Today's Australian parliament is a late-nineteenth-century creation. The Constitution of 1901 establishes a bicameral parliament composed of a House of Representatives and a Senate with virtually equal powers. The Senate is now composed of seventy-six members elected for a six-year term, twelve for each of six states and four representing federal territories. Half of the state senators stand for election every three years. All territory senators face reelection every three years, as do the 148 members of the House of Representatives. Since 1949, senators have been elected by the single-transferable vote mode of proportional representation (PR), with each state or territory forming a multimember constituency. This
mode of electing senators complements the single-member preferential voting method used in House elections. It is now characteristic of Senate party representation that neither the party of the government of the day nor that of the official opposition, both of which are determined by the strength of their relative numbers in the House of Representatives, can expect to control the Senate. PR allows minor parties and independents to hold the balance of power between the major parties, and it creates uncertainty about the fate of many legislative measures.

The formal constitutional limitations on Senate power qualify the manner rather than the might of the Senate's capacity to act independently of the House of Representatives and of the political executive based therein. At first glance, the formal provisions might seem to deprive the Senate of institutional clout. For example, the formal constitutional provisions include limiting the size of the Senate to half that of the House, prohibiting the introduction of basic money bills in the Senate, banning the Senate from amending tax bills or supply bills "for the ordinary annual services of the government," and requiring final resolution of intercameral deadlocks through a joint sitting of the House and Senate—at which stage the House's numerical strength, and the political strength of the executive based in the lower house, can be expected to win out.

But a closer look at the form and substance of Senate power reveals a remarkable parliamentary institution, unlike any other upper house in the Westminster-derived world. Although the Senate is limited in the legislative matters which it may initiate or amend, it has unlimited power to return to the lower house "any proposed law" with requests for amendments. If unpersuaded, the House's only resort is to play out the cumbersome deadlock resolution procedure, which involves a three-month interval between the initial and a second deliberate attempt by the Senate to alter a House measure, followed by a "double dissolution" for all House and Senate members, before the final convening of a joint sitting in the event that the election outcome has itself not resolved the protracted disagreement.

These facts provide the barest of bones about the Senate as an institution. Beyond these commonplaces, bicameralism in Australia allows for the emergence of divided party government, a condition often thought to be anathema to parliamentary systems of government. The constitutional design and political operation of the Australian Senate, which has proven its capacity to bring down governments and, with that power as a threat,
to transform the policy substance as well as the administrative style of
governments, provides the focus for this chapter. We begin the analysis
with an extended example that illustrates the emerging characteristics of
the Senate as a political institution. This leads to an examination of the
Senate’s contribution to an Australian version of what American political
scientists call “divided government,” which is distinguishable from the
case of minority party government often found in parliamentary settings.

Constitutional design, along with the crucial adoption of proportional
representation beginning with the 1949 parliamentary elections, frame the
development of Senate norms of institutional behavior and the patterns
of power devised by the modern Senate. Of particular institutional im-
portance has been the development of an extensive committee system.
This appraisal of the Senate as a parliamentary body concludes with a
review of the range of fears that governments have expressed about the
adverse effects of its power in Australian government. As we shall see,
these fears confuse the virtues of the separation of partisan powers inher-
ent in divided government with the vices of legislative and policy gridlock,
to which divided government does not necessarily give rise.

Contemporary Characteristics

The most striking examples of the emerging political power of the Austra-
lian Senate are two developments of 1993: the surgical strike against the
budget of the recently elected Keating Labor government, and the more
general hijack of the timetabling procedures for the legislative agenda
of governments. For Westminster-derived parliamentary systems, budget
bills are symbolically the most important of all legislative business. A gov-
ernment can enjoy no greater authority than its ability to apply its voting
power to the annual budget in order to stamp its mark on policy and
legislative processes. Indeed, 1993 was a major turning point in the norms
of Australian parliamentary government because it showed the capacity
of the minor parties in the Senate to take the initiative and orchestrate
parliamentary resistance to the government of the day’s power to manage
two of its most possessively cherished processes: the core budget process,
and the timetabling of legislative processes more generally.

All subsequent governments have had to live with the consequences of
the Keating government’s defeats at the hands of the Senate. Upon being
elected for its fifth term, the Labor government prepared its budget as an opportunity to establish the framework for its next three years in office. At no point since its original election in 1983 had the Labor government enjoyed a Senate majority. More significantly, the official opposition also failed over this time to command a Senate majority. Instead, the balance of power was held by a collection of minor parties. The 1993 election result was typical, with the government emerging from the election with thirty of the seventy-six Senate seats and falling nine short of a majority, the official opposition winning thirty-six seats, which was three short of a majority—and the balance going to the seven Australian Democrats, two Greens, and one Independent. The minor parties knew that they had no prospect of forming a government, but they had learned to extract concessions from the major parties in exchange for their support.

The combined power of the minor parties was used to pressure the government into revising not only the content of its budget package but also the very process through which this package was developed so as to widen the opportunities for constructive participation by those nongovernment parties on which the government might have to rely for passage of its budget. In fact, Westminster-derived parliaments typically facilitate the practice of strong party government, and their procedural norms reflect this preoccupation with government domination of financial initiatives. This was also the traditional Australian practice until the minor parties began to rewrite the legislative rule book. As Jackson notes of the emerging Australian practice, "By comparison, British and Canadian budgets are never amended by opposition tactics" (Jackson 1995, 12). The centerpiece of Labor's proposed budget was the so-called deficit reduction strategy, which involved a comprehensive package of legislative initiatives with many increased taxes that provoked widespread community protest for being at odds with earlier election promises. The minor parties took advantage of this wave of protest: significant elements of the government's package were withdrawn after the formal parliamentary presentation of the budget and were amended to take account of views of the nongovernment parties. Thus, the government was forced not only to reduce or delay a wide range of proposed revenue measures but also to increase outlays in social security measures—making for increases in the budget deficit of some $730 million over three years (see Senate 1994, 72–77).

The larger procedural changes heralded in 1993 are of two kinds. First,
from 1994 the government undertook to include the minor parties in pre-budget consultations that included access to confidential treasury information. The idea was to co-opt the minor parties into the budgetary process, trading off early access to government information for a commitment to bring on a final Senate vote on the budget bills by a set date. The evidence from the 1994 budget was that the minor parties gained little while giving little away but that the government had broadcast its desperation and growing dependency on the goodwill of those parties (Adams 1994). Second, the Senate greatly expanded the scope of a 1986 ruling under which its consideration of government bills was conditional on government compliance with timetables for the introduction into the Senate of government bills.

The 1993 extension included a new “double-deadline” test obliging the government to meet stipulated deadlines for the introduction of bills into the lower as well as the upper house, so that parliament as a whole would have enhanced opportunities to debate and examine legislation. The government expressed outrage at the presumption of one parliamentary house laying down conditions for the internal operations of another house, and at the hubris reflected in Senate preaching about its role in protecting the capacity of parliament as a whole to act as an effective deliberative assembly (Jackson 1995, 11-14; Senate 1994, 68-69; Senate 1995, 93-94).

These events were the tip of a larger set of institutional changes consolidating in the Australian Senate. Prominent in the price that the government was having to pay for the support of votes from the minor parties was a new deal on accountability. Ministers conceded unprecedented obligations to explain and justify the conduct of government and to provide new levels of information and documentation about government decision making that would formerly have been withheld on the grounds of executive privilege. The budget battles of 1993 prepared the ground for the establishment of the accountability accord of 1994, which among other things committed the government to a code of ministerial conduct to identify standards expected of the political executive, and enhanced independence for the Auditor General as the primary instrument of the bureaucracy’s accountability to parliament. As the government Senate leader ruefully observed when conceding the new intrusion of the Senate into the prerogatives of executive government, “We are talking not about
any old upper house but the most powerful upper house constitutionally in the Westminster world. There are no ifs, buts or maybes about that” (see Uhr 1995, 130; Reid 1984; Blewett 1993, 11–13).

Divided Government

If one word summarizes the traditional orientation of Australian parliamentary executives, that word is mandate. When used in this sense, “having a mandate” means having the popular authority and hence democratic legitimacy to proceed with a promised course of action in law or policy, even over the objections of nongovernment parties in parliament. The language of mandate is normally used by political executives to argue that the defeated forces in parliament do not have the political authority to obstruct the passage of the victor’s legislation. But over recent years the traditional magic has begun to wear off, especially as minor parties in the Senate have not accepted that they, unlike the official opposition, are defeated forces. They might be small parties, but to an extent their minority position is one of choice, reflecting a deliberate strategy to hold the balance of power between government and opposition.

The minor parties have developed their own version of mandate theory, which holds that they too have been returned to parliament with a mandate from electors endorsing their public commitment to subject government legislation to the closest possible scrutiny short of outright obstruction—to “keep the bastards honest,” to use a slogan devised by the most established of the minor parties, the Australian Democrats.

One would suspect that the Australian electoral system, with its characteristic combination of House with half-Senate voting, especially considering the presence of proportional representation in the Senate, makes it difficult for any incoming government to claim a mandate for representing the nation. The claim makes more sense as a sign of a government’s frustration with parliamentary impediments to its will. Thus it comes as no surprise that simultaneous or so-called double dissolutions for the whole Senate as well as the whole House have taken place on six occasions, when justified by the constitutional provisions regulating the resolution of disagreement between the two houses: 1914, 1951, 1974, 1975, 1983, and 1987 (Evans 1995, 75).

Australian political analysts have begun to rely on the United States
concept of divided government when examining the capacity of the Senate to frustrate the policy and legislative agenda of Australian governments. Divided government refers to the division of control over the core institutions of government when opposed political parties dominate the executive and legislative branches of government (see Mayhew 1991; Cox and Kernell 1991; Thurber 1996). Divided government refers in part to the checks and balances built into the constitutional framework, and in part to the deliberate choice by the electorate to "split the ticket" and place opposed parties in control of executive and legislative branches of government. A recent example occurred after the 1996 U.S. elections, which saw the Democrats retain control of the White House and the Republicans retain their control of both houses of Congress, which they had won initially in 1994.

At the center of the divided government literature is a debate over the legislative and policy effects of divisions of partisan control between legislative and executive branches. The initial supposition was that divided government meant deadlocked government, or political gridlock, as it is sometimes called. One response to this fear of deadlock was the revival of interest in parliamentary alternatives to congressional government first articulated by Woodrow Wilson over a century ago.

This longing for the supposed capacity of decisive leadership thought to be found in parliamentary systems can be traced back to Woodrow Wilson's critique of the deleterious effect of systems of separation of powers on a nation's political leadership (Ceaser 1986). Debate ensued over possible reform of American governmental institutions along parliamentary lines in order to establish a better platform for identifiable political responsibility and democratic accountability. Although without any practical institutional consequences, this search for a parliamentary alternative reawakened interest in the serious comparison between congressional and parliamentary systems, motivated by the belief that in general parliamentary systems facilitate public accountability as well as political leadership (see Weaver and Rockman 1993).

Another response that attracted greater scholarly support was to review the evidence to determine whether the institutional separation of legislative and executive powers has really led to gridlock. Despite the worst fears of those interested in parliamentary alternatives, the evidence does not easily support the argument that legislative and policy outcomes suffer under conditions of divided government (Mayhew 1991, 175–99;
Mayhew's important attempt to demonstrate the limitations of the more extreme fears about divided government is an object lesson in the perils of loose fears about the separation of partisan power across competing political institutions.

The emerging Australian debate is comparatively poor, and it displays a confusion between the messy routines of American budget making and the larger fears about policy gridlock between legislative and executive institutions. The political debate over the Australian Senate reflects only a limited range of the issues in the original American debate that it dimly reflects (see Sharman 1990; Mulgan 1995, 190–93). This is evident in two typical examples. First, there is Adams's report of the political debate about whether the Australian budget process has begun to become “Americanized,” in which he quotes former Liberal prime minister Malcolm Fraser, who has argued that the Senate “is running the risk of making Australia ungovernable . . . [by] turning the annual Budget process into a series of bargains and trade-offs similar to those which occur in the United States” (Adams 1993, 223, 225). Second, Jackson's detailed analysis of federal and state parliamentary developments leads him to ask if Australia “has entered an era of at least partially negotiated budgets and the threat of political gridlock,” which is at odds with the conventional accounts of the supposed virtues of the Australian parliamentary system (Jackson 1995, 12).

The concept of divided government was not devised with parliamentary government in mind. A parliamentary approximation to this situation is the condition referred to as “minority government” when a parliament without a party or coalition in command of a clear majority is prepared to entrust executive office to a minority party or coalition, on the basis that the government has a realistic opportunity of stitching together a working majority to enable it to get on with the routine business of government. But minority government differs from divided government in that it does not refer primarily to institutional deadlocks that can divide government into two camps each possessed of the power to veto the other. One might be tempted to think of the Australian parliament as establishing a minority government, to the limited extent that most governments cannot command a majority in both parliamentary houses. But to accept this temptation would be to downplay the significance of the often huge majorities that governments can command in the House of
Representatives and of their ability to use this to their ultimate advantage in joint sittings of the parliament, which is the final phase of intercameral dispute resolution.

The relevance here of the term divided government is that it focuses, first, on the electorate's choice to share political power among the parties of government and of opposition and, second, on the institutional capacity of the Senate to mobilize nongovernment interests to check and balance the power of governments enjoying comfortable majorities in the House of Representatives. The Australian electoral and party system for the House has provided clear winners at every election for the past fifty years, although the same cannot be said about parliamentary government at state level, where minority governments have been far from unusual.

The challenge at the federal level is posed by the Senate, where governments have rarely secured a majority since the introduction of PR. The exceptions are 1951–55 and 1958–61, at the end of which the Menzies government faced the permanent prospect of two minor parties holding the Senate balance of power; and 1976–80 at the end of which the Australian Democrats arrived in strength. The historical description for this standard situation has been that governments have faced "a hostile Senate" where the most severe challenge to the authority of the government was likely to be Senate obstruction. This usually meant something falling far short of the 1975 situation when the opposition parties refused to pass budget bills of the Labor government and stampeded the governor general into dismissing the Whitlam ministry, which resoundingly lost the subsequent general election.

The Australian constitution provides little guidance on the distinctive political responsibilities of the two parliamentary houses, although it comes closest to articulating norms of parliamentary governance when dealing with the resolution of deadlock between the two houses. Deadlock is defined in terms of the inability of a government based in the House of Representatives to secure parliamentary passage of its legislation. The constitutional provisions relating to the resolution of a parliamentary deadlock apply only to Senate obstruction of government initiatives and not to any failure by the House to pass Senate initiatives.

Although governments have anything up to a third of their ministry drawn from the Senate and, to use the 1993–96 figures, introduce around
a third of their legislation in the upper house, the rules of the constitutional game pay particular attention to Senate disagreements with government bills passed by the so-called house of government. Under specified conditions of deadlock, the government may arrange a "double dissolution," which is a fresh election for both houses. Should that fail to clear the legislative path, the government may subsequently convene a joint sitting of all senators and members (as distinct from a conference of representatives of the two houses), at which point the relative weight of house numbers will secure passage of any contentious legislation.

But even the constitution's careful recognition of the potential for institutional conflict falls short of identifying the range of particular parliamentary tasks expected of the Senate. The standard role claimed for it was that of a states' house, although it is important to note that the constitutional framers overturned an early decision to call it the "states' assembly" (Uhr 1995, 134). The fact that the Senate so early in its institutional development after federation failed to act as a states' house is less surprising than the lack of a political consensus, then or now, on a positive role for the Senate.

Australian political life has a variety of competing terms that try to identify the role of the Senate, and most do so in terms of a subordinate relationship to the House of Representatives. For example, "upper house" relates to the lower house and has all the disability of democratic preference for institutions that are closer to the people. "Second chamber" refers to the first and implicitly primary chamber. Even the term "house of review" relates to the lower house as the "house of government," implying that the Senate's role is basically reactive, checking and balancing the initiatives of the government of the day. The lower house is widely regarded as "the house of government" by virtue of the fact that the government of the day is formed from the party or parties holding a majority in it, and further that the leading minority party forms the official opposition or shadow government (Barlin 1997, 33–42, 103–6). The Senate is often regarded as the house of review, suggesting that its primary role is one of scrutiny and review of government operations, as distinct from more proactive tasks in which it might collide with the lower house over the conduct and direction of government (Evans 1995, 11–14, 117–20).

Although originally there were few doubts about the extent of the Senate's constitutional powers, over the years doubts began to surface about the appropriate role of the upper house in a federal system of responsible
parliamentary government. Despite periodic proof of its constitutional clout, the Senate has never displaced the House of Representatives as the primary political arena in which governments are formed. Not even the awful events of the 1975 dismissal of the Whitlam government prove the primacy of the Senate. It is true that the governor general exercised his constitutional prerogative to dismiss a ministry enjoying a clear majority in the House of Representatives on the argument that the government failed the core test of parliamentary confidence because it could not control the Senate. But these constitutional niceties pale in comparison with the political realities, particularly the role of the leader of the opposition, Malcolm Fraser, using his base of power in the lower house to marshall his Senate party members as instruments in his quest for prime ministerial power. Few can forget the audacity of Fraser's rise to office, but few can remember any of the Senate leaders or the supposed rights of the upper house (Barlin 1997, 52–59; Evans 1995, 89–105).

The divided government thesis arose at a time when analysts in the United States were comparing the alleged gridlock of their own congressional system with the apparent virtues of Westminster-derived responsible parliamentary government. But the irony is that at around the same time as Wilson was comparing the vices of congressional government with the virtues of parliamentary government, Australian nation-builders were approaching federation as an opportunity to modify the inherited parliamentary system to move in the direction of the congressional system (La Nauze 1972, 24–28, 273–75). A further irony is that the revival of Wilsonian interest in institutional reform of the congressional system coincides with the strengthening of an Australian republican movement which displays surprising interest in adapting elements of the congressional system in order to promote more open and deliberate legislative processes (see Uhr 1993).

But before exploring the effects of the contemporary Senate on the practices of Australian government, it is important to take stock of the deeper constitutional roots of the institutional power of the Senate. Those roots find their nutrients in the original constitutional design for a bicameral parliament of approximately equal powers, and in the later establishment of an electoral system using proportional representation to break the policy and institutional domination of the established major parties and to give minor parties the chance to acquire considerable parliamentary power.
Constitutional Framework

Names of political institutions do not always provide reliable guidance to their real significance. The legal framework for Australian national government is contained in a constitution that establishes a federal polity consisting of the commonwealth or national government and the six state governments. The federal government is a parliamentary government comprising two elected houses: the larger House of Representatives reflecting the national distribution of population, and the smaller Senate in which each state is equally represented. Senators' terms are twice the length of those of House members, staggered so that half the Senate is elected every three years. The constitution provides that the House shall be twice the size of the Senate, which effectively conveys the original understanding of the relative political weight of the two bodies. But institutional developments have not always complied with that original understanding.

The formal titles are interesting for a nation with a British colonial history and an inherited system of parliamentary government at state and federal levels. Although Canada shares a similar history, its national parliament is organized around a House of Commons that explicitly draws on British precedent. Although the Parliament of Canada includes a Senate that might appear to be loosely modeled on that of the United States, the Canadian upper house is an appointed body, representing regions rather than states or provinces. In choosing the title of Senate, the Australian constitutional framers rejected the Canadian version and even revised the American original by rejecting the practice in the United States of election by state legislatures and opting for popular election (Uhr 1989; Sharman 1990).

But it is one thing to confer democratic legitimacy on a political institution; it is another thing to arrange that institution so it complements rather than competes with other democratic institutions. Although the title Senate reflects a commitment to equal state representation, the constitution does not stipulate any particular legislative tasks as the preserve of the Senate, as does, for example, the United States Constitution in relation to the ratification of treaties and confirmation of executive and judicial appointments. The Australian Constitution makes the two houses virtually equal in their legislative power, although the Senate is limited in its capacity to amend tax bills or bills "for the ordinary annual services of
the government." But even matters that the Senate may not amend, it may reject outright or return to the initiating house with a request for amendments. Clearly the constitution grants the Senate enviable power, but from the beginning uncertainty has surrounded the areas of political responsibility in which the Senate might best use that power.

It is well known that the design of the Senate repeatedly gave rise to the most protracted disputes during the 1890s Conventions in which the constitution was framed (La Nauze 1972, 40–44, 140–41; Crommelin 1992, 39–43). The Convention delegates were divided over the purpose and practices associated with a federal house of review. Progressive Liberals tended grudgingly to accept the Senate as the price that had to be paid for federation and the transition to the new nation. The general contours of the Convention debates over the powers of the Senate have been well described elsewhere (Galligan 1980; Galligan and Warden 1986). But despite the attention that has been directed to the Senate's legal powers, much less attention has been given to its electoral composition.

*PR in Theory*

The framers' case in principle for proportional representation can be reconstructed from evidence of their approach to representation in general. Many of the framers had few illusions as to the likely place of party politics in both houses of the federal parliament; some, like Deakin and Barton, probably tolerated PR as a means of adapting the principle of party to serve a distinctively qualified Australian variant of parliamentary government (La Nauze 1972, 44, 119, 148, 188; Quick and Garran 1976, 444). The argument for an upper house conceded the case that equal state representation was the inevitable entry price being extracted by the smaller states, but it reached beyond that to issues relating to the structural requirements for effective parliamentary deliberation in a large continental federation (see Quick and Garran 1976, 386–87, 422).

Very prominent framers like Deakin and Barton went on the record predicting that parliament would probably opt for PR for the Senate. The constitutional framers were convinced that PR would realize the promise of the Senate as a house of review by establishing a different parliamentary institution capable of representing a range of community views not reflected in the House. With the inclusion of PR in the original 1902 electoral bill, where the provisions were deleted, opponents quite rightly saw
the guiding influence of such philosophical liberals as John Stuart Mill. Arguably, Mill’s account of the merits of a second chamber organized on proportional representation provides one of the important missing ingredients in the framers’ confident recipe for a federal house of review (see Reid and Forrest 1989, 87–94; Mulgan 1995, 201–2). Mill provides the substance for the argument, advanced only hesitatingly by a few of the framers, that the primary purpose of an upper house, and of proportional representation, is to enhance the deliberative capacities of parliamentary institutions by providing new opportunities for minority voices to be heard and new accountability requirements that ministerial voices be heard at the convenience of parliament rather than the government of the day. Perhaps surprisingly, Mill can still be found as an authority on bicameralism in the contemporary Senate (see Uhr 1995, 136).

According to Mill, the aim of the second chamber was to act as “the center of resistance to the predominant power in the Constitution,” which in modern democracies is the force of the majority. This “democratic ascendancy” had a proven tendency to cultivate what he, following Tocqueville, identified as the tyranny of the majority. The purpose of the review chamber is to check “the class interests of the majority” and to represent above all the interests of vulnerable minorities, ever conscious of the need to respect the political principles and institutional norms of equality and so to promote “nothing offensive to democratic feeling.” The review function is one which Mill termed “the function of antagonism,” by which he refers to the check or control to be placed on the unexamined power of “the ruling authority.” Control in this legislative sense means open, public examination of the reasons for ruling; and proportional representation can provide the requisite “rallying point” around which “dissentient opinions” can form, facilitating review and revision of the governing strategies of the ruling majority (Mill 1991, 386, 388, 391).

PR in Practice

The first federal government attempted unsuccessfully to introduce PR for Senate elections. The 1902 electoral bill was introduced in the Senate, and after an important debate over the strengths and weaknesses of responsible party government, the Senate deleted the proposed provisions for proportional representation on the understandable grounds that they
posed real risks for the stability of British-derived party government (Uhr 1995, 136–38). The proponents of PR defended it in terms of establishing the true voice of the majority, and not in terms of minority rights. They explicitly accepted that democracy means that “the majority in decision must rule” and that the minority has “a right to be heard and not to rule.” The government Senate leader’s case was that traditional forms of representation associated with the British Constitution had been “invested with a certain amount of sacredness” that was “altogether unsuited to modern times.” Parliament must strive to become “a true reflex of the opinion of the people” by arranging political representation so that “every shade of opinion, as far as possible, may be represented.”

After extensive debate, the Senate threw out the provision for PR, chiefly on the correct perception that it would introduce a war of representation into the new federal parliament, probably challenge the conventions of cabinet government (or “honest party government,” as it was called) and increase the potential of the Senate to compete for popular legitimacy with the House of Representatives. The preconditions of responsible cabinet government would be eroded, in that under what the opponents cleverly called “fractional representation” political leadership would be challenged by the activity “of sections and fads,” enfeebling cabinet’s claim to representative leadership as “the dominant power.” Opponents rightly appreciated the potential of the revamped Senate to “altogether paralyze responsible government modelled upon the British system” (Uhr 1995, 138). The 1902 electoral legislation entrenched a version of the block vote, which had the striking effect of confirming both sides’ expectations and delivering Senate representation generally into the grateful hands of whichever party was about to become the government of the day, with little or no regard for minority representation. Typical government majorities in the Senate were 31 to 5 in 1914, 35 to 1 in 1919, 33 to 3 in 1934, and 33 to 3 in 1948.

The 1948 reforms to the electoral legislation that introduced PR for the Senate are well researched and require only limited comment here (Reid and Forrest 1989, 118–22; Fusaro 1968, 129–30, 135). By way of contrast to the 1902 legislation, the 1948 measures were introduced in the House, as though to suggest that this was as much a matter for government as for the house of review. Sure enough, Attorney General Evatt explained the reformed system of Senate representation as “one most likely to enhance
the status of the Senate.” The stated aim was to ensure that “the majority group will get the majority of seats and no more,” a policy on representation long advocated by the established third party then known as the Country Party.

Opposition leader Menzies clearly identified Labor’s partisan strategy, in which a Labor majority in the Senate was an insurance policy against the probability that they might lose office at the next election, as in fact happened. Menzies also foreshadowed the possibility of a government using the barely tested procedures for double dissolutions to attempt to restore parity of representation in both houses, which is exactly what he did in 1951. For Menzies as for all subsequent prime ministers, the existence of the constitutional provision for double dissolutions and subsequent joint sittings was proof enough of the subordinate place of the Senate in Australian government. The “will of the people” must trump the representation of minority groups in the Senate; and it is the people’s House which “makes and unmakes governments” (Uhr 1995, 138–39; 1992, 99–102).

Forms of Senate Power

One can distinguish between two general phases of Senate reform since the introduction of PR in 1949. The first phase may be called “the age of majority” to refer to the prevailing ethos that was compatible with the norms of strong party government. This phase extended from 1949 to the late 1960s, embracing the heyday of the first minor party, the Democratic Labor Party (DLP), which broke away from Labor and effectively entered an alliance with the coalition government against Labor, doing comparatively little to transform the ways of the Senate. The second phase may be called the “age of minority” because it sees the rejuvenation of the Senate as a parliamentary chamber through the arrival of the second wave of minor parties which were less committed to shoring up the major parties in government. Between the decline of the DLP and the arrival of the second-wave minor parties, there was something of an interregnum, coinciding with the Fraser government’s unprecedented command of a majority in both houses of parliament between 1976 and 1980.

The presence of minor parties holding the balance of Senate power is not the sole ingredient in the rise of a system of multiparty decision
making. The DLP was formed out of the Labor split of the 1950s. It effectively held the balance of Senate power from 1955 to 1958, and then later it shared that balance with other splinter groups and independents from 1961 until the party's eclipse in 1974. But the relevant point here is that not all minor parties are the same, and that the DLP made little effort to alter the rules or procedures of Senate decision making. As Malcolm Fraser has argued, it was not until the demise of the DLP and the arrival of the Australian Democrats as the holders of the balance of power in 1980 that the apple cart of convenience was overturned (Fraser 1993). As a striking symbol of the potential docility of minor parties, consider the impact of the DLP on the growth of the Senate committee system, which they voted against when it was originally established at the insistence of the Labor opposition. DLP leader Gair, drawing on his state experience in executive office, advocated a "policy of gradualism," which would have held back the committee system until extensive trials had been conducted. Clearly there are major differences among minor parties, and these can spoil tidy predictions about the modes of multiparty parliaments.

Two reservations should be borne in mind when thinking of an age of minority. First, it is rational for minority parties to resist routine reliance on legislative committees as a substitute for chamber consideration because the chamber is the one site in which minor parties and especially independents can marshal their legislative power to constrict the flow of legislative business. Thus it comes as no surprise that the age of minority gives rise to more complex rules for chamber treatment of government proposals, equal in importance to the threat of referral of bills to committees.

Second, there is no single cutoff date separating the age of majority from that of minority; the two overlap, with the result that the Senate can still revert to type whenever the minor parties lose the will or interest to hold the line against the combined ambition of the major parties. The major reforms associated with the age of minority occurred at the end of the Keating government, when the Democrats were joined by the Greens. But the tone was set in the mid-1980s when Democratic senator Michael Macklin successfully moved what became known as the "Macklin motion," which was a resolution declaring that the Senate would defer until the next period of sittings consideration of any bills received after a specified deadline (Evans 1995, 253–55).

Recollecting the initial case study of the 1993 timetabling reforms
effected by the Senate, we can see that this package of procedural reforms stands as a symbol of the arrival of the age of minority. Although the Senate may waive its right not to consider “late” legislation, the onus is on the government to convince it to lift the ban on a case-by-case basis, which is itself a time-consuming burden. In the initial period of operation from November 1994 to mid-1996, the Senate exempted 141 government bills and refused exemptions for only 15 of them, or a little more than 10 percent. The proportion might suggest that the Senate tends to cave in to government demands, but one should remember that the legislative process is now so tight that governments only apply for exemption in those cases where they genuinely believe that there is some pressing need for early consideration of nominated legislative proposals.

Characteristic of the age of minority is the procedural revolution of 1994, which broke the government chokehold on committee power. It had long been observed that although the post-1949 Senate almost never had a government majority, standing orders reflected the interests of the established parties competing for government by requiring that the power of the chair reside in the party in government. Even in the absence of procedural protection, Senate power reflected the interests of the governing party, which is nowhere better illustrated than in the convention that the presidency is a gift to the party in government, regardless of that party’s proportion of Senate seats. Why not have that power shared to reflect the actual balance of the parties represented in the Senate? That traditional convention held sway until the minor parties brokered a new accord which eventually obtained Senate support (Evans 1995, 392–93).

The first manifestation of the new committee system was the division of each former committee into two new separate committees. These included (1) a legislation committee of six members with government chair and majority, and (2) a reference committee of eight members with nongovernment majorities and chair, shared between the opposition and the Australian Democrats on a 3 to 1 ratio. The two Greens and the lone Independent won no such rights of formal responsibility, but their voting power remained decisive when formal considerations reached the chamber.

The original intention was that the reference committees under opposition control would target matters of public policy and other matters referred to them, but events never turn out as neatly as the rules intend. Early in the life of the 1996 Howard government, the Senate successfully
referred a number of important government bills to reference and not legislative committees, on the basis that the former but not the latter had nongovernment majorities. Thus, despite the initial logic behind the two spheres of responsibility, the Senate adopted the more sustainable logic of using its numbers to take government legislation out of the hands of government majorities and to incorporate the reference committees into the routines of the legislative process.

According to governments, the general behavior of the Senate as a legislative chamber has been obstructive, but the evidence does not support this accusation. The trend is that around 30 percent of bills passed by the Senate receive prior committee examination, and around 30 percent of eventual amendments have been examined during committee consideration (Evans 1995, 262). The 37th parliament (1993–96) provides an instructive example: the Senate record shows that the government had 482 bills passed during that 1993–96 period, 140, or 30 percent, of which were referred to committees for examination. Taking amendments to government bills as a good test of the Senate’s legislative will, the record shows that 157, or 33 percent, of these 482 bills were amended. It is true that a majority of these amendments are recorded as government amendments, but a high proportion of them indicate a change of legislative mind on the part of a government as it moves to repair provisions which, to judge from the state of Senate opinion, might otherwise not pass.

The charge of obstruction only makes sense when the Senate’s profile of amendments is contrasted with the ineffectual protest of the nongovernment parties in the House of Representatives where governments can expect to pass their initiatives at will. During the 37th parliament (1993–96), 157 bills attracted 1,812 successful Senate amendments at an average of 11 amendments per bill. The bills withstood many more proposed amendments that were unsuccessful, including half a dozen of the government’s own proposed amendments. The distribution of successful nongovernment amendments is as follows: official opposition 267, or 15 percent; Australian Democrats 159, or 9 percent; Greens 76, or 4 percent; and Independent 2, or less than 0.1 percent. This understates the impact of the Australian Democrats, who have had many proposed amendments taken up by the government and formally moved either by the government alone or in cosponsorship with the Democrats.

Another test of the Senate’s power over government is the rigor of its daily Question Time compared with that in the House of Representatives.
Australian practice in both chambers is that "questions without notice" to the ministry alternate from opposition and government, so that only half of the questions come with real surprise or are likely to carry much sting. But within the tame limits of Australian practice, the Senate process provides greater opportunity for nongovernment parties to keep the heat of accountability on the ministry, a third of which will be senators (Barlin 1997, 507–25; Evans 1995, 498–502).

Parliamentary standing orders protect the right of parliamentarians to put questions to ministers, but they do not compel ministers to answer questions, and practice in the lower house has degenerated into a parade of lengthy ministerial statements typically about the defects of the opposition parties (Blewett 1994, 6–8). But Senate and House versions of Question Time differ in fundamental ways, with the Senate version being of more value in terms of backbench opportunities to test the credibility of ministers. Following a 1992 overhaul at the instigation of the nongovernment parties, Senate Question Time now is distinguished by rules that attempt to share around as evenly as possible the exposure time enjoyed by questioners and answers. Questions are limited to one minute, answers to four, with tighter rules for supplementaries; and each day after Question Time senators have thirty minutes set aside as a kind of right of reply in which to "take note" of earlier answers, again subject to tight time limits on each speaker (Evans 1995, 498–514).

Regarding written "questions on notice," Senate rules stipulate that when ministers fail to provide answers within thirty days, they must provide "an explanation satisfactory to that senator" who asked the question, or run the risk of Senate debate on their ministerial failure to provide either information or explanation to the Senate. Related Senate rules that give the upper house a comparative advantage in extracting information from the ministry include the use of "returns to order," by which the Senate formally "orders" that specified documents be "returned" or submitted to the Senate by a certain date. Another is the use of orders directing the auditor general to investigate matters on the Senate's behalf, a relatively new practice begun in the 1990s which could signal a revolution in parliament's use of so-called parliamentary officers as investigative arms of nongovernment parties.

A final distinguishing feature of the Senate's armory of accountability is the role of estimates hearings by legislative committees during the Senate's consideration of the government's annual appropriation bills for
public service expenditures. In formal terms, these hearings are meant to provide the committees with opportunities to examine the government budget estimates as contained in the two sets of appropriation bills passed twice each year. But despite this formal appearance as a legislative reference designed to help senators form a judgment on the merits of legislation implementing the government's budget, estimates hearings typically take on the substance of an open and frequently disorganized investigation into suspicions of ministerial or bureaucratic inefficiency and maladministration.

The term hearings accurately conveys the orientation: estimates committees approach their task as a hearing or audit of government explanations of budget and management performance. To the extent that the hearings move away from details of financial inputs to larger issues of ministerial or bureaucratic performance, the committees openly accept that they have usually lost any prospect of consensual agreement. This honest embrace of dissent is reflected in the quality of the committee reports which, unlike the hearings that precede them, frequently do little to enhance public debate about government operations. Opinions vary on the value of a model of estimates hearings that culminates in a shopping list of unresolved items in dispute, to which senators can declare their determination to return during subsequent Senate debate of the budget bills.

As instruments of accountability, estimates hearings are potentially significant because they provide regular opportunities for the Senate to take advantage of the availability of public servants who appear as witnesses to clarify and explain the extensive budget and management information prepared by each agency. Although departmental public servants appear at the direction of their ministers, the Senate's role as a small upper house means that in many cases they are accompanied by a duty minister unprepared to intervene and protect witnesses against probing lines of questioning about agency details. Better alternatives have been proposed, but one basic hurdle is the remarkable lack of interest by the House of Representatives in adopting detailed estimates processes. An experiment with estimates committees was attempted under the Fraser government, and even though this coincided with growing interest in and experimentation with legislative committees, the House dropped both practices after a few years, and estimates committees have never returned. This leaves the main estimates responsibility with the Senate, which itself tells much about
the limits of "Westminster" categories for the analysis of Australian parliamentary practices (Reid 1984; Reid and Forrest 1989, 378; Evans 1995, 323–28).

Forms of Government Opposition

In the Australian situation, proof of the pudding of divided government is found in the escalating resentment that political executives express over the effects of the Senate on the legislative and policy agenda of governments, and their increasingly strained defenses of their right and supposed mandate to unobstructed government (Mulgan 1995, 193–98). There is ample evidence that the Senate is in the process of redefining its representative role. The novel level of intrusion into government decision making has been joined by a deeper transformation of the Senate’s institutional understanding and norms of due process. Most importantly, this alteration in the business of the Senate poses fundamental challenges to the conventional model of Australian responsible government. It is not accidental that Prime Minister Keating, a spirited defender of the established parliamentary order, should be the one to provoke this articulation of a new system of multiparty shared responsibility.

The Senate has ensured that Keating will remain famous for his views that senators are the “unrepresentative swill” of Australian politics and that Australia does not really need a Senate (Uhr 1995, 129–33, 139–40). Keating argued that precisely because of PR, especially with the current “exceptionally low quotas,” the Senate has become “unrepresentative,” displaying the behavior of “a spoiling chamber . . . usurping the responsibilities of the executive drawn from the representative chamber” (i.e., the House of Representatives). Institutional conduct that the minor parties describe as part of an agenda of accountability Keating calls “simply holding any government to ransom.”

The traditional view of responsible party government has its able proponents. Senator Evans concedes that “it is all very well for minorities to have their voice,” and “it is all very nice having them chirp up from time to time, but it is not very nice having around 50,000 votes determining the ability of a government with five million votes to govern.” Supporting the traditional model is a concept of a government’s popular mandate, openly on display in the views of Prime Minister Keating. The mandate concept derives from the inherited British model of responsible party
government, where it fits the institutional circumstances of a popularly elected house defending itself against the pretensions of an unelected upper chamber. But Australian institutional circumstances differ, consistent with a deliberate strategy for reshaping that inherited model—not by reintroducing the powers of an established estate, but by widening the net of political representation to implement more rather than less democracy.

Only slowly and reluctantly have the major parties begun to learn the lessons of their minority status in the Senate. PR brings to the Senate a set of institutional incentives for less hasty decision making and enhanced political deliberation across party divisions. Defenders of the old order are unlikely to alter their views on preferred institutional arrangements, but a more accurate guide to the virtues of the emerging order comes from Labor’s former Senate leader John Button, who concedes that “the necessary process of conciliation and negotiation tempers the mood of the Senate considerably more than is the case in the House of Representatives.” Further, Button openly concedes that the current Senate system establishes something akin to “a minority government,” which while “very difficult” is also “a very salutary experience” (Button 1992, 25).

Conclusion

Most analysts of Australian parliamentary institutions assess the Senate’s representative capacity in two related ways. First, they contrast the practice as a party house with the supposed original intention of an assembly representing states’ interests. Second, they concede that, although the 1948 introduction of proportional representation brought a refreshing legitimacy to the Senate, that reshaping reflected very little by way of theoretical design, and can best be seen as a clever Labor scheme to retain hold of power in the upper house in the likely event, all-too-true, of an imminent loss of control in the approaching elections for the House of Representatives (see Souter 1988, 94–97, 403).

I have argued that a strong case can be made that the constitutional intention of the framers and founding generation of Commonwealth politicians was for the Senate to represent majority interests, even more accurately than the professed House of Representatives, by providing opportunities for the election of minority parties. The original design did not focus exclusively on PR as an instrument for protecting minority
interests as an end in itself. The representation of minor parties was intended as an instrument to help form a broader coalition of democratic, as distinct from simply majoritarian, interests. The common rhetoric of the Senate as a (failed) states' house has got it no more than half right, and has done a disservice in suppressing the wider justification of the Senate as a brake on the misuse of majority power. The current institutional redefinition of the importance of PR should come as no great surprise; it gels with much, but not all, of the Senate's norms of committee scrutiny of government action affecting civil liberties (Sharman 1977; Reid and Forrest 1989, 141–45; 215–30; Galligan and UHR 1990; Mulgan 1995, 201–3).

The contrast in styles and substance between the two parliamentary chambers is nicely captured in the contrasting fates of the opposed leaders of the government and the Senate at the time of the resurgence of Senate power in the late 1960s: Liberal senator John Gorton and Labor senator Lionel Murphy.

In 1968 Gorton was promoted from the office of leader of the government in the Senate to that of prime minister when elected leader of the governing Liberal Party upon the death of Prime Minister Holt. Gorton knew that he could not lead a government or more particularly a governing party from the Senate, from which he resigned to take up a lower house seat. His conduct has been followed in spirit by many ambitious leaders of the government in the Senate who have resigned and taken up House of Representatives seats as part of a strategy to position themselves for the highest political office. His story illustrates that peak political power is located in the House of Representatives, and that ambitious parliamentarians who want to be considered for prime ministerial office eventually have to make their way in the larger and more public world of the lower house.

Gorton's opposite number in the Senate was Lionel Murphy. Prompted by the legendary Senate clerk J. R. O. Odgers, Murphy saw the opportunities for the Senate as a house of review with an extensive committee system. Almost as Gorton departed for his prime ministerial office, Murphy began his move to establish a fresh institutional capacity to review government operations, which was set in place in 1970 through a system of estimates and general purpose committees (Reid and Forrest 1989, 178–79; 375–80). Murphy's interest in civil liberties led him to push
the Senate into the sphere of scrutiny of government operations and the cultivation of an institutional ethos as the watchdog protecting the community against the bureaucratic pretensions of big government. The establishment of the Senate committee system in 1970 brought a new sense of legitimacy to the upper house, which within a few short years was to find expression in the confident assertion of its will against that of Murphy’s own Labor government.

Murphy himself escaped the trauma of the 1975 dismissal, since he moved on in 1974 from Gorton’s old position as leader of the government in the Senate to the High Court. But not even the separation of powers between judiciary and legislature could protect Murphy from Senate scrutiny. In the 1980s, Murphy triggered a series of Senate inquiries that marked the beginning of impeachment proceedings against him for alleged misconduct. Murphy’s affairs were the subject of two inconclusive Senate committee inquiries in 1984 and a further inquiry by a specially established parliamentary commission in 1986. Murphy died before the 1986 parliamentary commission could complete its inquiry (Evans 1995, 538–50).

Nothing better illustrates the power of the Senate than this determination to bring even the highest court within the orbit of its scrutiny. Opinions naturally differ on the capacity of the Senate to make responsible use of this vast power. For too long, Australian political analysts have simply presumed that the Senate was an anomaly in terms of the conventions of responsible parliamentary government. Only now are observers learning to take seriously the Australian version of divided government, which is challenging the traditional model with its implied right to untrammeled rule by the party holding power as the government of the day.

References


