THE SENATE, FEDERALISM AND DEMOCRACY†

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[*If federalism requires a States' house in the Commonwealth parliament, the Senate must possess legislative power and power over the Commonwealth executive. But if democracy entails responsible government, the Commonwealth executive must answer only to the lower house. The article argues that this inconsistency can be resolved: the Senate should be granted sufficient power to defend States' interests against the House of Representatives and the Commonwealth executive. It examines two recent attempts to redefine the role of the Senate and concludes that it is not possible to avoid the question of when States' interests should prevail.*]

1. *Introduction*

That it is the function of the lower house in a democracy to represent the popular will raises a well-known dilemma for upper houses. Either an upper house possesses genuine power, in which case this power can be exercised to frustrate the lower house, or it does not, in which case it is a mere talking shop. On the one hand, upper houses are harmful; on the other, they are pointless. Either way, they simply should not exist.

Indeed, this conclusion should not be considered surprising.[1] In Australia at least, their traditional function has been to represent established interests against possible 'excesses' of the lower house. As the power of upper houses has diminished, they have moved from being harmful to being pointless. However, this process is far from complete as, to take just one example, the Victorian Government has recently found to its chagrin. The Opposition-controlled Legislative Council has in the past few years rejected significant parts of the Government's legislative programme. Indeed, current proposals such as the Victorian Government's plan to follow New South Wales' lead in 1977 and introduce proportional representation in the Legislative Council promise or threaten (depending on one's point of view) to give upper houses a new lease of life.

This paper is concerned with the Senate, rather than upper houses in general. As every constitutional law student knows, the Senate was established as the States' House. (We can ignore, for the time being, what every constitutional law student also knows, that with a few possible exceptions[2] it has never functioned

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1 Not that this has led to the mass abolition of upper houses. Only Queensland has adopted this course of action (in 1922) but this was for reasons far removed from the perceived force of the above argument.

2 Even these are doubtful. See Odgers, J. R., *Australian Senate Practice*, 5-12 (5th ed.); Sandford, C. J. G. 'Reconciling Responsible Government and Federalism' in Ellinghaus, M. P., Bradbrook, J. and Duggan, A. J. (eds), *The Emergence of Australian Law* (1989) 355, 361.

in this way.) Federalism was thought to require such an upper house to prevent the legislature from being dominated by the larger states.[3] The underlying assumption was that such domination could not be overcome by making compensating changes elsewhere in the constitutional structure, for instance, by reconsidering the distribution of legislative powers between the Commonwealth and the States, or by giving the High Court a greater role in policing this distribution.

This raises, of course, the familiar issue of the compatibility of federalism and democracy. This paper is concerned with the perennial question of whether, as a States' house, the Senate is any more compatible with democratic principles than the upper houses of nineteenth-century colonial legislatures. It may even be asked whether the undoubted failure of the Senate to serve this role has been an important factor in the success of the Australian federal system. This paper examines two recent contributions to the debate on the role of the Senate which, in very different ways, challenge orthodox views. The first is Professor Colin Howard's proposal that Senators should be appointed by State governments rather than elected by popular vote. The second is an argument which Dr. Charles Sampford has recently put forward rejecting the widely accepted view that our Constitution represents an unworkable compromise between democratic and federalist principles. These contributions are examined in Sections 2 and 3 respectively.

2. *Howard's Argument*

In the most recent edition of *Australian Federal Constitutional Law*[4] Howard claims that 'the structure of the national parliament does not accurately reflect social and political reality.'[5] The House of Representatives represents the people, although here there is some distortion arising from two sources. First, there are restrictions on the structure and membership of the House of Representatives, for example, the requirement that electorates be formed wholly within States,[6] and the minimum State representation requirement.[7] Second, there is the failure to take account in Chapter I of the Constitution of the representation of territorial Australians.[8] (Proponents of proportional representation would add a third, and far more important source of distortion: the system of single-member constituencies itself.)

Turning to the Senate, Howard argues that, as presently constituted, it is incapable of representing the States. This is because it too is elected on the basis of popular vote, and on the whole electors do not vote along State lines. The

[3] One purpose of this paper is to examine a recent argument against this view (see section 3, *infra*). However, there is an obvious point worth noting at this stage. Seeing that the Senate has conspicuously failed to fulfil its States' house function, such a house can scarcely be an essential feature of a successful federal system.

[4] Howard, C., *Australian Federal Constitutional Law* (3rd ed. 1985) 95-8.

[5] *Ibid.* 95.

[6] Commonwealth Constitution, s. 24; *Ibid.* 4, 97.

[7] Commonwealth Constitution, s. 24.

[8] *Supra* n. 4, 95.

result is a second 'people's house', but one in which the vote is grossly distorted because all States have equal representation, regardless of population. Howard says that the States, which the Senate is supposed to represent, 'correspond[-] to nothing in reality.'[9] Given Australia's 'linguistic, social and cultural homogeneity',[10] they cannot be regarded as geographically distinct communities, identified through the individual traits of the people who make them up. It is not, one could add, as though New South Welshman were predominantly Anglo-Saxon in origin, Victorians French, Queenslanders Japanese, and so on. Australia does not even have one sizeable geographical minority group as does Canada. However, Howard argues, this is how the system of popular vote treats them. If the States were distinct communities, the popular vote would give those communities some representation, through people voting on regional lines. But as just noted, although local issues sometimes affect the vote in national elections — witness, for instance, the Tasmanian dams issue in the 1983 general election — on the whole such factors are not important,[11] voting on national party lines being the norm. The result is that the popular vote is reflected in the Senate in a way heavily biased towards the less populous States.[12]

According to Howard, the only[13] other possible conception of the idea of a State — the only alternative to the 'popular' or 'social' conception, as it could be called — is that of a political unit, identified by its parliament and government. As political units, States are 'identifiable power blocks with interests clearly and measurably distinct from those of the national government . . .'[14] It is only as such units that the Senate is capable of representing the States. But this requires abandoning popular elections for the Senate. If senators are to represent States according to the 'institutional' or 'political' conception of the State, they must be appointed either by State parliaments or governments. Howard goes on to argue that it must be the latter.[15] Given the dismissal of the popular conception of the State, and that these are the only two alternatives, this is the only way to make sense of the idea of a senator representing a State.

Howard's complete schema involves not just a Senate selected on such lines, but a distribution of lower house seats without regard to State boundaries. The purpose of this is to overcome the federal-based distortions mentioned above. (He does not raise the issue of proportional representation.) He claims that the implementation of these suggested reforms would mean that 'the whole system would become more flexible and more effective in both federal and parliamentary terms.'[16] He sets out the main advantages of such a reconstructed system as follows:

9 *Ibid.* 96.
10 *Ibid.*
11 *Ibid.*
12 Of course, one could speculate that a federal structure more sympathetic to State interests would have produced a similarly more sympathetic party system. If the Senate were to be selected as Howard recommends, this could lead to a rather different party structure, though the lesser role of the Senate in relation to the House of Representatives would militate against this.
13 *Supra* n. 4, 96.
14 *Ibid.* 97.
15 *Ibid.* 98.
16 *Ibid.* 97.

> Regional opinion in relation to local matters, as reflected in the elected governments of the States, would be given its full and proper representation in the Senate through these governments. In that form the State representation could be expected to act as a unit in the interests of the State concerned and not be fractured by being divided between national political parties as happens at present. A change of opinion within a State, as reflected by the election of a new and different government, would be immediately reflected by a change of membership of the Senate. Other advantages would follow. There would be no need for a link to be maintained between the size of the House of Representatives and the size of the Senate, for numerical comparisons could be manifestly irrelevant. The memberships of the two Houses need be linked in neither source nor identification nor length of term. The State represention in the Senate would consist of persons nominated by the governments of the States for the time being, changing from time to time in accordance with electoral events within the States. It would be important that the membership of the Senate be representative of the State governments and not of the State parliaments. If the latter course were adopted there would immediately reemerge the confusion what is meant by a State which is the flaw in the present arrangements.[17]

Two major issues need to be explored here. The first is whether federalism really requires, as Howard argues, a Senate appointed by State governments. If the popular conception of the State does not hold in Australia, should federalism be abandoned rather than reformed? Is there any point in having a federal system if the regional differences which the system is supposed to reflect do not exist? The second issue arises only if Howard's recommendation about the selection of the Senate is accepted. The objection here is that even if it is conceded that federalism requires senators to be appointed by State governments, this cannot be reconciled with democratic principles, and federalism should defer to democracy. These issues will be examined in order.[18]

According to Howard's analysis, the Senate as presently constituted stands in a theoretical no-man's land. It serves no democratic purpose, as the lower house is the popular house.[19] Indeed, because the States have equal representation, the smallest as much as the largest, the Senate runs foul of the principle of 'one vote, one value'. Neither does the Senate successfully serve any federal purpose, because the popular conception of the State (the only conception consistent with selecting senators on the basis of popular vote) does not hold in Australia. It is only through turning to the institutional conception of the State that the Senate can be given a distinct role. However, is it open to Howard to so easily reject the popular conception of the State? The difficulty here is whether there is any point to the institutional conception of the State if this is not underpinned by the popular conception. State parliaments and governments only deserve representation in the federal parliament if their interests are at one with those of their people.[20] If they have developed interests separate from those of the people, such interests do not deserve representation at State level either, and indicate some failing, or even breakdown — depending on the extent of the divergence — in the democratic process at State level. If the interests of State parliaments and governments are, as they should be, identical with those of their people, there seems to be no advantage in them appointing senators. There is no reason why senators, like members of the lower house, should not be elected directly by the people.

[17] *Ibid.* 97-8.

[18] Those inclined to reject Howard's proposal out of hand should note that in West Germany members of the federal upper house are appointed by provincial governments, *supra* n. 4, 97; *Basic Law*, Art. 51. Note also that the objection to Senators being appointed, rather than directly elected, is

So rather than the conclusion which Howard draws from the non-application of the popular conception of the State in Australia, a very different conclusion should be drawn. This is that the federal system in Australia should be abolished, or at least, allowed to 'wither away'. Federalism can serve no useful purpose in a nation as homogeneous as Australia. At most, the States are relics of our colonial past.[21]

Of course, Howard's rejection of the popular conception of the State may be challenged. It might be argued that Australia does after all exhibit the regional differences for this conception to hold. But this can hardly help him, for his objection to popular elections for the Senate is predicated on the rejection of the popular conception. Far from showing how the federal system could be improved, his argument rests on a premise that requires its abolition. Howard says that under his proposal, the Senate 'would at last represent a clearly identifiable power group or interest within the Australian community and in so doing acquire a purpose in life.'[22] But if the States do not exist as popular as opposed to institutional entities, there simply is no point to this.

Turning to the second issue, Howard does not claim only that his proposal is compatible with federal principles. He holds that, were it to be adopted, 'the democratic ideal . . . would be strengthened'.[23] However, it is not clear why this should be so. What authority would an appointed upper house possess? It seems an unwanted return to a bygone era, a matter of turning the constitutional clock back well over one hundred years, to before the introduction of responsible, or even representative, government. Alternatively, it smacks of (at least, pre-Gorbachev) Soviet-style democratic centralism. As Howard himself points out, 'except during the earlier stages of the colonial period there never has been any

considerably weakened if the Senate were only to have power in regard to matters affecting the States. For a contrasting view, see Galligan, B., 'Federal Theory and Australian Federalism: A Political Science Perspective', in Galligan, B. (ed.), *Australian Federalism* (1989) 45, and in particular, his discussion of the sociological theory of federalism, at 51-5.

19 Not that democracy is to be equated with majority rule. Upper houses can serve the quite legitimate democratic role of protecting individual and minority rights. This need not be solely the prerogative of a constitutional court exercising judicial review powers. This matter is taken up below. For a recent account of the advantages of the Senate, see Maddox, G., *Australian Democracy: in Theory and Practice* (1985) 176-82. See also Bryce's classic discussion of upper houses, in Bryce, J., *Modern Democracies* (1921) ii, 437-57.

20 This needs qualification. Parliaments supposedly represent the people, in so far as party divisions in Parliament mirror divisions in ideology and interest in the community. But governments generally (grand coalitions and wartime coalitions aside) do not represent the whole community in that they are formed by parties which represent only a majority of voters.

21 A contrasting view is that, however misguided, the people want the States and that federalism in Australia has widespread support. The 1988 referenda, it could be added, merely confirm this. See Galligan, B., 'Australian Federalism: Perspectives and Issues', in Galligan, B. (ed.), *supra* n. 18, 1, 6. A further point is that the existence of regional minorities is not the only reason for having a federal system. There are general decentralist arguments as well, arguments well supported by the democratic consideration that political decision-making should be kept as close to the people as possible. As Brian Galligan points out, '[f]ederalism within a liberal democratic polity enhance[s] democratic participation because it sets up, in addition to national government, subnational governments which deal with the bulk of local issues and are closer to the people', *supra* n. 18, 6. He develops this point in 'Federal Theory and Australian Federalism: A Political Science Perspective', *Ibid.* 61-3. It should be pointed out, however, that such arguments for the continued existence of States do not necessarily support a States' house in the national Parliament.

22 Howard, *op cit.* 98.

23 *Ibid.*

doubt that the ultimate source of political authority is the popular vote.'[24]

The dangers inherent in Howard's proposals need to be spelt out. Given that senators are to be appointed by State governments, they will all presumably be from the same party or political grouping as governs the particular State. They will vote as a block. Indeed, as Howard makes clear above, he sees this as one of the virtues of his proposal — State representation will not 'be fractured by being divided between national political parties as happens at present'.[25] (This, it might be added, is a supposed virtue shared by the old first-past-the-post system.) There will be clear expression in the Senate of a change of opinion and government at the State level.[26] This raises the spectre of the senators from three small states, representing at most three million people or so (ignoring complications with territory senators) being able to unite to block bills passed by the House of Representatives, and hence prevent the popularly elected government from carrying through any aspect of its legislative programme with which these senators happen to disagree. Contrary to Howard, it seems that one of the merits of the present system is that senators *do* represent the political divisions within their respective states, that it is not a case of 'winner takes all'. (This was a major reason for replacing the first-past-the-post system with the present proportional representation system.)[27] The founding fathers were not fundamentally mistaken, as Howard's view implies, in insisting (at least by 1897)[28] that the Senate should be 'voted by the people'.

3. *Sampford's Argument*

In 'Reconciling Responsible Government and Federalism',[29] Dr Charles Sampford is concerned with the widely-held view that responsible government and federalism are incompatible. On the one hand, responsible government requires the executive to be responsible to the lower house, which means that it must be the dominant house; on the other hand, federalism requires an upper house to represent State interests with powers more or less equal to those of the lower house. As Baker remarked rhetorically at the 1897 Sydney Convention:

> The essence of federation is the existence of two houses, if not of actually co-equal power, at all events of approximately co- equal power. The essence of responsible government is the existence of one chamber of predominant power. Now, how are we to reconcile two irreconcilable propositions?[30]

[24] *Ibid.* 95.

[25] *Ibid.* 97.

[26] One objection here is that regional representation in the federal parliament is contrary to the central federal idea of a separation of the two levels of government. This issue is taken up in section 3 of this article.

[27] Odgers, *op. cit.* 94-5.

[28] Commonwealth Constitution, s. 7. See Galligan, B. and Warden, J. 'The Design of the Senate' in Craven, G. (ed.), *The Convention Debates 1891-1898: Commentaries, Indices and Guide* (1986), Vol. 6, 89, 109-10; Quick J., and Garran, R. R., *The Annotated Constitution of the Australian Commonwealth* (1901) 418-9.

[29] Sampford, *op. cit.*

[30] *Convention Debates, Sydney 1897*, 784. Cited in Crommelin, M., 'The Executive', in Craven, G. (ed.), *op. cit.* 25, 127, 140.

Sampford rejects this dilemma, and claims that federalism and responsible government are 'perfectly compatible'.[31] He puts forward two arguments. The first is that federalism does not require a States' house. This may be part of the American model, but there are other models. Secondly, he argues that, even if the necessity of an upper house representing regional interests is conceded, there still need be no incompatibility with responsible government. A distinction can be drawn between the legislative power of a house of parliament, and its power to control the executive — its executive power, for short. A federalist upper house requires only equality in legislative power. There is no need for it to possess executive power, let alone equal executive power with the lower house. There is therefore no threat to the lower house's control of the executive under the doctrine of responsible government.

The second argument is of greater interest here, but the first should not be ignored. Sampford does not base his rejection of the standard view that an upper house to protect States' interests is essential to federalism, on the obvious empirical observation that the Senate has never (or virtually never)[32] acted as a States' house. His is rather the theoretical point that a States' house is not required in the first place. The reason the founding fathers insisted on such a house is that they were preoccupied with the American model of federalism, to the detriment of continental models. Insofar as the former insists on a Senate elected on the basis of equal representation for all States, it is mistaken. Such a States' house 'does not represent a part . . . of federalism, but a partial denial of it'.[33] It is not 'additional to', but 'an aberration from, the core federal principle of a division of powers between different levels of government,'[34] because:

> [f]ar from keeping the government 'federal' with a division of powers between state and national arms, the introduction of a state based Senate represents an attempt to give the regions some control over legislative powers allocated to the national government.[35]

This is to cross the divide between federal and State matters, to give the States the power to interfere in national affairs. Sampford's view is, of course, diametrically opposed to Howard's. Howard claims as a major advantage of his proposal that it *does* give State governments a direct say in matters at the national level.

To examine Sampford's first argument, the main concern is whether a federal legislature without an upper house in which all States have equal representation will be dominated by the larger States. As noted above, it is the claim that this problem cannot be solved by making corresponding changes elsewhere in the Constitution that provides the best justification for a States' house. It is not clear, however, why this claim should be accepted. It could well be argued that the function of protecting the interests of regional minorities could be performed equally well by the High Court. As it is, the High Court stands condemned by States' righters for not occupying the vacuum created by the Senate's palpable

31 Sampford, C. J. G. *op. cit.* 364.
32 *Ibid.*
33 *Ibid.* 358.
34 *Ibid.* 361.
35 *Ibid.* 358.

failure to act as a States' house.[36] The problem of reconciling federalism with responsible government or democracy only arises if the States' house role is supposed to require an equal say, not just on bills which are of particular concern to the smaller and weaker states, but on legislative proposals generally. It is argued below that the main failing of the founding fathers was to believe that the Senate's function as a States' house required it to have more or less equal legislative power with the House of Representatives. As has recently been pointed out, '[b]ecause much of the federation debates on the Senate were taken up with arguing about differences over its financial powers, there is perhaps a tendency to lose sight of the level of agreement over the Senate's basic structure and role.'[37] Most importantly, 'it was generally agreed that the Senate's legislative powers should be equal to those of the House of Representatives, except with respect to money bills.'[38] It is such equality, of course, which creates the problem of compatibility with democratic principles. The better view, it is argued in this paper — even if it did not prevail — was well expressed by Kingston at the 1891 Sydney Convention:

> the will of the people as expressed in the house of representatives should prevail, and should not be interfered with by the senate in the slightest degree, except in cases where state rights and state interests are involved.[39]

Discussion of this issue is best pursued in the context of Sampford's second argument, to which we now turn.

Sampford claims that, even if it is assumed that federalism requires a State's house with genuine power (no mere House of Lords — or need one add the unfortunate example of the Canadian Senate?), this does not make federalism and responsible government incompatible. As pointed out above, he holds that the key to reconciling the two lies in distinguishing between a house's legislative power, and its power under the doctrine of responsible government to control the executive. Sampford's point is that the Senate possesses only the former type of power:

> The 'federal principle' justifying the Senate's equal power supposedly prevents legislation contrary to the interests of a majority of states. Responsible government gives power over the executive to the lower house. There is no conflict because the two principles are dealing with different kinds of power. The power of the Senate to pass, amend or fail to pass bills is clearly legislative. The power to determine the ministry is clearly executive . . .[40]

Support for the proposition that the Senate has no power over the executive is provided by consideration of its American counterpart:

> The Senate and its 'federal' principle of coequal legislative power is taken from a constitution in which the separation of powers is regarded as fundamental and inserted into a constitution that took them very seriously. Thus no federal principle borrowed from the United States or elsewhere which gives equal *legislative* power to a state-based senate can possibly support an executive power over the government. Even those who require participation by the states in the central body only require participation in legislation.[41]

36 *Ibid.* 361.
37 Galligan and Warden, *op. cit.* 89, 90.
38 *Ibid.*
39 *Convention Debates, Sydney 1891* 737.
40 Sampford, *op. cit.* 364-5.
41 *Ibid.* 365; See also Sampford, C. J. G., 'The Australian Senate and Supply — Some Awkward Questions' (1987) 13 *Monash University Law Review* 119.

There is no incompatibility between responsible government and federalism in giving the Senate equal power with the House of Representatives, so long as 'the equality of powers is only in terms of legal and legislative powers.'[42] Sampford contends that:

> [t]here is nothing in the written constitution, nothing in the debates, nothing in the U.S. model, nothing in the conventions and nothing in the British model that would give the senate equality in conventional and executive powers.[43]

Sampford uses this argument to provide a fresh analysis of the 1975 constitutional crisis.[44] The Senate certainly has the legislative or legal power to refuse supply. But it does not have the executive power to force the government to resign by refusing supply. There is no convention that the government must resign if the Senate refuses supply. Responsible government requires the executive to be responsible to the lower house only. (The attempt by Kerr and Barwick to develop a theory of dual responsibility must be dismissed. Far from solving the supposed problem of incompatibility between federalism and responsible government, such modification of the latter doctrine creates it.) But without such a convention, the legislative power to refuse supply is pointless. It means that refusing supply cannot be used by the Senate, as it can by the House of Representatives, as a way of forcing the government to resign or to call an election. The Senate's legal power over supply is one which the founding fathers never envisaged the Senate exercising,[45] as it is at most a power to create chaos.[46]

There are two obvious ways of attacking Sampford's second argument. (Comment on his analysis of 1975 must be left to another occasion.) It could be objected first that limiting the Senate to equal legislative power with the House of Representatives is too great a restriction from the federalist point of view. It is not that federalism requires the Senate to have more than equal legislative power, but it does require it to have executive power as well, even if not equal executive power. Secondly, it could be objected that restricting the Senate to equal legislative power is too weak from the standpoint of responsible government, or more broadly, from that of democracy. Democracy requires not just that the lower house, as the house in which the majority will be expressed, be dominant in executive power, but in legislative power as well.[47]

Concerning the first objection, it might be asked quite simply why the Senate should have not just equal legislative power, but a direct say in the executive as well. Sampford contends that there is no evidence from the convention debates that even States' righters sought this.[48] This was rejected as contrary to

[42] Sampford, *supra* n. 2, 366.
[43] *Ibid.*
[44] Sampford, *supra* n. 41.
[45] *Ibid.* 132; contrast with Galligan and Warden, *op. cit.* n. 28, 104.
[46] Sampford, *supra* n. 41, 137.
[47] As indicated earlier (*supra* n. 19), this is not to imply that democracy is exhausted by the notion of majority rule, in that it excludes institutions, whether upper houses or courts exercising judicial review powers, which function primarily to protect rights.
[48] Perhaps this is explained by their preoccupation with the American model of federalism. As Sampford points out, citing Frenkel, M., *Federal Theory* (Centre for Research on Federal Financial

responsible government. Nevertheless, it is not unreasonable that the Senate should have some say over executive decision-making. Indeed, this might be thought essential to its role of defending the interests of the smaller states, which obviously can be threatened as much by actions and activities of the Commonwealth executive as by the Commonwealth legislature.

Turning to the second objection to Sampford's argument, is the Senate's possession of equal legislative power consistent with democracy? The contention here is that democracy requires not just that the lower house be dominant in executive power (though this is compatible with the Senate having some executive power, to safeguard regional minority rights from executive abuse), but that it be dominant in legislative power as well. (One could scarcely imagine the House of Lords today having equal legislative power with the House of Commons, despite having lost all power to control the British executive under the doctrine of responsible government.) The majority has the right in a democracy not just to control the executive, but the legislature as well. This is not to say that the upper house cannot play a role in defending individual and minority rights — in a federal system, regional minority rights in particular — but this does not require equality of legislative power. This does not mean that the upper house needs a capacity to veto any government legislative initiative, but only those which discriminate against smaller States. Certainly, it does not require the upper house to have any control over general money Bills.

It might be thought that in presenting this objection to Sampford's argument some sleight of hand has been involved in substituting the term 'democracy' for 'responsible government'. Sampford's concern is with the responsible government/federalism dilemma, whereas this paper's concern is with the democracy/federalism dilemma. But if there is any cause for misunderstanding here, it can be easily resolved. Let it be admitted for argument's sake that Sampford resolves the responsible government/federalism dilemma by showing that there is no need for the upper house to exercise executive power.[49] (Ignore for the time being the above issue of executive abuse of States' interests.) But this is only one aspect of a broader dilemma between democracy and federalism. It has another major aspect which concerns legislative power. Sampford ignores this aspect in concentrating as he does on the responsible government/federalism dilemma. Responsible government is a doctrine purely about the 'executive' power of a legislature, and has nothing to say about its legislative power.

Indeed, it is necessary for him to ignore the legislative aspect of the democracy/federalism dilemma if he is to maintain the high opinion he holds of the founding fathers' treatment of the question of Senate power. His basic thesis is that

Relations, Canberra, 1986) 64, 'some continental theorists include, in their definitions, a requirement that the constituent states "participate in an ordered and permanent way in the formation of the central entity's will"' — Sampford, *supra* n. 2, 357.

[49] For a contrasting view, see Reid, G. S., and Forrest, M., *Australia's Commonwealth Parliament 1901-1988* (1989), in particular, the section 'The Senate as Opposition', 70-79. Reid and Forrest state that '[t]he Senate . . . has consciously developed a role for itself which emphasizes the importance of parliamentary scrutiny of the Executive' — *ibid.* 70.

> although our constitution is to some extent a 'cut and paste job', incorporating principles and institutions from two different model constitutions, the new found compatibility makes the 'cut and paste job' far more respectable than previously asserted.[50]

If he is to hold that the founding fathers did such a good job on this score, he obviously cannot believe that they were fundamentally mistaken in insisting on rough equality of Senate legislative power with the House of Representatives. Yet fundamentally mistaken, it is suggested here, they were. All that a States' house requires is power over legislation of particular concern to the States — 'State' as opposed to 'national' legislation.[51] Indeed, if Sampford were to accept this, he could solve both the executive and legislative aspects of the democracy/federalism dilemma, instead of only the executive aspect, that is, the responsible government/federalism dilemma. Returning to the issue of executive abuse of State interests, he could solve the executive aspect if he were prepared to go back on his view that the Senate has no executive power. This would require only minor modification of his position, as the executive power required by the Senate to perform its role of safeguarding State interests is quite consistent with the House of Representatives alone having the power to determine the composition of the executive. That is, it is quite compatible with the core of the doctrine of responsible government.

Indeed, this brings us back to the conclusion to his first argument, namely that federalism does not require a States' house in the first place. (Of course, the second argument is directed at those who refuse to accept this conclusion.) If the legislative power of a States' house is limited to power regarding legislative proposals that specifically concern the States, then a States' house is not really required. States' interests could just as well be protected by suitable changes to the Constitution and an enhanced role for the High Court. Only if the Senate's role as a States' house requires roughly equal legislative power can this role not be exercised by the High Court. Similarly, the High Court could safeguard smaller States from actions of the Commonwealth executive just as effectively as the Senate.

Indeed, the solution to the democracy/federalism dilemma lies in determining where the line is to be drawn between the respective spheres of majority rule and State interests. It requires a theory of States' rights, a theory about when State interests are to be accorded the status of rights, and therefore allowed to 'trump' what the majority wants, as expressed in the House of Representatives.[52] It cannot be solved, as Sampford attempts to do, by drawing a distinction between executive and legislative power, and holding that although the two houses are roughly equal in legislative power, the lower house alone possesses executive power. Just as the responsible government/federalism dilemma is part of a

[50] Sampford, *supra* n. 2, 356.

[51] Regarding the point that the smaller States would never have agreed to federate if the Senate was not given equal legislative power, Sampford points out that it was New South Wales' fear that the Senate would have too much power that led to the second referendum, and proved to be the greatest stumbling block — the 'lion in the path' — not the smaller states' fear that Senate would not be strong enough — *Sampford, supra* n. 44, 130.

[52] On the idea of rights as trumps, see Dworkin, R. M., *Taking Rights Seriously* (1978) 90-4.

broader democracy/federalism dilemma, so the latter is part of a still wider dilemma between majority rule and State interests.

It is perfectly understandable that the founding fathers did not wish to get involved in the last-mentioned issue. Attempting to clearly demarcate States' rights, to determine when States' interests can overide national interests, is fraught with difficulties. It is quite unclear how one distinguishes federal legislative proposals over which the Senate, as a States' house, is to have a say, from national legislative proposals over which it is not to have a say. Rather than enter into this controversial and divisive issue, it is understandable that convention delegates decided to play safe, and assume the need for roughly equal power with the House of Representatives. Nevertheless, the task of developing a theory of States' rights cannot be avoided. It was the failure to do so — the decision to go down the road of a Senate with roughly equal legislative power — that created the problem of incompability between federalism and democracy.

It might be objected, however, that this conclusion is too hastily drawn. In view of the Senate's function as a house of review, a theory of States' rights is not really required. This function requires the Senate to have general legislative power, even if the States' house function does not.

For the objection to succeed, that is, for the Senate's function as a house of review to require it to have general legislative power even though its States' house function does not, the two functions must be quite distinct. Otherwise the former does not provide the independent grounds for general legislative power which the latter fails to provide. However, it seems that the two functions are not distinct. If an upper house is genuinely to be a house of review, and not just to be limited to technicalities and drafting difficulties, then it must carry out its review function from a specific standpoint. An upper house must represent a specific set of interests, if it is not merely to duplicate the lower house. In the case of colonial upper houses, the specific interests were established property interests. With the Senate, it is the States. The two supposedly distinct Senate functions are therefore intimately connected. It is only through being a States' house that the Senate can properly perform its house of review function. Therefore, one is still faced with the problem of having to construct a theory of States' rights. This is not obviated by turning to the Senate's function as a house of review.

Two objections to the claim that the Senate's function as a house of review is inextricably bound up with its role as a States' house must be considered, although they ultimately fail. The first objection accepts the necessity of a specific viewpoint, but argues that the Senate could have a different viewpoint: that of minority and individual rights generally rather than States' rights in particular. (Many argue that in recent years it has been concerned to develop such a role, which appears particularly attractive to small parties, such as the Democrats, which have no chance of winning government.) The second objection simply denies the need for a specific viewpoint. The Senate, just like the lower house, could still perform its house of review function if it acted as a majoritarian body.

Starting with the first objection, it seems that the contention that the Senate should exercise its house of review function from the viewpoint of minority and

individual rights generally is of no assistance here. In order to do this, a theory of such rights is required, that is, a theory of which minority and individual interests are to count as rights, and so have the capacity to trump majoritarian demands as expressed in the House of Representatives. If these rights are held to include States' rights, then one must still construct a theory of States' rights. Rather than the problem of constructing the latter theory existing in its own right, it exists as part of a much greater problem, namely one of constructing a general theory of minority and individual rights. Alternatively, if one holds that a theory of States' rights is no part of a general theory of minority and individual rights (perhaps on the ground that the popular conception of the State does not hold in Australia, that there are no regional minorities to exercise or benefit from State rights), one still has the problem of why such a theory should require a Senate with roughly equal legislative power. Its States' house role requires specific legislative power, not a general capacity to frustrate the will of the majority as expressed in the lower house.

The second objection claims that, even though it is the lower house's role to function as the majoritarian house, there is nevertheless nothing objectionable in an upper house reviewing legislation from the standpoint of the majority. However, if the Senate does not perform its house of review function from a specific standpoint, it is difficult to escape the conclusion that it merely duplicates the work of the lower house. The reasons for having such a house relate solely to the advantages that a bicameral house has over a unicameral house, such as a more thorough legislative process, and a greater capacity to oversee executive action.[53] If the Senate is to review from a majoritarian standpoint it is no more required to have roughly equal power with the lower house, than if it represents minority and individual interests, or States' interests. There is no reason why an upper house that reviews from a majoritarian standpoint should be able to reject lower house bills. On the contrary, it should defer to the lower house. Why grant the upper house roughly equal legislative power if that power can be used to frustrate the will of the majority as expressed in the lower house?

I now bring the present argument to a close, and summarize the main differences between it and Sampford's position. Sampford holds that the distinction between legislative and executive power shows that responsible government can be reconciled with federalism. There is no incompatibility so long as the Senate has no executive power. This paper suggests a modification here, and it is submitted that it is open to Sampford to accept it, as it does not threaten the core notion of responsible government, namely that the lower house alone is to have control over the composition of the executive. According to this modification, the Senate can be granted sufficient executive power to protect States' rights

[53] With the democratization of the franchise upper houses no longer represent specific interests, principally those of property, as they did in colonial times (and in some cases well into this century). Of course, a State upper house, just as much as the Senate, could take on the new role of defending individual and minority interests. Consider the New South Wales Legislative Council since the introduction of proportional representation in 1978.

from infringement or violation by actions of the Commonwealth executive. The main disagreement with Sampford concerns legislative power. Granted that Sampford can solve the executive aspect to the democracy/federalism dilemma (with the help of the modification suggested here), there remains a difficulty with the legislative aspect. To grant the upper house roughly equal legislative power with the lower house is inconsistent with democracy, because it gives the upper house too great a capacity to frustrate the popular will as expressed in the lower house.[54] This paper argues that the only way to solve this problem is to reduce the legislative power of the Senate, so that it has power over only legislation of specific concern to the States, as opposed to national legislation. This gives democracy no less than it requires, and it gives federalism no more than it requires. Federalism does not require an upper house with anything more than a capacity to safeguard States' rights.[55] Of course, this raises the unavoidable problem of demarcating 'federal' from 'national' legislation. This in turn requires a theory of States' rights, to determine when States' interests are sufficient to override the principle of majority rule. The democracy/federalism dilemma can only be solved at this fundamental level, and not at the more superficial level of Sampford's distinction between legislative and executive power.

4. *Conclusion*

This paper has examined two recent contributions to the long-standing debate on the compatibility of the Senate with democratic principles. The first was Professor Howard's proposal that senators be appointed by State governments. Howard contended that only the institutional and not the popular conception of the State holds in Australia. It was argued that his contention supports not the reform of federalism but its replacement by a unitary form of government. There is no point in a federal system if Australia genuinely lacks the regional differences which such a system is designed to reflect. It was further argued that Howard's claim that his proposal can be defended on democratic, and not merely federalist, grounds cannot be substantiated. On the contrary, there are grave dangers inherent in a system which gives the dominant party or political grouping in a State control over its entire Senate representation.

The second contribution was Dr Sampford's attempt to reconcile the Senate, as a States' house, with the doctrine of responsible government. He argues that federalism does not require a state based upper house but that, even if it does, there is nevertheless no incompatibility with responsible government. It is the second argument that is of major interest here. At its heart is a distinction which he draws between the legislative and executive power of a house of Parliament.

[54] 'Too great' in the sense of going beyond the power an upper house legitimately possesses to protect individual and minority rights. Note also a danger concerning not so much the quantum of power, but the purpose for which it is exercised, namely the advancement of State interests rather than the defence of individual and minority rights.

[55] To use Dworkin's distinction, upper houses are only consistent with democracy if they are concerned with rights rather than goals. Dworkin, *op. cit.* 90-1.

Sampford argues that there is no incompatibility with responsible government because federalism at most requires an upper house with equal legislative power to the lower house. It does not require the Senate to have equal executive power, or indeed, any executive power at all. There is therefore no need to modify the doctrine of responsible government to require the executive to be responsible to Parliament as a whole, rather than to the lower house alone. Indeed, attempts to develop a theory of dual responsibility such as that by Kerr and Barwick in 1975, serve only to create incompatibility.

Two replies to this argument were examined. One objects that it concedes too little to federalism. Federalism requires an upper house not merely with equal legislative power to the lower house, but also some, if not equal, executive power. The federal executive, just as much as the federal legislature, is capable of threatening State interests. The other reply holds, on the contrary, that Sampford's argument concedes too much to federalism. Even though denying the Senate executive power neatly solves the problem of federalism/responsible government incompatibility, granting it equal legislative power renders insoluble the broader incompatibility of federalism with democracy. A States-based upper house requires, at most, equal legislative power regarding proposals that affect the States.

The solution developed in this paper involves giving the Senate enough executive and legislative power to protect States' rights from actions by both the Commonwealth executive and legislature. Of course, this raises the difficult question of how federal and national matters are to be distinguished, or at least, of determining when State interests should be accorded the status of rights, and therefore be capable of overriding national interests. This question cannot be sidestepped by showing that the Senate's function as a house of review justifies granting it legislative power roughly equal to that of the House of Representatives, even if its function as a States' house does not.