

HOBBS VERSUS MADISON AND ISAACS VERSUS BAKER: CONTRARY THEORIES AND PRACTICES IN AUSTRALIAN DEMOCRACY

HARRY EVANS*

I TWO THEORIES OF GOVERNMENT

In his landmark work *The Political Theory of a Compound Republic*,¹ the American political scientist Vincent Ostrom identified two theories of government which have contended in the intellectual and political history of modern civilisation.

The first theory Ostrom associated with the 17th century English philosopher Thomas Hobbes, although it can be traced back to ancient times. This is the idea that sovereignty is indivisible, and that in every state there must be some person or body in possession of the ultimate, final and overriding power. That repository of sovereignty may be the whole people gathered together, as in an Athenian democracy, or a representative assembly, or a king; but sovereignty must exist somewhere in the state and somebody must possess it, otherwise there is no government.

The other theory Ostrom identified with the American founder James Madison, although again it is a theory with a very ancient lineage. This is the theory of countervailing power. It holds that the establishment of a system of government does indeed require that power be conferred on persons or bodies, but also holds that those persons or bodies will turn their powers to unexpected ends and abuse them unless they are subject to limitations and constraints. To vest all power in the whole people, as in an Athenian democracy, merely transfers and enlarges the problem. To give the people control over the government through the medium of election is not sufficient, because majorities can abuse their powers as well as kings. The way to guard against this is to confer different powers on different persons or bodies and set them to check and balance each other. It is not necessary to give supreme power to anybody.

These differing ideas of government affect the way in which systems of government work, as people who follow the two theories of power attempt to put

* Clerk of the Senate.

1 Vincent Ostrom, *The Political Theory of a Compound Republic* (first published 1971, 2nd ed, 1987). Quotes from Hobbes and Madison introduce the work.

them into practice. Ostrom's purpose was to re-explain and revive the Madisonian theory of countervailing power, because it had fallen into some disfavour, and to demonstrate its relevance to the practice of government in the United States and the wider world.

II THE THEORIES IN AUSTRALIA

Australians are largely unaware that these two theories of government were major contenders at the constitutional conventions which drew up the *Australian Constitution* ('Constitution') in the 1890s, and have been major contenders in the workings of Australian government ever since the country's founding. The Australian founders were practical, and not much given to theory, but they included followers of Hobbes and followers of Madison, and this fundamental disagreement is reflected in the structure of government they created. As a result, the contrary elements of the structure have kept the rival theories in play in our subsequent political history.

The Hobbesian theory of undivided sovereignty re-emerged in the 19th century, in Walter Bagehot's classic exposition of the British parliamentary system, *The English Constitution*.² Quoting Hobbes with approval, Bagehot sought to demonstrate that the British system was far superior to any other, precisely because it vested sovereignty in a single place – the House of Commons. In his opinion, the fusion of executive and legislative powers, through the House of Commons and the Cabinet, gave British government a quality and efficiency not matched by systems of divided power, such as the American one. Having the people elect different levels of government and different bodies within the government, in the hope that they would check and balance each other, merely resulted in a muddle, and was the source of America's failings. In contrast, having the people (on a limited franchise) elect the all-powerful House of Commons, and the House elect the Cabinet, was the secret of imperial Britain's great success.

The Madisonian theory of countervailing power was represented for the Australian founders by the work of another Englishman, James Bryce, in his book *The American Commonwealth*.³ Bryce's exposition of how the American people, scattered across a vast continent, delegated their powers to the different levels of government and to the two houses of the legislature, which represented them at different levels, was frequently quoted by the Australian founders, many of whom hoped that Australia would emulate both the democracy and the immense scale of the 'Great Republic'.

The Australian Hobbesians were the 'responsible government men', those who believed that the British parliamentary system was best and who wished to

2 Walter Bagehot, *The English Constitution* (1867) ch I, 'The Cabinet'; ch VI, 'Its Supposed Checks and Balances'.

3 James Bryce, *The American Commonwealth* (1888). Volume I of this monumental work opens with a series of lucid sketches of the federal and democratic character of the American polity.

follow it as closely as possible. They insisted that Australia had to have a cabinet system, with the executive government carried on by a ministry supported by a majority of the House of Representatives. Their most vociferous spokesman was Isaac Isaacs, who believed that the Australian people should elect a national government through the House of Representatives, and who was sceptical of the notion of the Senate (representing the people equally by State) acting as a check on the House.⁴

The Australian Madisonians were those who styled themselves as the true federalists, those who considered that the division of power between the State and federal governments, and between the two Houses of the central legislature, would be the vital ingredients of the new system. Their chief spokesman was Richard Baker. He expounded and defended the theory of the double majority: with the House of Representatives representing the people as a whole, and the Senate representing them equally by their State; a law would not pass unless it was supported by a majority of the people and by a majority of the people in a majority of States, which is the true formula of a federation. So important did Baker regard this principle, and the concomitant requirement that the two Houses be equal in power, that he endeavoured to persuade the convention to abandon the cabinet system of government whereby the Cabinet is responsible to one House only. Instead, he attempted to substitute a separately constituted executive, as in the United States or Switzerland, but on this point he was outvoted by the 'responsible government men' and those who wished to stay with the system they knew.⁵

III THE CONSTITUTIONAL COMPROMISE

The two factions had to compromise, and their compromise emerged in the structure of the Constitution. Isaacs had to live with a Senate based on the equality of the States; Baker had to live with cabinet government. Thus, they fought their major battles over the powers of the Senate. The 'responsible government men' wanted it to be inferior in power to the House of Representatives, so that the exclusive responsibility of the ministry to that House would be reinforced. The federalists wanted the two Houses to be equal in power to preserve the essence of federalism. Predominantly, the struggle focussed on financial powers, because the House of Commons had become supreme through its control of finance. The ultimate compromise is reflected in s 53 of the Constitution: the Senate may not directly amend some kinds of financial legislation but may request amendments, and may withhold assent from any legislation until its requests are met. This arrangement was regarded as a victory for the federalists, because the difference between amending a Bill and

4 Isaacs' major speech was on 13 April 1897: see Adelaide, *National Australasian Convention Debates*, 13 April 1897, 542-6 (Isaac Isaacs).

5 Baker's major speech was on 17 September 1897: see Sydney, *Australasian Federal Convention Debates*, 17 September 1897, 782-9 (Richard Baker).

requesting an amendment was rightly held to be a matter of procedure only. The federalists, however, had to live with s 57 of the Constitution, providing for simultaneous dissolutions of the two Houses followed by joint sittings to resolve deadlocks between the Houses over legislation.

To an extent both sides were vindicated by subsequent developments. As Isaacs envisaged, federal elections came to be seen as the selection of a central government through a majority of the House of Representatives. Baker's attack on the 'British sham' of responsible government as producing autocratic Prime Ministers and feeble parliaments was borne out by the rigid ministerial control over the House of Representatives to which we are now resigned. Thus, the system developed in ways which disturbed both schools of thought.

IV POST-1901 CONTENTIONS

The battle did not end when the Constitution was settled; on the contrary, it continued in 1901 and continues to this day.

Hostilities resumed in 1901, when the first ministry presented to Parliament the first two Supply Bills to provide the new Government with the money it needed to operate. The wording of one Bill suggested that the grant of money was the sole prerogative of the House of Representatives, and the funds in the other Bill were sought in a single sum, with the implication that the Senate did not need to know what the money was to be spent on. Was this merely a slavish adherence to British practices, or was it a last-ditch attempt by the 'responsible government men' to rewrite the Constitution? The Senate did not care what it was. Incited no doubt by Richard Baker, then its President, the Senate refused to pass the Bills until the offending words were removed and a list was provided showing what the money was for. For the sake of the money, the Government was willing to comply.⁶

The arrival of organised political parties, and the presence of the same parties in the Senate as in the House of Representatives, did not end the ideological divide, but perpetuated it in a different form. Parties simply change sides according to whether they are in government or in opposition. The party in power tends to support the prerogatives of the executive government and the exclusive rights of the House of Representatives, while the party in opposition tends to support parliamentary checks and balances, and they adjust their theoretical positions accordingly. Thus in 1914, the Labor Party Opposition, holding a majority in the Senate, presented to the Governor-General an address objecting to the Cook Government's advice that both Houses should be dissolved under s 57 of the Constitution for the first time. The address was a resounding

6 The decisive votes by the Senate were taken on 14 and 19 June 1901: see Commonwealth, *Journals of the Senate*, Senate, 14 and 19 June 1901, 35-6, 42-3.

defence of the Senate's right to reject or to amend any legislation and a forthright statement of the theory of checks and balances.⁷

Two factors have modified this pattern of partisan rotation. Firstly, in the period from about 1920 to about 1950, the theory and practice of checks and balances went into something of an hibernation, with only occasional outbreaks, such as those of 1929-32 when the Senate made life difficult for the Scullin Government. During this period, for reasons related to wider historical developments, a 'Westminster hegemony' prevailed. Australians came to see their system of government as fundamentally British, or at least one that should aspire to emulate the British model. The federal system was seen as something of an historical encumbrance, and the Senate as an unfortunate colonial substitute for a House of Lords. This prevailing view corresponded with intellectual trends in the rest of the world. Federalism and Madisonian theories of divided power were out of fashion, a situation which authors like Ostrom later set out to correct.

Secondly, the events of 1975, when the non-Labor parties used a fortuitous majority in the Senate to force the Whitlam Government to an election, with the assistance of the Governor-General, has somewhat dampened the Labor Party's enthusiasm for checks and balances. In more recent times, however, the Labor Party, when in opposition, has not hesitated to join with minor parties in the Senate to reject or amend government legislation and to use the Senate's inquiry powers to expose government misdeeds and mistakes.

The revival of Madisonian theory and practice in Australia was influenced by one highly significant institutional change: the introduction in 1949 of proportional representation for elections to the Senate. The new electoral system resulted in the Senate becoming arguably more representative than the House of Representatives, in the sense that parties win seats in the Senate very nearly in proportion to their share of votes. By contrast, under the House of Representatives electoral system parties usually win majorities with less than 50 per cent of the vote, and often with fewer votes than their main rivals.⁸

This situation has given legitimacy to the Senate's use of its legislative powers under the Constitution. A majority of the Senate, by whatever combination of parties it is composed, can claim to represent a majority of the electors, whereas a government in the House of Representatives usually represents only a plurality of the electors, and sometimes not even that.

V RECENT EVENTS

A recent manifestation of the continuing struggle between the Hobbesian and the Madisonian theories of government in the Australian political system was the debate which occurred in 1998 over the newly re-elected Howard Government's

7 The address was adopted by the Senate on 17 June 1914, and appears in Commonwealth, *Journals of the Senate*, Senate, 17 June 1914, 86-8; and is quoted in part in Harry Evans (ed), *Odgers' Australian Senate Practice* (9th ed, 1999) 87.

8 Ibid 23-6 has figures for percentages of votes and seats in each election for each House since 1949.

'mandate'. Nowadays, the belief in undivided and unlimited sovereignty often appears in the guise of the mandate theory. The power of a government to rule is legitimised by its supposed possession of a mandate from the people. Mr Howard claimed that his re-election gave him a mandate to put into law the changes to the tax system which he foreshadowed during the election campaign. There were several problems with this claim. Firstly, when in opposition, he had rubbished the mandate theory, and he and several of his party colleagues had vociferously supported the right of the Senate to exercise its legislative powers.⁹ Secondly, his mandate was dubious, as his party received fewer votes in the general election than the Beazley Opposition, before and after the distribution of preferences. The non-government parties in the Senate therefore claimed the right to represent a majority of the electors by carefully scrutinising his legislative proposals and rejecting or amending them. In so doing, they conformed with the pattern of parties out of power preferring checks and balances to mandates, but also with Baker's view that each House possesses a distinct mandate. Mr Howard soon tacitly abandoned the mandate theory and began to seek the support of other parties in the Senate to have his legislation passed. We have not heard the last of the mandate, however. It is sure to re-emerge whenever there is an election which a government can claim to have won. And whoever is then in opposition will no doubt be impressed with the requirement for checks and balances.

The revival in Australia of the theory and practice of countervailing power reflected a world-wide development. The intellectual reappraisal, led by authors like Ostrom, developed into a flood of literature on the subject, largely but not exclusively focussing on the founders of the United States and the problems of the British polity.¹⁰ The decline of Britain was accompanied by a decline of the British model. In Britain, a constitutional and parliamentary reform movement sought the adoption of institutions to divide the hitherto concentrated power of the state. Membership of the European Union imposed a Bill of Rights and a quasi-constitutional court on the previously sovereign Parliament, and a quasi-federal system has now been established. The other old European states similarly ventured down the road of decentralisation and restraining the state. The collapse of the command economies and the complexity of contemporary issues have destroyed the naïve faith in centralised government power as the solution to all problems. Countries with constitutions which restrain government power appear to have fared rather better on most measures of success.

In Australia, the Constitution may be changed only with the consent of the electors, who are thereby the real possessors of sovereignty. They have demonstrated a strong suspicion of proposals to increase government power; they are instinctive Madisonians. It has often been observed that most proposals for constitutional change have been rejected because they would have enhanced

9 See Harry Evans, 'The Howard Government and the Parliament' in Gwynneth Singleton (ed), *The Howard Government* (2000) 26-36.

10 A recent example is Scott Gordon, *Controlling the State: Constitutionalism from Ancient Athens to Today* (1999), with chapters on American constitutionalism and modern Britain. An Australian example is Brian Galligan, *A Federal Republic: Australia's Constitutional System of Government* (1995).

the power of the central executive government. The rejection of the proposed republic model in the November 1999 referendum conforms with this pattern. The 'minimalist model' of an appointed head of state dismissible by the Prime Minister was designed to preserve the ministerial monopoly of executive authority, but could not be 'sold' to electors generally believed to favour a republic in principle.

VI A CONTINUING CONTEST

Given these contemporary developments and the spirit of the Australian people, our native Madisonians of the 1890s seem to have ultimately had the better of the argument, and their concern with restraining central power with safeguards now looks more modern than their rivals' faith in ministerial responsibility under the Crown.

The contest, however, will continue. The notion that Australia has, or should have, a 'Westminster system' is deeply entrenched in the political classes and in both major parties. Indeed, when in power, they often try to act as if it were true. So long as Prime Ministers and governments believe that their powers provide the key to success, and that enhancement of those powers would be in the best interests of the country, Hobbes and Madison will remain at war in the Australian political system, and the ghosts of Isaacs and Baker will continue to haunt our public forums.