THE AUSTRALIAN LABOR PARTY (A. Parkin & J. Warhurst eds. 1983).

[33] [F]or Australia, parties and the party system are not just among the most important, they are *the* critical components in the polity. There can be no argument about the ubiquity, pervasiveness and centrality of party in Australia. The forms, processes and content of politics — executive, parliament, pressure groups, bureaucracy, issues and policy-making — are imbued with the influence of party, party rhetoric, party policy and party doctrine. Government is party government. Elections are essentially party contests, and the mechanics of electoral systems are determined by party policies and party advantages. Legislatures are party chambers. Legislators are overwhelmingly party members. The majority of electors follow their party identification. Politics in Australia are party politics.

D. JAENSCH, *supra* note 32, at 9-10.

Australian law treats political parties as private rather than public entities. Their internal rules, including those regulating party candidates for office, are enforced only within the party. The High Court of Australia refuses to intervene.[34] In the United States, by contrast, party candidates are selected in publicly run primary elections.

Unlike political parties in the United States, which are large and loosely organized, the Australian parties are fairly small and tightly disciplined. Party members in Australia pay dues and can be expelled for failing to support party policies and rules, although they are permitted to criticize and seek to have policies changed within the context of the party.

Approximately 9,000,000 of Australia's 15,500,000 citizens are registered voters.[35] In 1984, ALP claimed 57,000 members.[36] In 1973, Liberal Party membership was an estimated 100,000 and the National Party (then called Country Party) had about 80,000 members.[37] Party membership probably does not exceed two percent of the at large population and is less than five percent of the voting population.[38]

The parties are organized similarly. Members join local branches; the branches elect delegates to a state conference which, with an executive branch, runs the state party, and the state party sends delegates to a national conference. An equal number of delegates from each state represent the Liberal and National parties, but, since 1983, ALP has allocated half its national conference seats to the states in ratio to population. ALP also differs from other parties in that about sixty percent of its members are designated by affiliated labor unions and come into the party at the state level. The unions also provide most of the party's financial support.[39] The national conferences meet periodically and are the central power of the party, making policy and having the power to

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[34] Cameron v. Hogan, 51 C.L.R. 358 (Austl. 1934). The plaintiff contended that the party violated its rules in refusing to select him as a party candidate and in expelling him from the party. The court refused to intervene.

[35] D. AITKIN, STABILITY AND CHANGE IN AUSTRALIAN POLITICS 5 (2d ed. 1982).

[36] This membership figure was announced in September 1984, as the Labor Party launched a recruitment drive for new members. AUSTRALIAN INFORMATION SERVICE, AUSTRALIA NEWS, Sept. 13, 1984, at 8.

[37] J. JUPP, *supra* note 32, at 174 n.21.

[38] Few identifiers and supporters of Australian parties are members of the parties. While three-quarters of the adult Australian population identify with one or other of the major parties, and even more offer regular electoral support, less than five per cent of adults are party *members*. And, as any party organizer can attest, not all members of parties are activists.

D. JAENSCH, *supra* note 32, at 108 (emphasis in original).

[39] *See id.* at 116-17.

dissolve and reorganize local branches. State conferences run state elections without involvement by the national conference.[40]

To ensure support for their positions, all parties discipline their members in Parliament. The latter are expected to vote for party-approved bills; failure to do so usually means not being certified as a party candidate in the next election. ALP even requires its Parliamentarians to sign a pledge to follow all party policies.[41] This extreme discipline tends to break down, however. When the ALP is in power, the tensions build up between the practicalities of governing and the party policies adopted by those outside Parliament.

2. Elections

The 148 members of the house of representatives currently are allocated as follows: New South Wales, 51; Victoria, 39; Queensland, 24; South Australia, 13; Western Australia, 13; Tasmania, 5; Australian Capital Territory, 2; and Northern Territory, 1. Election of members, for three year terms, is from single-member districts substantially equal in population. The party or party coalition in majority installs the prime minister and ministry and runs the government. Election of house members, then, is the key to the parliamentary system.[42]

Australian election procedures are quite liberal.[43] For years it has had full adult suffrage, extending more recently to eighteen year olds. Voting is by secret ballot and is compulsory; fines may be imposed for failure to vote. About ninety-five percent of those eligible to vote do so, although some may cast informal ballots that cannot be counted.[44]

Voting for the house of representatives is preferential. Each party has a candidate, and voters are required to list on their ballots all candidates in order of preference. If no candidate gets a majority of first preference ballots, the candidate with the least votes is excluded and

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[40] For a detailed description of the parties and their organization, see L. CRISP, AUSTRALIAN NATIONAL GOVERNMENT 159-265 (1978); D. JAENSCH, *supra* note 32, at 112-35; J. JUPP, *supra* note 32; MACHINE POLITICS IN THE AUSTRALIAN LABOR PARTY, *supra* note 32.

[41] *See* L. CRISP, *supra* note 40, at 195-98; D. JAENSCH, *supra* note 32, at 121-24.

[42] For detailed accounts of two Australian elections, see AUSTRALIA AT THE POLLS — THE NATIONAL ELECTIONS OF 1975 (H. Penniman ed. 1977) [hereafter AUSTRALIA AT THE POLLS]; THE AUSTRALIAN NATIONAL ELECTIONS OF 1977 (H. Penniman ed. 1979).

[43] *See* J. MCMILLAN, G. EVANS & H. STOREY, *supra* note 15, at 246; Epstein, *The Australian Political System*, in AUSTRALIA AT THE POLLS, *supra* note 42, at 27-28.

[44] For a discussion of compulsory voting and its impact on the electoral system, see D. JAENSCH, *supra* note 32, at 98.

that candidate's votes are allocated in accordance with the second preference count. This procedure is repeated until one candidate has a majority. Although only candidates' names, with no indication of party affiliation, are listed on the ballot, political parties print "how to vote" cards, which they distribute at the polls.

The parties control the process of nominating candidates. Each party has its own system for selecting its candidates. The selection system is important because approximately sixty percent of those nominated are elected. Usually selection is made by a committee consisting of approximately 100 party members from the district and state levels.[45] The party's control over the selection process is the key to party discipline.[46]

This selection process is markedly different from the primary election system in the United States. Australia's system of campaigning and voting also differs from the United States system. In Australia the focus in campaigns is not upon local issues and the particular viewpoints of candidates. The focus, instead, is upon which party shall run the government and which party leader will be prime minister. Voters are asked to vote Labor or Liberal, not because of the particular viewpoints of individual candidates but because the candidates will exercise their one significant vote by electing the party leader as prime minister. The personality and the particular views of the candidate may be important in a district where the election is closely fought, but otherwise they are of minor concern. In essence, the election is like ours for the President in that the real issue is the selection of the leader. It is unlike ours in that there is no election in which individual viewpoints count because there is no separation between legislation and administration.

After the election of the house, the governor-general summons the majority party leader and commissions the leader to form a government. The leader later submits a list of ministers to the governor-general, who then administers the ministers' oaths of office. In all parties the incumbent prime minister or the newly elected leader has been elected prime minister by all members of Parliament who belong to the same party. In the Liberal Party, that leader, when he becomes prime minister, can choose ministers and the positions they will hold. In the

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[45] ALP candidates are required to sign a pledge "on all occasions to do my utmost to ensure the carrying out of the principles embodied in the Labour Platform, and on all such questions, especially on questions affecting the fate of a Government, to vote as a majority of the Labour Party may decide in a caucus meeting. . . ." L. CRISP, *supra* note 40, at 192. *See also* D. SOLOMON, INSIDE THE AUSTRALIAN PARLIAMENT 40 (1978).

[46] On preselection, see L. CRISP, *supra* note 40, at 149-53; D. JAENSCH, *supra* note 32, at 123-24; Epstein, *supra* note 43, at 25-27.

ALP, the party members in Parliament (the caucus) elect which members shall hold rank as ministers. The only discretion the prime minister has is in determining which person on the list will hold which position.[47]

The Australian senate differs in a number of respects.[48] Terms of office are normally for six years beginning on July 1, with half of the members being elected every three years. The election can be at any time within the year prior to the beginning of the senate term. The constitution provides that senate elections are to be called by the governor of each state, but in practice the governor-general (on the prime minister's recommendation) invites governors to call the election for a specific date; this avoids elections on separate dates and correlates senate and house elections whenever possible. Occasionally the schedule works out so that senate and house elections cannot be at the same time. The only deviation from this pattern occurs if there is a double dissolution, at which time all senate seats are voted on at the same time as the house seats, with all of the elected senators having a term beginning on the July 1 prior to the election, half for a three-year term and half for a six-year term.

Prior to 1984 each state had ten senate members, with five elected each time. Now that number has been increased to twelve, with six being elected each time. The Northern Territory and the Australian Capital Territory each have two senators.

When the constitution was written, it was assumed that the senate would represent the states and give the smaller states the protection they sought. However, the senate has never operated that way but instead has always acted on party lines. Party structure is built into the electoral system. The elections are conducted under a preferential voting system with ballots counted under a complicated proportional representative system.[49] Each party has a state committee (usually consisting of 100 members), which selects six or seven people to run on the party ticket and decides the order in which the candidates should be ranked in voting. Thus, the voter receives a ballot with a large number of names, set up in groups as requested but with no party designation, and must rank them all. Again, the party how to vote cards are

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[47] *See* L. CRISP, *supra* note 40, at 357-74.

[48] *See id.*, ch. 11; J. MCMILLAN, G. EVANS & H. STOREY, *supra* note 15, ch. 11; Pearce, *The Legislative Power of the Senate*, in COMMENTARIES ON THE AUSTRALIAN CONSTITUTION 119 (L. Zines ed. 1977).

[49] For descriptions of this system, see AUSTRALIA AT THE POLLS, *supra* note 42, at 337-49; M. MACKERRAS, ELECTIONS 1980, at 333-35 (1980).

essential.

Prior to 1984, when five persons were chosen in each election, the candidates who were designated either number one or number two by the respective major parties were always elected. A person pre-selected (nominated) and given the first or second ranking knew that the vote of the pre-selection committee was the effective election. Because each major party's two top candidates always won, the fifth seat was the only one in serious contest in the election. In such a three-way contest a minor party had a chance to win.

This pattern may be significantly changed by a 1983 statute that increased the number of senators from ten to twelve in each state. The government wanted to increase the size of the house. Because of a constitutional provision making the senate one half the size of the house,[50] the government had to increase the size of the senate as well. This change may limit the ability of third parties to elect candidates. Under the five-seat system a party had to gain fifty percent of the vote to secure election for three of the five seats. A third party candidate getting approximately ten percent of the vote might have the most votes of the three candidates seeking the fifth seat and secure it on distribution of preferences. Under the new situation, however, with six seats, a party can win three seats by attaining forty-three percent of the votes. One can expect the elections now to give three seats to each major party in any state in which the major parties are closely matched. An independent party could receive ten to twelve percent of the vote but have no chance at a seat if each of the major parties secured forty-three percent or more. Minority parties, then, will need to win more votes (approximately fourteen percent of the first preference votes) in order to be elected.[51]

The major emphasis in senate elections, as in house elections, is on party control of the senate. The party in power seeks to control the senate, while the opposition seeks power for itself. Elections for the senate do not affect who is to run the government; that is solely a function of house elections. However, senate members may be selected to be ministers. If the party in power does not control the senate it will have

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[50] AUSTL. CONST. § 24.

[51] The figures are taken from Farmer, *Oh No! The Early Election Disease Infects Canberra Once Again*, THE BULLETIN, Nov. 9, 1985, at 26. Farmer suggests that in order to secure the re-election of enough of its members to have the controlling force in the senate, the Australian Democrats may need to exercise their votes to delay or defeat the budget in order to ensure a double dissolution. In an election for 12 senators, only 7.7% of the first preference votes will ensure election of a senator.

more difficulty in securing passage of its program.

C. Administration

This Essay principally focuses on the operation of a parliamentary system in the legislative process. This section briefly discusses the system's administrative structure.

The administrative structure of Australia is in a general sense similar to that of Great Britain.[52] Government departments are headed by career civil servants. These officials are required by law to be nonpartisan; they must serve any party in power and take policy direction from a minister in the current government. Ministers are the responsible heads of departments. Policy formulation is vested in the ministry with the duty imposed on civil servants to carry it out.

Ministers are not, however, full time administrators of departments as they are in the United States.[53] Typically, ministers use their offices in Parliament House or its associated buildings rather than those provided in their departments. Much of the ministers' time is taken up in cabinet or ministerial meetings and in meetings of Parliament. Furthermore, many ministers spend considerable portions of time in their home states when Parliament is not in session. The civil service heads of departments, then, have considerable authority. The ministers receive a large portion of the legislation that they propose from the administrative departments.

D. Legislation

The Australian Parliament works on a totally different basis than the Congress of the United States.[54] As discussed above, only legislation introduced by ministers generally is enacted into law. From 1901 to 1980, only eighty private members' bills were introduced and only nine

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[52] *See* D. BUTLER, THE CANBERRA MODEL 27-35 (1973); L. CRISP, *supra* note 40, ch. 15; S. ENCEL, CABINET GOVERNMENT IN AUSTRALIA (2d ed. 1974); M. PAINTER & B. CAREY, POLITICS BETWEEN DEPARTMENTS — THE FRAGMENTATION OF EXECUTIVE CONTROL IN AUSTRALIAN GOVERNMENT (1979); R. SPANN, GOVERNMENT ADMINISTRATION IN AUSTRALIA (1979); C. WINTERTON, PARLIAMENT, THE EXECUTIVE & THE GOVERNOR-GENERAL (1983).

[53] *See* D. BUTLER, *supra* note 52, at 28; D. SOLOMON, *supra* note 45, at 16. Maintaining parliamentary effort and administering departments places heavy burdens on members of the ministry.

[54] *See generally* DEPARTMENT OF THE PRIME MINISTER & CABINET, CABINET HANDBOOK (1983) [hereafter CABINET HANDBOOK]; DEPARTMENT OF THE PRIME MINISTER & CABINET, LEGISLATION HANDBOOK (1983) [hereafter LEGISLATION HANDBOOK]; HOUSE PRACTICE, *supra* note 20; D. SOLOMON, *supra* note 45.

passed.[55] In contrast, virtually all legislation introduced by ministers is enacted into law.

This control over the legislative process is possible because the governing party can insist that its members always vote for government sponsored legislation. Controversy focuses on what kind of legislation should be enacted, not on the formal procedures of enactment. The government decides what legislation it needs to secure and calls Parliament to sit for the minimum amount of time necessary to accomplish that business. Parliament is run by the prime minister and the cabinet; the crucial decisions are made in cabinet, with the concurrence of the members of the governing party from both houses, rather than in Parliament.[56]

The government ministry is divided into two groups. At present there are twenty-seven ministers, of which seventeen comprise the cabinet. The cabinet rules the legislative program; ministers submit proposed legislation to the cabinet. These submissions are examined by functional cabinet committees and by the cabinet itself. If the submission is approved, the minister prepares drafting instructions, which are sent to the parliamentary counsel (a government officer) who drafts the bill and associated speeches in accordance with these instructions. The committee then examines the bill to ensure that it conforms with cabinet authority. The minister submits the bill to caucus[57] (or perhaps to a caucus committee and then to caucus) for approval. The Parliamentary Business Committee, a cabinet committee that controls the business of Parliament and decides which bills can be introduced, then places the bill on the calendar.[58]

Once a bill has been approved for passage, it is introduced by the minister and presumably will be enacted into law. Occasionally, a bill will be introduced and then offered to the public for comment. Later, the bill may be revised within the cabinet to reflect this public comment.

Note how this system works. The cabinet is the crucial actor in the legislative process. Members of the governing party who are not in the

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[55] HOUSE PRACTICE, *supra* note 20, at 523.

[56] *See* D. JAENSCH, *supra* note 32, at 123-24, 213-15; D. SOLOMON, *supra* note 45, at 38-44. For an account of the slightly looser situation in Britain, see Wall St. J., Aug. 5, 1980, at 1, col. 1. Occasionally, the cabinet will give members a "free vote" on an issue for the decision of which the government does not want to assume responsibility.

[57] "Caucus" is used here to include all members of the governing party from both houses of Parliament.

[58] *See generally* CABINET HANDBOOK, *supra* note 54; LEGISLATION HANDBOOK, *supra* note 54.

ministry have some opportunity to consider legislation when it is shown to the caucus prior to its introduction. These caucus meetings are also confidential and are the one formal opportunity for individual members of the Parliament (of the governing party only) to express their individual views and seek changes in proposed bills. With respect to those few bills on which there is substantial division within the party, the caucus meetings may cause the cabinet to pull back or amend bills they have proposed. But on the whole it does not appear that legislation is given careful review at this level. The ALP caucus, however, is more likely to take positions against the prime minister and cabinet than has been true when the LP/NPA coalition is in power.[59]

More broadly, no organized public forum exists for individuals and groups to support or oppose legislation or raise questions as to its drafting. Ideas for legislation, of course, come from many sources. Some legislation will have been promised in the policy speech with which the party leader opened the campaigning. Much legislation will be suggested by the public service: government agencies see a need for legislation and persuade their minister to garner approval for it. But ideas also come from many other sources. In a 1984 statement on Budget Reform the government said:

> [A]dvice and opinion are available to the Government from a wide range of sources: parliamentarians, trade unions, industries, commercial and professional groups, the media, academic institutes and a great variety of other special interest groups with legitimate interest in what the government does in (and out of) the budget each year. Individual Ministers of the Government meet and consult frequently with representatives and members of these various groups.[60]

But these consultations are mainly confidential. There are no public hearings at which statements are made and records kept. Occasionally, major issues will be dealt with more publicly. In 1985, consideration of major changes to the tax system led to the issuance of a white paper by the government explaining its program. The government held a "tax summit" attended by invited groups to discuss the tax problems.[61] All

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[59] Occasionally, an ALP minister may appeal to the caucus to have a cabinet decision overturned, but this is regarded as both unusual and dangerous. *See* Farmer, *Hawke Faces an Outbreak of the Whitlam Disease*, THE BULLETIN, Nov. 5, 1985, at 26.

[60] BUDGET REFORM 8 (Austl. Gov't Pub. Serv. 1984).

[61] The summit did not seem to contribute to governmental policy. It appears that the prime minister negotiated privately with union leaders and finally agreed with them to make much smaller changes than those presented in the previous white paper. The summit then wrangled for a day less than planned. Also, the program to be presented

of these meetings and discussions, however, lead to a confidential cabinet process in which final plans for legislation are laid.

Once this confidential process within the party has been completed and the legislation introduced in Parliament, the major decisions have been made. All governing party members (no matter what private objections they may have to a bill) are obligated to vote for the bill. Any significant failure to approve government legislation is likely to result in a member's not being allowed to return to Parliament at the next election. At most, party members may be able to indicate their own positions during the time set aside for questions.

Only the senate keeps this parliamentary system from being perfect for the prevailing party. The senate is the wild card in the Australian deck. It has not operated substantially as a states' house. Senators vote for or against legislation according to party desire, rather than, for example, to advance the interest of small states over large states. Thus, the senate, like the house, is a party house.[62] But because the senate is elected often at different times and for different terms, it may not be under the control of the party controlling the house.

When the party controlling the house also has a majority in the senate, the senate tends to be a mere echo of the house, dutifully enacting government bills into law. The legislative activity of 1977 provides a good example. The LP/NPA coalition controlled both houses. All bills passed by the house were approved by the senate and the few government bills introduced in the senate (because the relevant minister was a senator) were adopted by the house.[63] The government's control extended to the use of the "guillotine" to speed legislation. One example was spectacular. Concerned over a postal strike, the government on a Thursday morning showed to its party members legislation giving the government power to discharge striking public employees. Thursday afternoon the bill was introduced into the house; it was adopted that same evening. The senate was given six hours for debate and the bill was passed the next day without discussion by any government senators.[64]

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by the government was left obscure. *See* THE BULLETIN, July 23, 1985, at 28-32. For a view of a Liberal Party member of Parliament, see Coleman, *Aussie Tax Reformer's Numbers Get Crunched*, Wall St. J., July 22, 1985, at 19.

[62] For general discussion of the senate, see L. CRISP, *supra* note 40, at 324-49; J. MCMILLAN, G. EVANS & H. STOREY, *supra* note 15, at 226-45; J. ODGERS, AUSTRALIAN SENATE PRACTICE (5th ed. 1976); D. SOLOMON, *supra* note 45, at 80-96.

[63] AUSTRALIA HOUSE OF REPRESENTATIVES, WORK OF THE SESSION, 30TH PARLIAMENT, 2D SESS. 1 (Nov. 18, 1977).

[64] This emergency bill was not proclaimed into law for a variety of reasons. The

The situation in the senate is quite different when the opposing party has the power to refuse passage to government bills. If the senate rejects a substantial number of bills, the government must take a double dissolution to get its legislation enacted. The senate may even delay passage of the budget long enough to force an election to enable the government to function. In 1974, a double dissolution was forced when the party controlling the senate refused to enact six major bills. After the election, the senate still refused to pass the bills; the bills were then enacted in a joint meeting of house and senate.[65] The senate continued to defeat government bills (approximately fifty from mid-1974 until fall 1975), but the government did not seek another double dissolution. The senate then delayed passing the budget, leading the governor-general (exercising disputed authority) to dismiss the prime minister and his party, calling on the minority party to form a temporary government and declare a double dissolution.[66] Obviously, in this kind of situation the senate has a good deal of power, but the power is exercised as part of the continuing fight between the major parties or to bring about elections at a favorable time.

The third role for the senate is significant when neither major party or coalition has a majority of seats and a third party possesses the votes either to pass or defeat government legislation. At present, for example, the Labor Party, which controls the house, has thirty-four members in the senate. The LP/NPA parties have thirty-three members. The Australian Democrats have seven seats, the Nuclear Disarmament Party has one seat, and one seat is independent.[67] In this situation the seven seats held by the Australian Democrats are enough to give a majority to

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entire episode is described in AUSTRALIA, PARLIAMENTARY DEBATES, HOUSE OF REPRESENTATIVES WEEKLY HANSARD 427-67 (Aug. 18, 1977); AUSTRALIA, PARLIAMENTARY DEBATES, SENATE WEEKLY HANSARD 325-94 (Aug. 18, 19, 1977).

[65] For an explanation of the details, see HOUSE PRACTICE, *supra* note 20, at 50-53, 68-71.

[66] *Id.* at 53-68. This episode gave rise to a major debate in Australia over the role of the governor-general and whether it was exceeded in this case. *See, e.g.*, L. CRISP, *supra* note 40, at 410-15; Howard & Saunders, *The Blocking of the Budget and Dismissal of the Government*, in LABOR AND THE CONSTITUTION 1972-75, at 251 (G. Evans ed. 1977); *See also* P. KELLY, THE UNMAKING OF GOUGH (1976); J. KERR, A MATTER OF JUDGMENT (1978); L. OAKES, CRASH THROUGH OR CRASH: THE UNMAKING OF AN AUSTRALIAN PRIME MINISTER (1975); G. SAWER, FEDERATION UNDER STRAIN (1977); D. SOLOMON, *supra* note 45, at 168-73; G. WHITLAM, THE TRUTH OF THE MATTER (1979); Zines, *The Double Dissolutions and Joint Sitting*, in LABOR AND THE CONSTITUTION 1972-75, *supra*, at 217.

[67] The Parliament of the Commonwealth of Australia, List of Senators (Feb. 21, 1985).

either the government or the opposition. Such a minority party may cast its votes against the government in order to provoke a double dissolution; this is precisely what happened in 1983.[68] Conversely, the minority party may be able to force the government to accept amendments in order to get its bills passed. Thus, in 1984 six bills passed by the house were withdrawn by the senate; six bills passed by the house were negatived in the senate; twelve bills were amended in the senate and the house agreed to the amendments; and with one bill, the senate requested an amendment, which the house granted.[69] More spectacularly, in June, 1985, the house had adjourned ahead of the senate. In the senate, the Australian Democrats insisted upon amendments to a bill designed to tighten eligibility requirements for government aid to ex-servicemen. The government then called the house back for a special session (costing about $15,000) with a time limit of one hour to approve the amendments so the bill could become law.[70]

Perhaps a more interesting result when neither major party controls the senate is that the senate may begin to have effect in the legislative process.[71] The senate has developed a committee system under which bills may be given limited examination. Through its Estimates Committees, the senate is increasingly active in supervising the expenditure of public funds and supervising public administration generally. If the present situation of a third party holding the balance of power continues, the senate could assert even more independence. The senate's newly independent role would make it more difficult for the governing party to secure passage of its legislation without substantive review. However, the increased size of the new senate may make it more difficult for third parties who cannot control large segments of votes to elect members. If that happens, the senate again will be either an echo of the house (when the government controls both houses) or an element in

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[68] This series of events resulted in the Labor Party winning and taking over the government.

[69] AUSTRALIA HOUSE OF REPRESENTATIVES, WORK OF THE SESSION, 33RD PARLIAMENT, 1ST SESS. 2 (Nov. 5, 1984).

[70] *See* THE BULLETIN, June 11, 1985, at 24, 48.

[71] Some senators actively seek to expand the role of the senate to give it the power to undertake genuine review of legislation sent to it by the house. *See, e.g.*, two speeches by Senator Alan Missen, Victoria: *The Role of the Senate*, speech to the Victorian Association of Social Studies Teachers (Apr. 1984), and *The Decline of Parliamentary Government in Australia*, speech to New South Wales Young Liberal Council (July 1982). For a discussion of the development of committees in the senate, see D. SOLOMON, *supra* note 45, at 80-87. For a brief description of committees, see the pamphlet AUSTRALIAN SENATE, SENATE COMMITTEES (1982).

party competition and timing of elections (when the government does not control the senate).

In summary, then, Parliament in Australia is a legislative branch designed to enact the government's program into law.[72] The government, consisting of the prime minister and cabinet, determines both the amount of time the legislature sits and the legislation it considers. The government does not want long parliamentary sessions. Because ministers must be present to participate, long sessions are burdensome, leaving little time during sessions of Parliament for ministers to conduct the government's administrative affairs. The government thus schedules Parliament to sit twice a year — for roughly thirty-two days from March to June and another thirty-two days from August to November. Typically, the sessions begin in mid-afternoon and continue well into the evening, sometimes as late as two or three a.m. Normally, Parliament meets Tuesday, Wednesday, and Thursday. Parliamentarians spend most of their time at home where they engage in constituent service and in various public appearances.[73]

The prime minister and the ministry both administer the national government and make the crucial decisions about what kind of legislation should be enacted. They must pay some attention to the views of their own party members in Parliament, but their major concern is to pass the kind of legislation that will assist them in getting re-elected. Thus, the crucial legislative decisions are made before the bills are introduced into Parliament. The parliamentary process merely authenticates the decisions made within the governing party. In the words of a parliamentary officer on the staff of the Australian senate, Parliament is not a "real legislature" but "a debating panel appended to the ministry."[74]

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[72] In the parliamentary, as in the electoral aspects of political representation, the overriding theme seems to be government of the people, by the party, for the party. . . .

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> The effect of party discipline has been a virtual destruction of parliament as an institution, and of parliamentary democracy as a process. . . . The debates, tactics and procedures which occur in the parliament are adversary not collegial, confrontational not discussive. It is *party* confrontation — automatic, blind, occasionally senseless confrontation, regardless of the nature, purpose or importance of the issue.

D. JAENSCH, *supra* note 32, at 213-15 (emphasis in original).

[73] *See* HOUSE PRACTICE, *supra* note 20, at 265, 267; D. SOLOMON, *supra* note 45, at 18-21. *See also* D. BUTLER, *supra* note 52, at 28-29 (noting that in England Parliament meets five days a week for eight months).

[74] Evans, *Party Government Versus Constitutional Government*, 56 AUSTL. Q. 265,

E. The Federal System

Australia's federal system is founded on the same principles as that of the United States but differs in many ways.[75] Australia still consists of the original six states and the territory that it had at federation. The states vary widely in population, land area, and natural resources. New South Wales and Victoria have sixty-one percent of the population. Western Australia has thirty-three percent of the area but less than nine percent of the population. Over forty-seven percent of the population of Australia lives in Sydney, Melbourne, and Brisbane.[76]

Each state has its own form of parliamentary system with a governor

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276 (1984). Harry Evans currently is Principal Parliamentary Procedure Officer in the Australian senate.

[75] For a general view of Australia's federal system, see J. HOLMES & C. SHARMAN, THE AUSTRALIAN FEDERAL SYSTEM (1977). For a view suggesting that the states have more power than commonly thought, see Sharman, *Fraser, the States and Federalism*, in AUSTRALIAN FEDERALISM: FUTURE TENSE 188 (A. Patience & J. Scott eds. 1983); Sharman, *The Commonwealth, the States and Federalism*, in GOVERNMENT POLITICS AND POWER IN AUSTRALIA 108 (D. Woodward, A. Parkin & J. Summers 3d ed. 1985).

For strong views supporting increased federal power, see the writings of the Labor prime minister, 1972-75: E. WHITLAM, ON AUSTRALIA'S CONSTITUTION (1977); Whitlam, *The Cost of Federalism*, in AUSTRALIAN FEDERALISM: FUTURE TENSE, *supra*, at 28. For arguments in favor of state power by present or former state Premiers, see Bjelke-Petersen, *Australian Federalism: A Queensland View*, in AUSTRALIAN FEDERALISM: FUTURE TENSE, *supra*, at 63; Burke, *Federalism After the Franklin*, 56 AUSTL. Q. 4 (1984). *See also* Hamer, *Australian Federalism: A View from Victoria*, in AUSTRALIAN FEDERALISM: FUTURE TENSE, *supra*, at 49; Samuels, *The End of Federalism*, 56 AUSTL. Q. 17 (1984).

For a useful collection of Australian views in an American periodical, see *Federalism in Australia: Current Trends*, 7 PUBLIUS 3-52 (No. 3, 1977).

[76] Australia has six states, the Australian Capital Territory (their version of the District of Columbia), and a Northern Territory. The table below shows certain characteristics of the states.

State	Capital City	Population (1983)	Area (square km)
New South Wales	Sydney	5,360,400	801,600
Victoria	Melbourne	4,037,600	227,600
Queensland	Brisbane	2,471,600	1,727,200
South Australia	Adelaide	1,341,500	2,525,500
Western Australia	Perth	1,364,500	984,000
Tasmania	Hobart	432,600	67,800
ACT	Canberra	236,600	2,400
Northern Territory	Darwin	133,900	1,346,200

AUSTRALIAN BUREAU OF STATISTICS, POCKET YEAR BOOK AUSTRALIA 1, 10 (1984).

appointed by the Queen on recommendation of the state government.[77] A premier and the ministry both administer the government and control the local legislatures. State governments and local governments provide most governmental services. In 1981, the state and local governments made final consumption expenditures of $A 16,690,000, while the federal government's final consumption expenditures totalled only $A 8,710,000. But in the same year state and local taxes were only $A 8,925,000 while federal taxes were $A 37,990,000.[78]

In a formal sense the state and federal governments are quite independent of each other. Relatively few people who are in the state parliaments move on to become members of the federal Parliament. Excluding the two instances mentioned below, the federal and state governments exist without any formal means of intercommunication. State governments may be of the same political party as the federal government, in which case the two governments have informal relations, or of a different party, in which case informal relationships are rare.

The two exceptions are the Premiers' Conference[79] and the Loan Council.[80] Federal and state premiers have held conference sessions since the beginning of the federal system. Since the 1920's, however, the federal government has called an annual Premiers' Conference. The prime minister presides over the conference, which is held in Parliament House in Canberra. This meeting permits premiers to talk directly with the prime minister about governmental problems, but its main purpose has been to provide the prime minister with an occasion to tell the premiers what financial aid they will receive in the next federal budget. The Loan Council, which meets at the time of the Premiers' Conference, performs more substantive functions. Composed of the prime minister, the premiers, and their treasurers, this confer-

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[77] *See* R. LUMB, THE CONSTITUTIONS OF THE AUSTRALIAN STATES 70-80 (4th ed. 1977).

[78] AUSTRALIAN BUREAU OF STATISTICS, *supra* note 76, at 88, 89.

[79] *See generally* J. HOLMES & C. SHARMAN, *supra* note 75, ch. 5; Sharman, *The Premiers' Conference — An Essay in Federal State Interaction*, Dept. of Pol. Sci., Research School of Social Sciences, Australian National University (Occasional Paper No. 13, 1977).

[80] *See generally* ADVISORY COUNCIL FOR INTER-GOVERNMENT RELATIONS, THE AUSTRALIAN LOAN COUNCIL AND INTERGOVERNMENTAL RELATIONS (1982); R. GILBERT, THE AUSTRALIAN LOAN COUNCIL IN FEDERAL FISCAL ADJUSTMENTS, 1890-1965 (1973); R. MENZIES, CENTRAL POWER IN THE AUSTRALIAN COMMONWEALTH ch. 7 (1967); Mathews, *The Australian Loan Council: Co-ordination of Public Debt Policies in a Federation*, Centre for Research on Federal Financial Relations, Australian National University (Reprint Series No. 62, 1984).

ence decides the amount of loans to be floated during the year and how these loans will be distributed.

Aside from these two institutions, there are no recognized channels of communication between the states and the federal government. Moreover, the states have no formal role in the federal legislative process.

In examining issues of federalism, this Essay first considers the financial relationship between the states and the federal government. This is the area in which the states have been least successful in preserving independence. Next, the Essay discusses the courts' role in enforcing the constitutional allocation of power between the federal government and the states. Finally, the Essay analyzes other elements that support state independence.

1. Fiscal Federalism

The greatest difference between the federal systems of the United States and Australia is in the financing of the costs of state governments.[81] In the United States the colonies had financed their own governments through ordinary taxation without using customs. When the Constitution gave Congress exclusive authority to impose customs, it did not reduce state revenue. The federal government could finance its own costs through customs and generally did so until the Civil War.[82] The United States government had no more revenue than it needed. The states continued to provide for their own revenue requirements through their own tax structures. The states did not seek federal subventions. No one believed that the federal government had an obligation to equalize the fiscal situation of the states or that it needed to regulate state borrowing.[83] In the last half century, the federal government has moved to make contributions to state governmental costs but mostly in the form of specific purpose grants.[84] Today those grants are decreasing and amount to less than twenty-four percent of the general revenue of the states.[85] States now provide differing levels of public service and

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[81] For an excellent recent summary of Australia's fiscal problems, see Mathews, *Changing the Tax Mix: Federalism Aspects*, Centre for Research on Federal Financial Relations, Australian National University (Reprint Series No. 63, 1985).

[82] UNITED STATES BUREAU OF THE CENSUS, THE STATISTICAL HISTORY OF THE UNITED STATES FROM COLONIAL TIMES TO THE PRESENT 352-57, 1106 (Ser. Y 1976).

[83] In 1913 only 1.6% of the general revenue of the states came from the federal government. *Id.* at 1129.

[84] In 1940 the federal percentage of state general revenue was 15.4%, rising to 28.6% by 1970. *Id.*

[85] Derived from BUREAU OF THE CENSUS, DEPARTMENT OF COMMERCE, GOVERN-

impose substantially different tax burdens on their citizens.[86] The federal government still makes almost no attempt to equalize the fiscal situations of the states.

Australia's situation was dramatically different. At the time of federation, the bulk of state revenues came from customs duties and excise taxes imposed on goods produced and sold within the state. In order to have freedom of trade among the states it was essential to give the exclusive authority to impose customs to the federal government. As a result, from the beginning the federal government collected far more revenues than it needed; the states collected far less than they needed.

The drafters of the Australian constitution were unable to decide how to handle the fiscal situation. They provided the federal government with the exclusive right to impose customs and excise taxes. They ordered the federal government to return to the states three-quarters of the customs that it collected for ten years. They then gave the federal government power to determine what federal funds should go to the states and to make special payments to individual states.[87]

a. Formula Grants

At the end of these ten years, the federal government, over state protests, ended the payment of three-quarters of customs and substituted a payment to each state of $A 2.50 per state citizen. By the mid-1920's the states, through income tax, were collecting a substantial portion of needed revenues.

Any hope that the states would take over their own expenditures ended with World War I. The federal government sought to persuade the states to agree on a wartime taxing scheme. When this failed, the government again exercised its powers and ensured state dependency by taking over the income tax. The federal government raised the federal income tax to a high level and took over the tax collection machinery and officials from the states. It then decided to give each state financial assistance equal to its then current income tax collection if the state

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MENTAL FINANCES IN 1982-83, at 6 (1984).

[86] For a state by state review of these economic and social differences, see N. PEIRCE & J. HAGSTROM, THE BOOK OF AMERICA: INSIDE FIFTY STATES TODAY (1983).

[87] A history of federal grants to the states prior to 1975 is given in TREASURER OF AUSTRALIA, PAYMENTS TO OR FOR THE STATES AND LOCAL GOVERNMENT AUTHORITIES 1975-76, at 155-72 (Budget Paper No. 7, 1975). *See also* R. GILBERT, *supra* note 25, ch. 1; J. MAXWELL, COMMONWEALTH-STATE FINANCIAL RELATIONS IN AUSTRALIA ch. 1 (1967); C. MAY, FINANCING THE SMALL STATES IN AUSTRALIAN FEDERALISM 4 (1908).

agreed not to tax income. The federal government also made it a crime to pay a state tax before paying the federal tax. The states were thus forced to abandon the income tax.[88] Four states challenged this system in the High Court but lost their suit.[89] In 1946, the federal government announced to the states that it wished to make permanent the uniform income tax. It agreed to give to the states in return an amount that would increase with population and wage increases. A court challenge was unsuccessful.[90] The federal government made one more attempt to limit its activity as tax collector for the states in 1953. This new attempt failed because the states did not wish to impose their own income tax unless the federal government drastically reduced its income tax. After this struggle, Prime Minister Menzies reported that "it became quite clear that no State really wanted its taxing powers back on terms which any Commonwealth Government could accept, and that consequently uniform tax, so called, must now be regarded for better or for worse as a permanent feature of the political landscape."[91]

From the late 1940's to the present, the federal government has had a system of paying direct grants to the states under varying formulas. In the late 1970's the federal government announced a New Federalism program[92] and provided by statute that the states could either increase the income tax and receive the extra money or reduce the income tax with a corresponding reduction in the payments they received from the federal government. Not surprisingly, no state has taken the offer and sought to increase or decrease income taxes.

b. Equalization

As early as 1910, the federal government saw that some of the states could not raise sufficient tax money to have a standard of government comparable to those of larger states. The federal government began

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[88] *See generally* L. CRISP, *supra* note 40, at 116-18; R. MENZIES, *supra* note 80 ch. 6; Mathews, *supra* note 81, at 8.

[89] South Australia v. Commonwealth, 65 C.L.R. 373 (Austl. 1942).

[90] Victoria v. Commonwealth, 99 C.L.R. 575 (Austl. 1957).

[91] R. MENZIES, *supra* note 80, at 91.

[92] For a full report, see TREASURER OF AUSTRALIA, PAYMENTS TO OR FOR THE STATES AND LOCAL GOVERNMENT AUTHORITIES 1975-76, at 11-23 (Budget Paper No. 7, 1979). *See also* Mathews, *The Commonwealth-State Financial Contract*, 2-9, Centre for Research on Federal Financial Relations, Australian National University (Reprint No. 36, 1982) [hereafter *Financial Contract*]; Mathews, *Federalism in Retreat: The Abandonment of Tax Sharing and Fiscal Equalization*, 7-12, Centre for Research on Federal Financial Relations, Australian National University (Reprint No. 50, 1982).

making ad hoc grants to some of the smaller states. In the late 1920's, the states were for a short period substantially independent of the federal government with respect to finances. But then came the Depression. Special grants were made in increasing amounts to three states: Tasmania, Western Australia, and South Australia. In 1933, the federal Parliament enacted legislation setting up a Commonwealth Grants Commission to investigate claims made by the states for special grants and to recommend the amounts to be paid.[93] The Commission announced its governing principle:

> [S]pecial grants are justified when a State through financial stress from any cause is unable efficiently to discharge its functions as a member of the federation and should be determined by the amount of help found necessary to make it possible for that State by reasonable effort to function at a standard not appreciably below that of other States.[94]

While this Commission could be viewed as aiding the smaller states, it also was a federal agency carefully looking over state budgets as a way of measuring federal grants.

From the 1940's onward, the federal government supplemented its formula grants almost every year with special ad hoc grants to one or more states.[95] By the late 1970's, the government attempted to limit applications to the Grants Commission to one state per year. More equalization aspects were included in the formula grants.

By the mid 1980's, the government decided to eliminate the use of special grants through the Grants Commission (except for grants to the Northern Territory) and make all equalization adjustments through the formula grants. The Grants Commission made three reports seeking to

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[93] *See generally* EQUALITY IN DIVERSITY — FIFTY YEARS OF THE COMMONWEALTH GRANTS COMMISSION (Austl. 1983) [hereafter EQUALITY IN DIVERSITY].

[94] *Id.* at 37. The standard currently is expressed as follows: The Grants Commission assessment should

> (a) be based on the application of the principle that the respective tax sharing grants to which the States are entitled should enable each State to provide, without having to impose taxes and charges at levels appreciably different from the levels imposed by the other states, government services at standards not appreciably different from the standards provided by the other States; and (b) take account of (i) differences in the capacities of the States to raise revenues; and (ii) differences in the amounts required to be expended by the States in providing government services of a comparable standard.

1 COMMONWEALTH GRANTS COMMISSION, REPORT ON TAX SHARING RELATIVITIES 1985, at 11 (Austl. 1985).

[95] *See* J. MAXWELL, *supra* note 87, at 61; TREASURER OF AUSTRALIA, *supra* note 87, at 7-23, 157-72.

provide the data for such a program.[96]

c. Grants and Equalization Today

At the Premiers' Conference on May 30, 1985, the federal government announced the latest new scheme, to which the states, having no other alternative, agreed.[97] Financial assistance grants are to be paid to the states, distributed among them in terms of per capita relativities recommended by the Commonwealth Grants Commission. The grants will be increased each year by two percent in real terms as determined by movements in a consumer price index. The system contemplates that every three years the Grants Commission will make a study and recommend the relativities of the grants for the ensuing three years. Because the equalization factors are built directly into the annual grants, the states will not be permitted to seek special grants from the Commission, although the Northern Territory may continue to do so. The immediate result of accepting the relativities suggested by the Grants Commission is to increase the percentage of total grants coming to New South Wales and Victoria and reduce the percentages of the other states.

In any event, the federal government has almost total control over the states' fiscal situation. The states are unable to meet all expenses through taxation because the Constitution, as interpreted by the High Court, does not permit them to use sales or VAT taxes (excise taxes)[98] and the federal government has taken over the income tax. The federal government on many occasions has sought to escape the burden of collecting taxes for the states to spend. But the states have been lobbying less for greater taxing power and more for obtaining money from the federal government. As a leading economist has said, "[S]tate leaders not only avoid the responsibility of having to make unpopular taxing and other revenue decisions but gain positive political advantages as champions of State interests against what they claim is a remote and parsimonious Federal Government in Canberra."[99] Both the states and

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[96] *See* COMMONWEALTH GRANTS COMMISSION, REPORT ON STATE TAX SHARING ENTITLEMENTS 1981 (Austl. 1981); COMMONWEALTH GRANTS COMMISSION, REPORT ON STATE TAX SHARING AND HEALTH GRANTS 1982 (Austl. 1982); COMMONWEALTH GRANTS COMMISSION, REPORT ON TAX SHARING RELATIVITIES 1985 (Austl. 1985).

[97] For a discussion of the new arrangements, see TREASURER OF AUSTRALIA, PAYMENTS TO OR FOR THE STATES, THE NORTHERN TERRITORY AND LOCAL GOVERNMENT AUTHORITIES 1985-86, at 15-31 (Budget Paper No. 7, 1985).

[98] *See infra* text accompanying notes 129-30.

[99] *Financial Contract*, *supra* note 92, at 15.

the federal government appear to be locked into this system of federal government taxing and state spending. And it appears unlikely that the federal government would risk the political liabilities it would incur by attempting to eliminate the system.

The states still receive a large portion of their income from the federal government. Of the total state income from taxes and federal grants (current and capital), about 37.7 percent comes from general federal grants and 26.9 percent from federal special purpose grants.[100] One-third of the capital amounts permitted by the Loan Council take the form of interest-free, nonrepayable capital grants. Loan Council restrictions have been loosened in recent years.[101] However, the states still must receive approval and the federal government has ultimate control over the Council, not only because of the special voting arrangements but also because it can threaten to reduce capital grants if the states do not agree.[102] Overall, the states receive over sixty percent of their expendable dollars from the federal government, based on a new system that promises a low annual growth and distribution in accordance with relativities determined by the Commonwealth Grant Commission.[103] This new system, which has been imposed by the federal government on the states, doubtless will change as the control of the federal government changes.

Clearly, the financial structures in the Australian and the American federal systems differ greatly. In the United States, individual states must raise revenues to cover over three-quarters of their expenditures. Each state can decide the level of services it desires to provide and the taxes it will use to raise revenues. The states differ markedly because of differing resources and differing judgments as to the desired level of government services. The federal government does play a role with respect to state finances, but that role is determined by political processes that incorporate representation of state interests.

The Australian situation is attributable largely to matters other than the parliamentary system. The fact that the states had raised most of their pre-federation revenues from customs and associated excise taxes was a major factor. The federal government had to be given power over

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[100] Derived from ADVISORY COUNCIL FOR INTER-GOVERNMENT RELATIONS, *supra* note 80, at 38.

[101] The details are discussed in TREASURER OF AUSTRALIA, *supra* note 97, at 33-45.

[102] *See* J. MCMILLAN, G. EVANS & H. STOREY, *supra* note 15, at 113-15; *Financial Contract*, *supra* note 92, at 2-3.

[103] For discussion of the Commission's methods, see 1 COMMONWEALTH GRANTS COMMISSION, *supra* note 94.

customs, which meant it had far more revenue than it needed initially and the states far less. The states were given ten years in which to enjoy the politically desirable situation of making a large share of their expenditures without paying the political price of raising the revenues. The states never have felt politically free to accept changes that would have allowed them to escape this situation.

The fact that the federal government had excess revenues and was making payments to the states also made it possible for Australia to move very early towards its equalization schemes. In the United States the federal government did not have sufficient revenues to make payments to the states until the sixteenth amendment, passed in 1916, allowed it to impose an income tax. Australia's parliamentary system has also contributed to this fiscal environment. The federal government has always had the power to determine the extent to which it collects taxes and redistributes them to the states. The states have very little access to the federal decisionmaking process. The states have been so apprehensive that when the federal government has attempted to stop collecting taxes, the states have made it politically difficult for the federal government to withdraw on its own. But each year the federal government makes its own decisions as to how much money is to be distributed to the states, determines applicable formulas, and, in effect, announces the decisions to the states at each Premiers' Conference.

2. The High Court as a Protector of State Interests

The High Court of Australia plays a much more significant role in restraining federal power to regulate than does the Supreme Court of the United States. The Supreme Court has concluded that the states have adequate political protection for their interests and has substantially given up any attempt to place judicial limitations on federal regulatory power.[104] This is not the case in Australia. While the High

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[104] In Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. 1005 (1985), the majority, in upholding the application of the Fair Labor Standard Act to employees of state and local governments, said that "the structure of the Federal Government itself was relied on [by the Framers] to insulate the interests of the States. . . ." *Id.* at 1018. They added:

> [W]e are convinced that the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the "States as States" is one of process rather than one of result. Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a "sacred province of state autonomy."

Court is viewed by many as too generous in construing grants of power to the federal government, no one doubts that the court does impose limits. Whether the limits result from the High Court's belief that there are inadequate political protections for the states and that only the court can maintain the constitutional division of power is not clear. In any case, the court's role is important.

Both the grants of power made in the Australian constitution and the role and methods of constitutional litigation in the High Court are sufficiently different from the United States counterparts to deserve preliminary separate treatment. The Australian constitution provides that Parliament shall have power "to make laws for the peace, order, and good government of the Commonwealth with respect to" a long list of powers.[105] Many of these powers, such as "Trade and commerce with other countries, and among the States,"[106] are similar to those in the United States Constitution. But many parliamentary powers are different: (1) "Foreign corporations, and trading or financial corporations formed within the limits of the commonwealth;"[107] (2) "Marriage;"[108] (3) "Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants;"[109] (4) "Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State."[110]

The High Court itself is different from the United States Supreme Court in many respects. In the main, the Australian government's separation of powers between the judiciary and the Parliament is similar to the separation of the judiciary from the other branches in the United States. Australia's appointments process contains less separation. The prime minister and the cabinet nominate court appointees and the Governor-General makes the formal appointments. But justices, once ap-

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Id. at 1019. The four dissenters, incidentally, did not agree that the political processes protect the states. *See id.* at 1025.

For academic commentary supporting the majority position, see J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 175-84 (1980); La Pierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 WASH. U.L.Q. 779 (1982); Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

[105] AUSTL. CONST. § 51.

[106] *Id.* § 51 (i).

[107] *Id.* § 51 (xx).

[108] *Id.* § 51 (xxi).

[109] *Id.* § 51 (xxii).

[110] *Id.* § 51 (xxxv).

pointed, are protected in tenure and in salary.[111]

The High Court is predominantly a non-constitutional court. It has jurisdiction to review state courts on issues of state and federal law; the absence of a bill of rights reduces its role in constitutional litigation. Fewer than ten percent of its cases over the years have involved constitutional issues.[112]

The High Court has original jurisdiction in all matters arising under the constitution or involving its interpretation.[113] It has exclusive jurisdiction in suits between states, in suits by the Commonwealth against a state, and in suits by a state against the Commonwealth.[114] The High Court has relatively open standing rules; for example, when the federal attorney general sues a state or when a state attorney general sues the federal government or another state, the plaintiff may bring suit directly in the High Court.[115] Thus, most cases raising constitutional issues commence within the original jurisdiction of the High Court. The court may remand the case for trial on the facts before a single justice of the court, but it seldom does so. Most cases appear to be decided on demurrers or upon agreed statements of facts.

The court tends to follow English rather than American precedents. Proceedings are predominantly oral without special time limits. The justices usually deliver individual opinions, beginning with the chief justice and without any official opinion of the court. The court conceives of itself as a legalistic institution construing the letter of the law, not making policy. Australia's justices have noted that the constitution is in the form of a British statute and that the words of the constitution are to be interpreted on the same principles as those applied to any ordinary law.[116] For example, in 1983 Chief Justice Gibbs stated in a highly controversial decision regarding power of the federal government to prevent Tasmania from building a dam:

> No lawyer will need to be told that in these proceedings the Court is not called upon to decide whether the Gordon below Franklin Scheme ought to proceed. It is not for the Court to weigh the economic needs of Tasmania against the possible damages that will be caused to the archeological sites and the wilderness area if the construction of the dam proceeds. The wisdom and expediency of the two competing courses are matters of policy

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[111] *Id.* § 72.

[112] *See* J. McMillan, G. Evans, & H. Storey, *supra* note 15, at 280-81.

[113] Judiciary Act of 1903 § 30 (Austl.).

[114] Judiciary Act of 1903 § 38 (Austl.).

[115] *See* Attorney General for Victoria v. Commonwealth, 71 C.L.R. 237 (Austl. 1945).

[116] *See* L. Zines, The High Court and the Constitution 11-13 (1981).

> for the Governments to consider, and not for the Court. We are concerned with a strictly legal question — whether the Commonwealth regulations and the Commonwealth statute are within constitutional power.[117]

In applying the constitution, the court has placed limitations on both the states and the federal government. Even though the court is said currently to have a four to three division in favor of federal power,[118] it still imposes limitations on the federal government that are far more significant than those in the United States.[119] A few examples will illustrate the court's approach to federal and state government power.

The High Court has a far more limited view of the commerce clause as a source of federal power than does the United States Supreme Court.[120] The High Court recognizes a distinction between interstate and intrastate commerce: the federal government has power to regulate only interstate commerce and has no power to regulate intrastate commerce that affects interstate commerce.[121] In addition, the High Court holds that the federal government may not regulate activities prior to interstate commerce or after the commerce comes to an end.[122] The court reads Section 92 of the constitution ("[C]ommerce and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free") as applying to both the federal government and the states. This clause has provoked constant litigation and the court has not settled upon any clear interpretation.[123] But the court

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[117] Commonwealth v. Tasmania, 57 Austl. L.R. 450, 457 (Austl. 1983). For a detailed discussion of this case, see *infra* note 133 and accompanying text.

[118] In one respect it is not surprising to find a bias in favor of the central government. The justices are appointed "by the Governor-General in Council," meaning that the prime minister, after consulting his cabinet, makes the decision and the governor-general announces it. Many suggestions have been made for adding more state influence in the selection process; the only action taken thus far is a 1979 statute requiring the attorney-general to consult with the state attorneys-general before an appointment is made. High Court of Australia Act 1979 § 6. *See* J. McMILLAN, G. EVANS & H. STOREY, *supra* note 15, at 277-80.

[119] L. CRISP, *supra* note 40, at 70 (High Court "found some degree of invalidity in Commonwealth Acts in sixteen cases and in State Acts in nineteen cases in the 1950-60 decade alone.").

The constitution does provide that the concurrent powers granted to the federal government affect the states only when the federal government acts. AUSTL. CONST. §§ 107, 109. Thus, the states are free to regulate until their regulations can be shown to conflict with an act of the federal government.

[120] *See* L. ZINES, *supra* note 116, at 37-58.

[121] *See* J. McMILLAN, G. EVANS, H. STOREY, *supra* note 15, at 74; L. ZINES, *supra* note 116, at 43-54.

[122] *See* L. ZINES, *supra* note 116, at 43-44.

[123] *See id.* at 79-130; J. McMILLAN, G. EVANS, H. STOREY, *supra* note 15, at 305-

has said that this clause restricts the federal government as well as the states and that it goes beyond invalidating discriminations against interstate commerce. Among other things, the court has construed Section 92 as preventing federal and state governments from creating central marketing authorities to control sales of primary products,[124] and as banning the nationalization of trading and commercial enterprises.[125]

The court has interpreted other clauses expansively to uphold federal power. For example, while the federal government has no direct regulatory powers over private sector employment, the court has construed broadly the federal government's power to establish conciliation and arbitration machinery for the prevention and settlement of labor disputes involving more than one state. Thus, the Australian Conciliation and Arbitration Commission has become the predominant body in setting wages and working conditions in Australia.[126] Similarly, the court recently has construed the corporations power to support federal commercial and industrial law regulations.[127]

The High Court does directly restrict federal legislative activity, as illustrated by a case decided in December, 1984.[128] The federal Family Law Act gave the federal Family Court jurisdiction over custody, guardianship or maintenance of access to a "child of a marriage." The Act included as a child of a marriage a child whom the husband and wife treated as a child of their family and who ordinarily was a member of the household. The court held that the federal government's constitutional power to regulate marriage included the power to regulate

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16; Coper, *Section 92 and the Impressionistic Approach*, 58 AUSTL. L.J. 92 (1984); Temby, *"In this labyrinth there is not a golden thread" — Section 92 and the Impressionistic Approach*, 58 AUSTL. L.J. 86 (1984).

[124] Clark King & Co. Pty. Ltd. v. Australian Wheat Bd., 140 C.L.R. 120 (Austl. 1978). *See* L. ZINES, *supra* note 116, at 116-22.

[125] Bank of New South Wales v. Commonwealth, 76 C.L.R. 1 (Austl. 1948); Australian Nat'l Airways v. Commonwealth, 71 C.L.R. 29 (Austl. 1945). *See* J. MCMILLAN, G. EVANS & H. STOREY, *supra* note 15, at 311-12; L. ZINES, *supra* note 116, at 87-89.

[126] *See* Merchant Serv. Guild of Australasia v. Newcastle & Hunter River Steamship Co., 16 C.L.R. 591 (Austl. 1913); Jumbunna Coal Mine v. Victorian Coal Miners' Ass'n, 6 C.L.R. 309 (Austl. 1908); J. MCMILLAN, G. EVANS & H. STOREY, *supra* note 15, at 77-81.

[127] *See* L. ZINES, *supra* note 116, at 59-78.

[128] *In re* Marriage of Cormick, 56 Austl. L.R. 149 (Austl. 1984). For another 1984 case holding that the Commonwealth could not retrospectively validate a state law previously held to conflict with a federal law, see University of Wollongong v. Metwally, 56 Austl. L.R. 1 (Austl. 1984). *See also* Sadler, *The Federal Parliament's Power to Make Laws "With Respect to . . . the People of Any Race . . .*", 10 SYDNEY L. REV. 590 (1985).

the children of the marriage but not to regulate non-parents of a child (in this case grandparents claiming against their daughter who was the unmarried mother of the child).

The court has been most restrictive of the states with respect to state taxing power. When the constitution was adopted, seventy-five percent of state tax revenues came from customs duties and excise taxes imposed on locally produced goods not subject to customs. The constitution gave the federal government exclusive authority to impose "duties of customs and excise" with an initial obligation to transfer to the states three-fourths of the money collected. The High Court has interpreted broadly what taxes are "excises" and thus not permissibly levied by the states.[129] These cases, as well as cases upholding the federal government's monopoly over the collection of income taxes,[130] have made it impossible for the states to finance government from their own revenues. Two recent cases show the complexity of the excise tax problem.

Victoria required a license for construction or operation of oil pipelines. Licensees were required to pay a pipeline operation fee. Victoria required one petroleum company to pay a $10 million per year fee for pipelines that transported oil from the Bass Straits to Victoria. When the petroleum company sued the state of Victoria in the High Court, the court held by a vote of four to two that the tax was an excise tax and beyond state power.[131] The fact that the tax was reflected in the cost of goods sold, even though not related to the quantity of goods sold, was enough to make it an excise.

Recently, the High Court, by a vote of four to three, held invalid a New South Wales statute requiring all persons slaughtering animals to obtain an annual license. The fee was a prescribed amount per animal slaughtered in a twelve month period.[132] Apparently, the court might have upheld the statute if the tax had been calculated according to sales rather than according to slaughter, which the court equated with production.

The High Court can act quickly, a feat particularly impressive when paired with a responsive legislature. A classic example of both legislative and judicial speed is the famous *Tasmanian Dam* case.[133] In 1970,

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[129] *See* Coper, *The High Court and Section 90 of the Constitution*, 7 FED. L. REV. 1 (1976); Mathews, *supra* note 81, at 4.

[130] Victoria v. Commonwealth, 99 C.L.R. 575 (Austl. 1957); South Australia v. Commonwealth, 65 C.L.R. 373 (Austl. 1942).

[131] Hematite Petroleum Pty. Ltd. v. Victoria, 57 Austl. L.R. 591 (Austl. 1983).

[132] Gosford Meats Pty. Ltd. v. New South Wales, 57 Austl. L.R. 417 (Austl. 1985).

[133] Commonwealth v. Tasmania, 57 Austl. L.R. 450 (Austl. 1983).

Tasmania proclaimed a state reserve, including the Gordon-Franklin area. Later, it took the Gordon-Franklin area out of the reserve and invested it in the Tasmanian Hydro-Electric Commission. In 1982, a Tasmanian statute authorized the Commission to construct a dam and associated works in that area. In July, 1982, the Commission began construction of a structure that, when completed, would flood three archeological sites in the area.

In 1981, on motions of the Tasmania government, the federal government recommended that the Tasmania parks, including the Gordon-Franklin area, be included in the World Heritage List under the Convention for the Protection of the World Cultural and Natural Heritage. The Convention was adopted by the General Conference of UNESCO in 1972 and ratified by Australia in 1974. It requires signatory states to endeavor to protect such properties when possible.

Despite citizens' protests about the dam's impact on Australia's cultural and natural heritage, the federal government decided to permit the dam's construction. However, in early 1983 an election was held. The prime minister in his policy statement promised to provide money to equalize power costs if Tasmania postponed building the dam. Mr. Hawke, speaking for the Labor Party, said that he would use all the powers at his disposal to stop the building of the dam while ensuring that Tasmania was not economically disadvantaged. Labor won the election on March 5 and Prime Minister Hawke and his Ministry were sworn in on March 11.

On March 31, the federal government adopted regulations, based on a 1975 federal statute, forbidding the construction of the Tasmanian dam without federal consent. On May 22, Parliament passed a statute forbidding the construction without federal consent. On May 27, the government issued regulations based on this statute.

The federal government filed two actions against Tasmania in the High Court, seeking to uphold the validity of the regulations issued under the 1975 Act and of the 1983 act and its regulations. Tasmania then brought an action against the federal government. Argument in the High Court began on May 31, nine days after the 1983 statute was enacted and six days after the regulations under the statute were made. The case was argued May 31, June 1 through 3, and June 7 through 10. On July 1, the High Court decided the case with seven individual opinions.

The case was complex. The principal issue was whether or not the federal government's actions were valid under the constitutional provisions giving Parliament the power to make laws with respect to "external affairs." By a vote of four to three, the court said yes. The majority

held that the federal government has full power to enter into an international agreement on any subject and that the government then has power to enact laws under the external affairs power implementing the treaty. However, the court held invalid the regulations issued under the 1975 Act. The court found valid enough of the sections of the 1983 Act to prevent the dam's construction. Thus, the court, in conjunction with the federal legislative branch, rapidly halted the dam project.

One indication of how the parliamentary system permits the federal government to intrude on state rights arises in the current attempt to enact a bill of rights as ordinary legislation. The government asserts that it has power to enact a bill of rights, covering state and federal governments, under the treaty power. Australia needs to enact certain protections of basic rights in order to carry out its obligations under the International Covenant of Civil and Political Rights. Journalists report that if such a bill is passed, it will be used, among other things, to prohibit states from having unequally sized electoral districts that would tend to favor the party in power. The theory is that unequal districts would violate the proposed bill's guarantee of "universal and equal suffrage." This aptly illustrates the federal government's broad power to govern the states through the passage of a simple statute.[184]

In sum, the parliamentary system provides the states with fewer ways to protect their interests than does the United States system. Fortunately, Australia's High Court plays a more significant role than the United States Supreme Court in marking out the boundaries between the federal and state governments.

3. Other Protections for State Interests

As shown above, the states receive no direct political protection in the operation of the federal government. State independence is at its lowest with reference to finance. States have a very limited power to tax and must depend on federal grants for more than half of their revenues. The High Court offers some protection to the states, but on the whole its interpretations appear to favor federal power. Yet the states are still present, still functioning, still providing the bulk of governmental services. What, if anything, protects this position of the states?

First, the states receive indirect political protection. The prime minister and the cabinet must worry about the next election, which cannot be more than three years away. The election's outcome turns on votes

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[184] *See* Reinhardt, *Labor's Rights' Bill Aimed at Joh's Gerrymanders*, THE BULLETIN, Dec. 10, 1985, at 23.

in the marginal districts. The safe seats rarely move between the parties. But other seats are always at risk; no government will survive politically having major antagonisms with one or more states. The government may have to placate the states by ad hoc arrangements or by not unduly interfering in state affairs.[135]

Second, the mere existence of the six original states, containing complete governmental structures and providing the bulk of public services, restrains the federal government. While Australia's area is 2,967,909 square miles (nearly equivalent to the area of the continental United States, which is 3,021,295 square miles), Australia consists of only six states and one territory. The desolate nature of a large portion of Australia's land indicates that no new states will be created unless the Northern Territory becomes a state. History alone would make it difficult to abolish the states or to turn state powers over to regional entities. This small and apparently fixed number of states causes special problems. A small group of people operate Australian governments. The prime minister and the six state premiers have enormous personal power. When these officers' power is deemed to extend to the ministries in each government, almost all current governmental operations fall within their reach. Thus, depending in part on whether the state and national governments are of the same party, many governmental issues can be settled in private conversations and by ad hoc arrangements.

Third, the limited number of states has allowed the creation of significant intergovernmental agencies. The most visible unit of this kind is the Premiers' Conference.[136] These meetings have taken place since before federation. But since the late 1920's the conferences have been called by the prime minister and staffed by the federal government. They are held once or twice a year and are attended by the prime minister (who presides) and the national treasurer, as well as each state's premier and treasurer. Other officials may participate from time to time if the agenda involves their area. These conferences currently

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[135] *See, e.g.*, THE BULLETIN, Aug. 13, 1985, at 29:

> The removal of the taxation concession on gold mining has been scrapped. The revenue foregone by this action is apparently considered by Prime Minister Bob Hawke to be a price worth paying to help keep the West Australian government of Brian Burke in office. Labor in West Australia face an election early next year and the loss of support in the Goldfields region would apparently be enough to ensure defeat.

[136] Sharman, *The Premiers' Conference — An Essay in Federal State Instruction*, Dep't of Pol. Sci., Research School of Social Sciences, Australian National University (Occasional Paper No. 13, 1977).

are confidential.[137]

The Premiers' Conferences are significant for many reasons. First, they are not mentioned in the constitution and the persons attending them do not make reports to their respective legislatures. In fact, no public records are made. Second, the conferences (with the associated Loan Council) constitute the one formal setting in which the prime minister confronts the premiers and discusses state issues and problems. Third, they are the mechanism by which the prime minister indicates to the states what monies the federal government will give to the states and how the funds will be distributed among them. Finally, a press conference may be held after the meeting at which the premiers call attention to state issues.

The Loan Council resembles the Premiers' Conference.[138] The Council was established by a Financial Agreement between the states and the federal government, which was then adopted as a constitutional amendment. The Council consists of the prime minister or a minister designated by him and the premier of each state or a minister designated by him. The federal members have two votes and a casting vote and each state has one vote. Under this arrangement, the federal government requires only the assent of two states to prevail. The federal government and the states submit their proposed loan programs to the Council each year; the Council determines the funds that will be available and allocates them between the federal government and the states. All borrowing is done by the federal government on securities that it issues and backs. The Financial Agreement may be altered only by the unanimous consent of the state and federal parliaments. Therefore, as one commentator noted: "The Loan Council seems to regard itself as a sort of Cabinet, responsible to no other body, and it is indeed, not responsible to any one Parliament. No Parliament can overrule its decisions, and this may be an unexplicit reason why no Parliament receives a report."[139]

The fact that the federal government's power to make grants to individual states permits a large area for ad hoc grants creates a fourth protection of the states. Money from the federal government can flow to

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[137] Until the mid-1970's most conference proceedings were published but more recently they have been confidential. *See id.* at 52-75. No transcripts are kept but brief summaries of actions taken at Premiers' Conferences are reported in an annual budget paper. TREASURER OF AUSTRALIA, PAYMENTS TO OR FOR THE STATES, THE NORTHERN TERRITORY AND LOCAL GOVERNMENT AUTHORITIES (Budget Paper No. 7).

[138] *See* authorities cited *supra* note 80.

[139] J. MAXWELL, *supra* note 87, at 92.

a particular state for several reasons: to ease the situation for the government's political party in a state election, to increase the state's financial base in return for an agreement not to seek special assistance through the Grants Commission, to deal with a local disaster, or for many other reasons. Negotiations leading up to these grants are normally confidential. It is not clear whether this system tends to show the strong central authority of the federal government or the ability of the states to use their powers to secure added assistance.

A fifth force tending to help the states is the strong pattern of federalism reflected in many national organizations, governmental and private. The tendency in such organizations is to have equal representation for the states. This pattern exists in most political parties[140] and existed in all of them until 1983, when the ALP provided that half of the membership of its national conferences should be allocated among the states in terms of population with the rest coming equally from the states. This widespread federalism brings state interests into national political operations. Even at the governmental level, prime ministers exercise care to see that every state is represented in the ministry. Many governmental bodies also have a federal slant. Meetings of treasurers, of attorneys general, and of other staff organizations are held frequently and state participation is usually equally weighted for this purpose. Many governmental decisions, both those that ultimately require legislation and those that do not, may be founded in agreements reached in the meetings of government officials. Again, these meetings are confidential and one is not easily able to ascertain their dynamics.[141]

Finally, a very significant protection for the states lies in an apparent general public dislike for strong government, particularly strong central government in Canberra. I have no way to measure this, but it is reported by politicians of all stripes and in various states. Any strong move in Canberra to take powers from the states could easily provide a vote against the government because of this widely held opposition to strong central government. Some indication of this phenomenon, now worrying the parties, can be seen in the increasing number of citizens who vote for the party they wish to govern when voting for the house

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[140] J. HOLMES & C. SHARMAN, *supra* note 75, ch. 4.

[141] For a listing of federal-state ministerial and departmental meetings during the period 1970-78, see M. PAINTER & B. CAREY, *supra* note 52, at 105-19. *See also* Warhurst, *Central Agencies, Intergovernmental Managers and Australian Federal-State Relations*, Centre for Research on Federal Financial Relations, Australian National University (Occasional Paper No. 59, 1983).

but vote for another party in the senate in order to ensure a check on the government. This sentiment is found also in places like Western Australia and Queensland where one hears mutterings about secession.[142]

III. A Parliamentary Government for the United States?

This description of the Australian experience provides an excellent illustration of an established parliamentary system operating within the context of a federal system. It has not, however, shown which portions of the Australian system must be adopted in order to create a useful parliamentary system. Identifying which aspects of the system would have to be borrowed and which could be rejected would be difficult.

But it does not seem necessary in practical terms to attempt such evaluation of the Australian system. The one clear foundation of a parliamentary system is that the executive have sufficient control over the legislature to ensure the enactment of the executive's key legislative proposals. Providing the American executive with this degree of control would require major changes in the American governmental structure — changes so fundamental that it seems highly unlikely that they can be achieved.

A. Moving to a Parliamentary System

Consider first the changes necessary to put into operation a system of executive control over Congress. At this point, assume that only the House of Representatives is involved; the Senate will be discussed later.

First, the executive and the legislature must be selected on the same ballot. As it happened this year, a President who is elected with an extraordinary majority cannot control a house selected at the same election with a majority of its members belonging to the other political party. A President might be retained for ceremonial duties, but it seems that control over the legislature would require a system like Australia's in which members elected to the house select the prime minister and ministry from their own members. The leader of the party achieving a majority of seats becomes the prime minister and chief executive, con-

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[142] In 1935 Western Australia petitioned the King and the British Parliament for a statute permitting the state to secede from the Australian Commonwealth. The Commonwealth opposed the secession and the British Parliament did not consider the issue on the ground that the proper party to pursue the matter was the Commonwealth of Australia conveying the wish of the Australian people as a whole. *See* Greenwood, *The Legal Secession of Quebec — A Review Note*, 12 U.B.C. L. Rev. 70, 76 (1978).

trolling both the legislative and administrative branches. Inevitably, the emphasis in these elections would swing from concern with how the legislators will vote on issues to how they will vote in selecting the prime minister.

Second, political parties would need some mechanism for disciplining party members. Members of Congress currently are very undisciplined, as shown by their record of voting with their parties. Party control can be measured by counting the percentage of legislative votes in which ninety percent of the members of one party vote in opposition to ninety percent of the members of the other party. This happened in the United States House only 1.6 to 8.0 percent of the time from 1950 to 1967.[143] In Australia the corresponding figure would be close to 100 percent. Even if party control were defined as a majority of one party voting in opposition to a majority of the other party, the percentage in the House from 1973 to 1982 ranged from thirty-six percent to forty-three percent.[144] Changing this system into one in which members may debate issues only within closed party sessions but must vote with the party majority on substantially all legislation on the house floor would involve major upheaval. In order to achieve party discipline by refusing to let undisciplined members run for office on the party ticket, party primaries would have to be eliminated and replaced by small nominating groups that would determine who could run under the party label.

Third, Congress' present power over the legislative process would need to be diminished greatly. The major task of Congress members would be to enact the government's legislative program. Severe restrictions would need to be placed on the introduction of bills apart from those coming from the government. In Australia private bills are rarely introduced and almost never passed. England follows a somewhat looser system. A certain number of private bills are permitted and the persons allowed to introduce them are chosen by lottery. But in the main, what occurs in Congress with respect to legislation would become a formality: the real decisions would be made within the governing party as it decided what legislation to push and the form it should take.

Fourth, some channel would have to be found for input into the legislative process by all of the groups that now appear in Congress and debate the wisdom of legislation. The United States has a large industry of professionals who regularly perform this lobbying function and a larger group of persons who write letters or appear personally to dis-

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[143] W. KEEFE & M. OGUL, THE AMERICAN LEGISLATIVE PROCESS — CONGRESS AND THE STATES 244 (6th ed. 1985).

[144] *Id.* at 245.

cuss legislation that affects their lives.[145] The Australian system provides no regular forum for public input since the key decisions are made in confidence. Because it is highly unlikely that we in the United States would wish to abandon public access to the legislative process, some methods would need to be invented to permit public access into the real legislative process within the majority party. Perhaps party committees could be formed to hold hearings on legislative proposals before they are finalized within the government and introduced. Much thought would have to be given to constructing a process that permits public dialogue with the administration without preventing the administration from formulating coherent legislative programs to be enacted in Congress.

B. Impacts on the Federal System

The second major problem is to consider what would happen to our federal structure if we adopted a parliamentary system. The Australian experience suggests that we should abolish the Senate. A parliamentary system works only when the government stands or falls on its support within one legislative body. If the government must also get legislation through a senate that is selected at different times and for different terms than the house, then the senate becomes either a useless or a dangerous body depending on whether the party controlling the house also controls the senate. Even the best situation, with a small third party contingent having enough votes to pass or reject government programs, puts far too much capability to disrupt the government into the hands of a few individuals.

Conceivably it would be necessary for the states to adopt a similar parliamentary system. Strong national parties controlling the federal government might not function properly if state governments operated on a separation of powers model. Certainly the federal government would have to assert complete control over elections for federal offices in order to establish the new forms needed for elections.

Establishing mechanisms for communication between the federal government and the states would be difficult. The states would have much less involvement in the federal legislative process. Formal meetings of state governors and the prime minister would be difficult if not impossible. Even with only six premiers, the Australian federal govern-

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[145] *See* WASHINGTON REPRESENTATIVES 1984 (8th ed. 1984). This pamphlet generally describes the American lobbying system. It then lists thousands of lobbying representatives and their clients.

ment does not communicate well with the states. Rather than six premiers meeting with a prime minister, in the United States fifty state leaders would have to meet with the prime minister.

It is hard to imagine at this time the full scope of the changes in our federal system that would occur if the federal government shifted to a parliamentary system. It is enough for present purposes to assume that the changes would be so substantial as to induce strong state resistance to any such change.

CONCLUSION

The Australian experience suggests that we should not start by trying to establish a version of the parliamentary system in the United States. The political changes that would be required if our government adopted a parliamentary system would be major. Most of the present apparatus — public and private — involved in the legislative process would probably be affected adversely by this move.

A parliamentary system can be established only if Congress and the public come to believe that no other changes that maintain separation of powers will solve our problems. The task of seeking out and implementing other changes will be formidable enough. Attempting now to move to a parliamentary system would be far more difficult.