

**DOES AUSTRALIA HAVE A  
CONSTITUTION?  
PART I: POWERS — A CONSTITUTION  
WITHOUT CONSTITUTIONALISM**

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Abstract:

The conventional wisdom about the Australian Constitution is that it neither says what it means, nor means what it says. The gap between language and meaning is starkest in the sections on executive power, in which, according to a universally accepted view of what the constitutional framers intended to create, the explicit language vesting all executive power in the Governor-General is supplanted by the conventions of responsible government. One consequence of this divergence between language and practice is that constitutional interpretation normally requires a series of finesses, in which much of the text is read out of the document entirely. We argue that this conventional view is incorrect, in that during periods of high conflict, especially during the 1975 crisis in which the Governor General dismissed the Prime Minister under disputed circumstances, the Constitution turns out to mean precisely what it says. The Constitution, as a result, does not serve the vital function of channeling and resolving political conflict according to established rules. Instead, the Constitution itself serves as a weapon of political conflict, intensifying political disagreements to the detriment of legitimacy and stability. The tensions at the root of the 1975 crisis remain unresolved. This is the first of two articles that explore the provocative proposition that in some meaningful sense Australia has no constitution. Since there is a well-known document called the

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Constitution of Australia, this statement requires some explanation. Our basic claim is that in order to be reasonably described as based on a “genuine” rather than merely a “putative” constitution, there are certain basic functions and certain basic structural elements that are required. We argue that Australia’s Constitution fails to satisfy these criteria in crucial ways. Ultimately, we conclude that there is a meaningful sense in which the answer to the question “Does Australia Have A Constitution” is “no.”

The definitions and descriptions that follow are intended to be helpful in organizing the discussion, not to present a novel or contentious theory of constitutional philosophy. Functionally, a constitution serves some combination of two distinct and complementary roles. First, there is what we refer to as the “powers constitution.” A powers constitution is a charter of government that establishes the powers of governmental institutions and the processes for resolving political disagreement. This latter aspect of a powers constitution receives less attention than it should. Beyond establishing the structure of government and limits on governmental powers, a constitution serves the vital purpose of managing political conflict and channeling disagreements. A belief in the legitimacy of a constitutional mechanism for conflict resolution creates incentives among political minorities – unsuccessful candidates or parties, legislative coalitions or interest groups that fail to achieve their goals – to accept undesirable outcomes. At a minimum, then, a powers constitution establishes government institutions endowed with legitimate authority, and creates procedures for resolving disagreements.<sup>1</sup> The second element of a constitution is what we call a “rights constitution.” A rights constitution defines the limits of the authority that the powers constitution describes, usually, but not necessarily, by defining a set of “rights.” These two elements are the essential defining functions of any genuine constitution. It is also the case that a constitution is required to contain the highest law, so that it is understood that contrary ordinary legislation or actions by state actors are invalid. None of these are elements that depend on any particular constitutional system or design. A putative constitution that fails to secure limitations on government pow-

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1. The classic work on the Australian Constitution offers this definition: “A Constitution is a general law or a collection of laws, capable of effective enforcement and binding on every member of the community, including the members of Government in their private capacity. It is a law which should be couched in wide and general terms, avoiding minute specifications and details and thus leaving room for ‘unpredictable emergencies,’ and possible and desirable developments.” JOHN QUICK & ROBERT RANDOLPH GARRAN, *THE ANNOTATED CONSTITUTION OF THE AUSTRALIAN COMMONWEALTH* 314 (1901).

ers, fails to establish institutional structures for the exercise of power and the management of political conflict, or lacks the character of higher law, is, in Giovanni Sartori's words, a "sham."<sup>2</sup>

The elements of any genuine constitution similarly vary among different constitutional systems, but basically fall into three categories. The crucial elements that are identified in the term "constitution" are constitutional texts, constitutional conventions, and constitutional *ethos*. A constitution need not be written, nor need a written constitution be limited to a single authoritative text. However, most, if not all, constitutions include written texts of one kind or another. Whether these written texts take the form of a single founding document, a set of documents recognized to have special authority, or special legislation enacted in order to formalize constitutional understandings, constitutional theorists frequently argue that there are specific consequences that flow from the written nature of a constitution.

In addition, most, if not all, constitutional systems depend on recognized principles of political and legal practice that are treated as having the authority of higher law. These so called conventions need not be enforceable by any particular set of institutional actors, such as courts, so long as they are understood to be binding on a set of relevant political actors. Where conventions are viewed as binding but not enforceable, the sanction for their violation is essentially political: the loss of the claim to legitimacy. The idea that a constitution implies the assertion of a claim to legitimacy, finally, points to the third element of a genuine constitution: what we will call a "constitutional *ethos*." By *ethos* we mean widely held beliefs that provide the basis for accepting the constitutional order as legitimate. "What is really interesting about any constitution," writes Australian legal scholar Greg Craven, is "its principled case for obedience."<sup>3</sup> A constitutional *ethos* is a doctrine or philosophy that describes a set of reasons that are taken to be persuasive for the legitimacy of a constitutional system of powers and rights. This concept of a constitutional ethos is not far from Hans Kelsen's famous appeal

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2. Giovanni Sartori, *Constitutionalism: A Preliminary Discussion*, 56 AM. POL. SCI. REV. 853, 861 (1962). An example of such a sham constitution would include any of the constitutions of the Soviet Union. These instruments failed to serve either of the basic functions that we have identified: they neither established limitations on the powers of the state nor provided institutional structures for the expression of political conflict. Instead, the Soviet constitutions were themselves instruments of the Communist Party. See generally ARYEH L. UNGER, CONSTITUTIONAL DEVELOPMENT IN THE USSR: A GUIDE TO THE SOVIET CONSTITUTIONS (1981).

3. GREG CRAVEN, CONVERSATIONS WITH THE CONSTITUTION 19 (2004).

to a *Grundnorm*.<sup>4</sup> James Madison's famous warning about "parchment barriers" is relevant here, as a constitution that is not supported by a constitutional ethos is either an empty formality or nothing more than an edict by a party with the power to impose its will. In such a putative constitution there is no claim to "legitimacy," only the articulation of a command; by contrast, a genuine constitution is essentially involved in a project of political legitimization.<sup>5</sup>

The relationships among texts, conventions, and *ethos* identify different forms of constitutional systems. In the British Westminster system, there are a series of foundational texts – the Magna Carta, Declaration of Rights of 1689, the Treaty of Unity of 1702 – but by far the bulk of the rules and principles that define the system of British constitutionalism consist of unwritten conventions. These include both parliamentary supremacy and principles of government that are understood to be mandatory upon members of Parliament, although the latter do not allow for enforcement by any outside authority such as courts. In Albert Venn Dicey's classic description,

The rule[s] which make up constitutional law, as the term is used in England, include two sets of principles or maxims of a totally distinct character. The one set of rules are in the strictest sense 'laws,' since they are rules which . . . are enforced by the Courts . . . The other set of rules consist of conventions, understandings, habits, or practices which, though they may regulate the conduct of the several members of the sovereign power . . . are not in reality laws at all since they are not enforced by the Courts.<sup>6</sup>

Furthermore, by ancient tradition and understanding, these conventions are taken to express concepts rooted in common law tradition as well as historical practice.<sup>7</sup> "From the seventeenth

4. HANS Kelsen, *GENERAL THEORY OF LAW AND STATE* 111 (Anders Wedberg trans., 1945)

5. One example of a putative constitution of this kind might be the Japanese Constitution that was imposed by the American occupation authorities after World War II. Over time, a Japanese constitutional ethos developed around that instrument, with the result that today there is lively debate in Japan over the extent to which the Japanese constitutional text accurately expresses the Japanese constitutional ethos. It has also been argued that the effort to create and implement a constitution for Iraq following the ouster of Saddam Hussein from power reflects the problems of a constitutional text unconnected to a constitutional ethos. See, e.g., NOAH FELDMAN, *WHAT WE OWE IRAQ: WAR AND THE ETHICS OF NATION BUILDING* 70–1 (2004).

6. A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 23 (7th ed. 1908). See generally *id.* ch. 14.

7. The description of constitutional conventions is separate from the tradition of common law constitutionalism, which comes into play more prominently in the context of discussions of rights. See generally JEFFREY GOLDSWORTHY, *THE SOVEREIGNTY OF PARLIAMENT: HISTORY AND PHILOSOPHY* (2001); GEOFFREY MAR-

century until today,” writes Jeffrey Goldsworthy, “mainstream British constitutional thought has held that Parliament is both legally sovereign and subject to customary restraints.”<sup>8</sup>

In the American system, by contrast, the “Constitution of the United States” refers to a single specific text that is the source of the legitimate powers of the national government and defines the limits of the powers of government at all levels, enforced through a robust practice of judicial review. The meaning of that text is informed by conventions – separation of powers, enumerated powers, “Our Federalism,” and the commitment to textualism itself – that are not mentioned explicitly in the text but are nonetheless taken to be authoritative guides to its interpretation.<sup>9</sup> These conventions, in turn, are based on appeals to an underlying *ethos* whose elements include a mistrust of concentrated power and a belief in popular sovereignty and representative democracy. As these comments suggest, conventions often function as the carriers of *ethos* in the interpretation of a text or in disputes over practice. It is arguably the case that all constitu-

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SHALL, CONSTITUTIONAL CONVENTIONS: THE RULES AND FORMS OF POLITICAL ACCOUNTABILITY (1984).

8. GOLDSWORTHY, *supra* note 7, at 190. For a discussion of customary law as a check on the power of the state in earlier periods, see Quentin Skinner’s description of the concept of *la police* in 16th century France. QUENTIN SKINNER, FOUNDATIONS OF MODERN POLITICAL THOUGHT 260–61 (1978).

9. One of the most interesting and famous examples of the effects of convention on American constitutionalism concerns the Ninth Amendment and the judicial convention of textualism in the context of the American rights constitution. The Ninth Amendment states that “the enumeration of rights . . . shall not be construed to disparage others retained by the People.” U.S. CONST. amend. IX. The provision is famously unclear as to what rights it is meant, or should be understood, to guarantee – Judge Robert H. Bork once analogized the Ninth Amendment to an inkblot – but at a minimum, the rule seems to unambiguously exclude any argument for any kind of strict textualism in the application of the rights constitution. *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. 224 (1987) (statement of Judge Robert H. Bork). Despite the existence of this provision, American courts have relied on the written text as the sole source of enforceable constitutional rights; remarkably, no U.S. Supreme Court case has ever been decided on the basis of the authority of the Ninth Amendment. Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 TEX. L.REV 597, 599 n. 2 (2005) (citing Knowlton H. Kelsey, *The Ninth Amendment of the Federal Constitution*, 11 IND. L.J. 309, 319 (1936) (noting that “[t]here seems to be no case that decides the scope of the Ninth Amendment even in part” and that when the Ninth is mentioned “it is either grouped with the Tenth Amendment in decisions based upon or involving the latter, and hence concerning reservation or denial of power, or it is merely classified as one of the first ten which are held to be limitations on national and not state power” and concluding that “[n]o case has been found that uses the Ninth Amendment as the basis for the assertion or vindication of a Right”). Whatever else this may say about American constitutionalism, it is the clearest possible expression of the power of convention; in this case, a judicial convention of textualism guides the interpretation and application of the text’s provisions to the point of rendering one of the ten elements of the Bill of Rights a nullity.

tions depend on a combination of written texts and conventions; only the balance between these two forms of expression varies. The differences between the British and American systems identify two basically differing models of constitutionalism. Nonetheless, both models feature a basic unity among text, convention, and ethos, and each provides both a powers and a rights constitution.

The Australian constitutional model combines elements of the British and American versions in what has been alternatively described as a “compound republic”<sup>10</sup> or a “Washminster” form of government.<sup>11</sup> Our argument that Australia does not have a genuine powers constitution is based on the claim that the attempt to combine two different forms of constitutionalism has resulted in a situation in which there is a fundamental discontinuity between the text, on the one hand, and conventions and *ethos* on the other. In our second article we argue that in the case of Australia’s rights constitution, there is a different point of discontinuity. In that case, the inconsistency is between the text and conventions, on the one hand, and the underlying *ethos* on the other. The chart below indicates the basic structure of the arguments of each article.

<u>Australia’s Powers Constitution</u>		<u>Australia’s Rights Constitution</u>	
Text	Convention	Text	<i>Ethos</i>
<i>Ethos</i>		Convention	

In the present article we focus on Australia’s powers constitution. However, the crucial point is the assertion that in both Australia’s powers constitution and its rights constitution there are fundamental discontinuities among constitutional text, convention, and *ethos*.

As the diagram above suggests, we will argue that Australia’s powers constitution is essentially split in two by a fundamental discontinuity between text and convention. The problem is not simply that the text fails to describe many of the central elements of government structure, as in the British system, but that on crucial aspects of governmental organization and authorization, constitutional language has *nothing* to do with how power is actually exercised; that is, the text of the Constitution creates structures that directly conflict with actual practices. This pattern is most apparent with the provisions related to executive power.

10. For an excellent review and analysis of the literature on Australia’s mixed constitutional system, see Graham Maddox, *Australian Democracy and the Compound Republic*, 73 PAC. AFF. 193 (2000). See also BRIAN GALLIGAN, *A FEDERAL REPUBLIC: AUSTRALIA’S CONSTITUTIONAL SYSTEM OF GOVERNMENT* (1995).

11. Elaine Thompson, *A Washminster Republic*, in WE, THE PEOPLE 91, 97 (Geroge Winterton, ed. 1994).

Constitutionally, the executive power is exclusively vested in a Governor-General, who on paper has a breathtaking range of powers as Head of State. In practice, however, it is the Prime Minister who functions as chief executive while the Governor-General is ordinarily a powerless figurehead. Yet the constitutional text makes no mention of the Prime Minister. The gap between constitutional theory and practice is filled by a series of conventions that determine the way in which authority is ordinarily exercised. Chief among these is the convention of responsible government, in which ministers are accountable to parliamentary majorities.<sup>12</sup> The conventional wisdom is that political conflict is managed by consensus, in which the main political actors agree upon the basic principles that constrain their day-to-day activity.

The conventional wisdom about the Australian powers constitution, in other words, is that the text does not mean what it says and does not say what it means.<sup>13</sup> Our position is that this received wisdom fails to capture – indeed, effectively disguises — the full scope of contradiction at the core of Australian constitutionalism. The problem is not that the Constitution does not mean what it says. It is, rather, that in the few times when the Constitution has been put to the test of a political crisis, such as the 1975 dismissal, it turned out to mean *precisely* what it said. As a result, the Australian Constitution failed to mitigate or channel political disagreement. At a time when the constitution should have served as a stabilizing force, it was instead used to amplify political conflict and decimate the conventions that had emerged over time as universally understood elements of political practice.

The gap between what the Constitution says and what it is taken to mean, and the difference between how the constitution is widely ignored during routine times but is occasionally enforced literally, raise fundamental questions about the nature of Australian constitutionalism: What are the consequences, for theory and practice, of attempting to combine a written constitu-

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12. “In the history of a Constitution there grow in association with it, and springing from its generalities, certain customs and practices, which cannot be exactly termed laws, strictly so called. These customs and practices generally related to matters which by the letter of the Constitution are left to the discretion of some member or branch of the sovereign body. In time, owing to political influences and considerations, these discretionary powers are exercised in a certain manner; and hence arise what have been described as ‘understandings and conventions’ of the Constitution, distinguishable from the positive law of the Constitution.” QUICK & GARRAN, *supra* note 1, at 314.

13. Bach, notably, describes the language as “remarkably incomplete and misleading, and deliberately so.” STANLEY BACH, *PLATYPUS AND PARLIAMENT: THE AUSTRALIAN SENATE IN THEORY AND PRACTICE* 7 (2003).

tional text with directly contradictory constitutional conventions? How do we determine what parts of the Constitution should be read literally, and the circumstances in which the text should trump convention? Ultimately, we conclude, there is an irreconcilable tension at the center of the Australian model of constitutionalism.

Our argument proceeds in three parts. In section I, we set out the basic features of Australian constitutional theory and practice. In section II, we analyze the 1975 dismissal, which arose precisely because of this direct conflict between convention and constitutional text. In Section III, we consider the implications of these constitutional contradictions.

## I. THE AUSTRALIAN CONSTITUTIONAL SYSTEM

### A. THE TEXT AND ITS PROVISIONS

Australia's written constitution was the product of a decade of negotiation carried out by several constitutional conventions and a series of public referenda held in 1898 and 1899. In 1900, the British Parliament approved the constitution, and Australia became a self-governing member of the British commonwealth. However, the path to full sovereignty was longer: in 1942, the *Statute of Westminster Adoption Act* removed the UK Parliament's authority to legislate on behalf of the Commonwealth. Australia is generally considered to have become fully independent soon after, although the precise date is uncertain.<sup>14</sup>

Constitutionally, Australia is a federal republic which combines parliamentary features with those of a traditional separation-of-powers system. It has a bicameral legislature, a federal structure with both national and state governments, and an independent judiciary with the power of judicial review.<sup>15</sup> In practice, Australia operates under the convention of "responsible government," in which the majority in the House chooses the executive government comprised of members of Parliament and headed by a Prime Minister, who serves as long as he or she has the confidence of a majority of the lower House. The federal relationships, based on the U.S. and, to a lesser extent, Canadian

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14. R.D. Lumb, *The Bicentenary of Australian Constitutionalism: The Evolution of Rules of Constitutional Change*, 15 U. QUEENSLAND L.J. 3 (1988).

15. See generally A.H. BIRCH, REPRESENTATIVE AND RESPONSIBLE GOVERNMENT: AN ESSAY ON THE BRITISH CONSTITUTION (1964). The British model of responsible government was independently adopted by all eight of the Australian colonies between 1850 and 1900, and provides a critical background understanding to the development of the Australian constitutional in 1902. Section 64 of the Australian Constitution provides that ministers of government shall be appointed by and serve at the pleasure of the Governor-General, and that all such ministers shall be members of the Federal Executive Council (the cabinet) and of Parliament.

experiences, featured elements of divided authority and state representation in the national senate that from the beginning stood as counterweights to the strong central government.

The structure of the Australian constitutional text parallels that of the United States. Chapter I vests the legislative power in a bicameral Parliament, with a lower House based on proportional representation and a Senate that gives each state equal representation.<sup>16</sup> Much like Article I, Section 8 of the U.S. Constitution, section 51 of the Australian Constitution specifies in great detail the powers of Parliament using a combination of explicit powers – over trade, finance, external affairs, immigration – and broad implied grants that suggest the outlines of British parliamentary supremacy.<sup>17</sup> The Senate, unlike the British House of Lords, has substantive legislative power, with authority equivalent to the House in all instances except over revenue or appropriations bills, where it has the power to approve or reject, but not amend, House legislation.

Chapter II describes the executive government, to be discussed below, and Chapter III the Judiciary. Chapter IV deals with the financial aspects of the national government, including matters related to tariffs, trade, and public debts. The powers of the states, and admission of new states into the commonwealth, are addressed in Chapters V and VI. The remaining language deals with the amendment process and the location of the national government. The latter was an issue of some contention between the two largest cities, Sydney and Melbourne, and the Constitution adopted an explicit compromise, specifying that the capital must be at least 100 miles from Sydney.<sup>18</sup>

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16. Each state elects twelve Senators, and is guaranteed at least six under the Constitution. The Northern Territory and Australian Capital Territory each elects two Senators.

17. Subsections xxxvi through xxxix give Parliament wide authority to address matters referred to it by state governments, matters identified but left unresolved in the Constitution itself, and “matters incidental to the execution of any power” vested in Parliament. Subsection xxxviii grants power to “exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia,” a formulation that makes the federalist elements of the constitutional system appear as a check on the otherwise potentially unlimited expansion of the powers of the national government, and even that limitation is explicitly subject to exception where the governments of the states involved raise no objection. This is obviously in sharp contrast to the much stricter, judicially enforceable version of federalism that characterizes American constitutionalism.

18. One element of Australia’s constitution that is not discussed in this article is the relationship with Great Britain. Prior to the Australia Acts of 1986, the British Parliament was authorized to promulgate laws binding on the Australian states, and certain classes of constitutional dispute could be appealed from the Australian High Court to the Privy Council. The Acts of 1986 by the British, Australian, and Austra-

## B. THE TEXT AND THE GOVERNMENTAL STRUCTURE

The main question in Australian constitutional history is how the actual structure of the national government can be derived from constitutional provisions that make no mention of key institutions. On the one hand, the basic elements of representative government are there: both a freely elected legislature and an independent judiciary. But on many other aspects of national government, the constitution is either completely silent, or it explicitly describes a system very different than what actually exists. Commentators have long recognized tensions among these different elements. Even the Framers themselves expressed skepticism as to whether all of the elements of government structure not organic to Great Britain – federalism, bicameralism, the referendum – could be merged with responsible government. Alastair Davidson describes the Australian Constitution as “so full of contradictions and ambiguities that it must inevitably end up being the object of dispute as to meaning.”<sup>19</sup> The concern that the different elements of the constitutional system might not be commensurate appeared repeatedly in the convention debate. As Edmund Barton famously put it on the last day of debate in 1898, “[m]uch more truly than it can be said that federation might kill responsible government, or that responsible government might kill federation, it can be said that the referendum might kill responsible government.”<sup>20</sup>

The inconsistencies are most pronounced in the constitutional provisions relating to the executive. By the terms of the Constitution, Australia remains a Constitutional Monarchy. A textual reading of the Constitution finds no ambiguity in the formal constitutional vestments of executive power. Sections 61-70 vest *all* of the executive power in a Governor-General, who operates as the Queen’s representative. In the exercise of most of those powers, the Governor-General is advised by a Federal Executive Council, whose members he chooses and who serve at his pleasure. The Governor-General is the Commander in Chief of the military, and is also empowered to create administrative de-

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lian state parliaments dissolved the authority of the British Parliament to legislate for Australia and limited appeals from the High Court to the Privy Council to hypothetical cases in which the High Court chose to voluntarily grant permission, something that has never happened in the intervening twenty-plus years. See A.D. Watts, *The Australia Act 1986*, 36 INT’L & COMP. L.Q. 132, 132–39 (1987).

19. ALASTAIR DAVIDSON, *THE INVISIBLE STATE: THE FORMATION OF THE AUSTRALIAN STATE 1788–1901* 238 (1991).

20. OFFICIAL RECORD OF THE DEBATES OF THE AUSTRALASIAN FEDERAL CONVENTION, 3rd Sess. 2470 (Mar. 17, 1898) (statement of Edmund Barton, representative from New South Wales), available at <http://parlinfoweb.aph.gov.au/piweb/Repository/Constitution/ConCon/18980317.doc>.

partments and appoint their heads. In carrying out his powers, the Governor-General "shall act with the advice of the executive council." The Governor-General's assent, on behalf of the Queen, is required for any act of Parliament to become law.

The reality, of course, is quite different. In practice, the executive power sections of the constitution – sections 61 through 70 – are ordinarily read out of the document almost entirely.<sup>21</sup> The Governor-General is a figurehead who barely registers in the public consciousness.<sup>22</sup> Instead, power is exercised through a number of extraconstitutional conventions: the majority party or coalition in the House of Representatives sets up the executive government, in which a Prime Minister governs through the Cabinet. The government remains in power unless it loses the confidence of the lower House. The Commander-in-Chief designation is titular, and does not confer any substantive power; the armed services answer to the Minister of Defense. Whatever the language says, "the practical result," write Quick and Garran, "is that the Executive power is placed in the hands of a Parliamentary Committee, called the Cabinet, and the real head of the Executive is not the Queen but the Chairman of the Cabinet, or in other words the Prime Minister."<sup>23</sup>

A cabinet answerable to an elected Parliament is the central element of Australia's system of national government. It is also the essence of responsible government, which is taken as the *sine qua non* of Australian constitutionalism: it is what the Founders were familiar with in the colonial context, it is what they intended to implement in Australia, it is what knits the constitution together into a sensible whole, and it has always been taken as a given by judicial doctrine. The historical record leaves little doubt as to the original meaning that was intended in this regard. Winterton writes, "[T]he great majority of the delegates to the Federal Conventions intended to establish in the commonwealth responsible government under the Crown. This is not a matter of conjecture, or even implication; on countless occasions they affirmed their intention to implement responsible government."<sup>24</sup> The discussion at the constitutional conventions of the 1890s con-

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21. The one exception is the third clause of Section 64, which specifies that no Ministers shall hold office for more than three months unless they are (or become) a member of the House or Senate.

22. In a November 2006 Newspann, only 14% of Australians could name the current Governor-General, Michael Jeffrey. Eighty-one percent of respondents didn't even take a guess. Newspann Market Research, *To the Best of Your Knowledge, What is the name of the current Governor-General?* (Nov. 2006), available at [http://www.newspann.com.au/image\\_uploads/1105%20governor%20general.pdf](http://www.newspann.com.au/image_uploads/1105%20governor%20general.pdf).

23. QUICK & GARRAN, *supra* note 1, at 703.

24. GEORGE WINTERTON, PARLIAMENT, THE EXECUTIVE, AND THE GOVERNOR-GENERAL: A CONSTITUTIONAL ANALYSIS 71 (1983).

tained hundreds of explicit mentions of the principle, and the Founders' intentions are quite clear. In the *Engineers Case*,<sup>25</sup> a landmark 1920 High Court decision that set the tone of constitutional interpretation for the next 70 years, the main decision stated, simply, that the Australian Constitution was "permeated with the principle of responsible government."

Yet, as is also widely known, this is not what the Constitution says. The document never mentions responsible government, an office called "Prime Minister," government accountability to either the House or Senate, or any of the other characteristics of responsible government. Nonetheless, all of these are understood to be central to the constitution's meaning. As we note elsewhere, a common rationalization of this gap is that the Constitution itself forms only part of the government's foundational charter, and the practices that comprise the day to day activities of government are merely the application of what the text really means.

This gap between what the Constitution *says* and what it is taken to *mean* is the most commonly identified problem in Australian constitutionalism. It may seem pointless to revisit a settled debate.<sup>26</sup> But the interpretive task is still useful, as the process by which responsible government is read into the Constitution has consequences for other aspects of constitutional doctrine. There is an extensive conventional wisdom about what the Framers were trying to implement, and why they chose not to express their intentions more directly. Our intention is not to challenge the accuracy of this received knowledge, but rather to explore its implications.

Fitting the reality of government operation within the constitutional language is a challenge. Relying on convention in areas of constitutional silence, or even when convention conflicts with constitutional language, is an untenable strategy. It will not do to openly admit that entire sections of the constitution are irrelevant, for that raises the question of what *other* constitutional provisions should give way in a case of conflict with conventions, or what method determines which provisions mean what they say and which do not.<sup>27</sup> Once this gate is opened, the Constitution ceases to have status as a precedential document, and therefore

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25. *Amalgamated Soc'y of Eng'rs v. Adelaide Steamship Co.* (1920) 28 C.L.R. 129, 147 (Austl.).

26. The classic statement is the 1901 treatise by QUICK & GARRAN, *supra* note 1. A more recent treatment is in L.J.M. COORAY, *CONVENTIONS, THE AUSTRALIAN CONSTITUTION AND THE FUTURE* (1979).

27. "If everyone accepts that the authors meant for the Constitution to say one thing but mean another with respect to executive power, why should their words be read literally with respect to legislative power?" BACH, *supra* note 13, at 100.

loses its basic character as a constitution. If there is no limit to what else the Courts or convention could inactivate, the very foundation of stable constitutionalism begins to crack.

The difficulty, then, is justifying responsible government as a constitutionally valid practice within the confines of a defensible interpretive method. In many ways, Australian constitutional theory reverses the traditional method, in which the allowable practices of government derive from constitutional theory, which is itself a function of the text. Here, constitutional theory makes sense *only* when it is viewed through the lens of practice.

The standard explanation for the absence of textual references to responsible government is twofold: first, that the Framers intended to establish the basic outlines of government while allowing specific practices to evolve; and second, that they considered responsible government such an obvious part of federation that there was no need to set it out. These intentionalist arguments are at the heart of Founder's Originalism. Robert Garran, writing in defense of the federation in 1897, spelled out the rationale:

We must not, however, attempt to fix the present pattern of responsible government as a thing to be clung to for all time; we must allow scope for its development – for its being moulded to fit the political ideas of each successive generation. Responsible government, as we know it, is a new thing, and a changing thing; it depends largely upon unwritten rules which are constantly varying, growing, developing, and the precise direction of whose development it is impossible to forecast. To try to crystallize this fluid system into a hard and fast code of written law would spoil its chief merit; we must be careful to lay down only the essential principles of popular government, leaving the details of form as elastic as possible. Some fundamental principles must be fixed by the Constitution (subject to a more or less difficult process of amendment); whilst the great mass of merely accidental, and not essential, characteristics of government may be left at large, to be controlled from time to time by the Parliament and the will of the people, as is the case to-day in Great Britain and in every self-governing British colony.<sup>28</sup>

As Garran explained it, the keys to responsible government are: the existence of a federal executive council appointed by the Crown; a requirement that council members sit in the lower House; and the rule that no money can be spent without parliamentary approval. Since all three of these elements are in the Constitution, the existence of responsible government is, in his view, explicit. “Upon these [rules] hangs the whole system of

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28. ROBERT GARRAN, *THE COMING COMMONWEALTH: AN AUSTRALIAN HANDBOOK OF FEDERAL GOVERNMENT* 149 (1897).

parliamentary government, with all its elasticity and adaptability; and in the Federal Constitution it will be enough to lay these rules down, and leave the rest to be moulded by circumstances.”<sup>29</sup> The actual language of the Constitution simply “stereotypes the theory of the British Constitution that the Crown is the source and fountain of Executive authority, and that every administrative act must be done by and in the name of the Crown.”<sup>30</sup>

There are other possibilities, though, that cast some doubt about the adequacy of the this conventional wisdom. Garran himself proposed that the Framers failed to specify governmental design in the text because, first, they wanted future governments to be able to work out the meaning of responsible government in practice, and, second, that everyone would recognize those principles as inherent in the few things that were specified. By contrast, Winterton concludes that the Framers avoided specifics because “they were afraid of appearing gauche and uneducated in British eyes” about the nuances of the Crown’s power.<sup>31</sup> Rather than attempt to describe in the Constitution the actual powers of the Crown as they existed in 1901, the Framers opted instead to describe the theory in terms that they expected no one would take literally.<sup>32</sup> Richard Lucy points to the breadth of the Governor-General’s power as a sign that the framers did not expect anyone to take them seriously: “[T]he powers the Constitution gives to the Governor-General seem broad enough to give the argument that he was never intended to use any of them some plausibility.”<sup>33</sup>

Either of these arguments ends by ascribing a very odd position to the constitutional framers: the competing positions are either that they knew precisely what they were doing but chose not to express their intentions in the constitution itself, or that they did not express their intentions in the constitution itself because

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29. *Id.* at 150.

30. QUICK & GARRAN, *supra* note 1, at 702. A second rationalization is that given the difficulties in combining responsible government with a federal structure – in particular, rationalizing accountability to the lower House with the state power enshrined in the Senate – it was the best that could have been expected. So in the case of the 1975 dismissals, the argument would be that the textual commitment of authority to the Governor-General was secondary to the understanding that the Framers intended to create a system of responsible government in which final authority rested with Parliament, precisely the argument that Whitlam himself had made at the time.

31. WINTERTON, *supra* note 24, at 3.

32. *Id.*

33. RICHARD LUCY, *THE AUSTRALIAN FORM OF GOVERNMENT: MODELS IN DISPUTE* 221 (2d ed., 1992) (“[T]he powers the Constitution gives to the Governor-General seem broad enough to give the argument that he was never intended to use any of them some plausibility.”).

they were afraid of looking as though they did not know what they were doing. Given the Founders' recognition of these tensions, the idea that basic elements of the structure of government were left out of the text but were nonetheless expected to be elements of the governing constitutional arrangements is difficult to credit.

This observation brings us to the problem of Australian constitutionalism. How can the tradition of interpreting the constitutional text by reference to Founders' Originalism be squared with the idea that fundamental elements of constitutional governance are left to conventions that take precedence over the text itself? Conversely, how can fundamental elements of Australian constitutionalism be conceived of as securely or clearly defined if they depend on respect for convention, a respect that gives way in the face of a sufficiently fierce political conflict as manifested in the experience of 1975.

The problem becomes more clear when we consider provisions that specify the operations of government, rather than broad grants of power and their limitations. Consider section 64 of the constitution:

The Governor-General may appoint officers to administer such departments of State of the Commonwealth as the Governor-General may establish. Such Ministers shall hold office during the pleasure of the Governor-General. They shall be members of the Federal Executive Council, and shall be the Queen's Ministers of State for the Commonwealth. After the first general election no Minister of State shall hold office for a longer period than three months unless he or she is a senator or member of the House of Representatives.

What does it mean? A literal interpretation seems to be that the power to establish and appoint leaders to executive branch departments rests with the Governor-General, and that all administrators must be members of Parliament. Instead, this section has been interpreted as establishing the principle that the government, which is composed of Ministers, must have the confidence of the House of Representatives.<sup>34</sup> Can the text support such a reading? One constitutional scholar notes that "Section 64, unlike sections in the State Constitution Acts, does not explicitly recognize a central tenet of the doctrine of responsible government, viz, that the Ministry must have the support of the majority of members in the House of Representatives, nor does it recog-

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34. WINTERTON, *supra* note 24, at 75-6 ("The Framers of the Constitution realized that if Ministers were required to sit in Parliament their responsibility to it followed automatically."). Winterton points to remarks by Edmund Barton in the Adelaide Convention of 1897, that requiring Cabinet members to sit in Parliament creates "cabinet government responsible to the people."

nize the duty of a Ministry defeated at an election to resign. *But it is clear that this is the basis for the formation of a government.*"<sup>35</sup>

And yet, despite the presumed clarity of the Framers' intentions, the sections that are said to imply ministerial responsibility are silent on the key question of whether responsibility is to the House alone. Sections 62 and 64 do not "expressly indicate whether Ministers are responsible to both Houses of Parliament or only to the House of Representatives."<sup>36</sup> Indeed, there is no language anywhere in the Constitution that resolves this silence. Winterton claims that responsibility to the House alone is implied in other sections, which allow the government to continue to operate even when the Senate has blocked a bill, and which require all revenue bills to originate in the House. Though the principle was unstated in the Constitution Acts, "many provisions made sense only on the understanding that ministerial tenure of office would be conditional upon retention of the confidence of the lower house of the legislature."<sup>37</sup> But the 1975 dismissal established the precedent that the Senate *can* bring down a government by blocking supply.

These examples demonstrate the phenomenon of extra-textual constitutional originalism. That is, an original commitment to responsible government translates into conventions of constitutional practice that have the force of constitutional requirements. Unsurprisingly, these conventions appear less in judicial discussions of the constitutional text than in political practice, but they claim no less a connection to the Constitution than the necessarily implied limitations on government power that derive from the commitments to responsible and representative government.

In practice, however, the precise definition of conventions – and the catalogue of which ones are in effect – can confuse even top government officials. At a 1985 Constitutional Convention in Brisbane, delegates were presented with a carefully thought-out list of 18 conventions which were purported to capture most of the accepted practices of responsible government. In the course of the debate, though, some delegates challenged the list as inaccurate, others proposed a series of amendments, and the motion to approve the list was defeated.<sup>38</sup> In 2003, the Gover-

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35. R.D. LUMB, *THE CONSTITUTION OF THE COMMONWEALTH OF AUSTRALIA ANNOTATED* 238 (4th ed., 1976) (emphasis added).

36. WINTERTON, *supra* note 24, at 79.

37. *Id.* at 74.

38. *PROCEEDINGS OF THE AUSTRALIAN CONSTITUTIONAL CONVENTION: VOLUME I, OFFICIAL RECORD OF DEBATES AND BIOGRAPHICAL NOTES*, 7–46 (1985). The motion was defeated on a 23–41 vote, losing by nearly two-to-one. The failure

nor-General (the government official who is formally vested with the executive power as discussed below) gave a speech to commemorate the 100th anniversary of the Australian High Court. In lauding the ‘checks and balances’ of the Australian Constitution, the Governor General asserted that:

In simple terms, it ensures the Prime Minister can have his commission withdrawn by the Governor-General if he loses the confidence of the Parliament or is in material breach of the Constitution. Conversely, the Prime minister has the right to advise Her Majesty the Queen to revoke the Governor-General’s commission should the Governor-General speak in a partisan political manner or become unfit to hold the office. This relationship – established only by convention – has helped underpin, in substantial measure, the political stability Australia has enjoyed in the leadership of the national for more than 100 years.<sup>39</sup>

Helen Irving was mystified by the Governor-General’s description of the extant conventions, finding “nothing in any official document, or any historical precedent” that would support the notion that a Governor-General could be removed for speaking in a “partisan manner.”<sup>40</sup>

The problem of Australian constitutionalism, then, is making sense of the relationship between the roles of text and convention within the conceptual system of the Founders’ Originalism. The 1975 dismissals are a perfect illustration. The Governor-General’s rescinding of the commission of Prime Minister Gough Whitlam was the culmination of a series of convention-breaking practices, in which Parliament, the Prime Minister, and the Governor-General all violated what were thought to be longstanding and stable conventions. “The upshot of the events of 1975,” wrote George Winterton, “is, then, a significant change in the operation of responsible government in Australia, based on the power of the Senate – a bare half of the Senate” to bring a government down by refusing to pass budget legislation.<sup>41</sup> But what,

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of the proposed list of conventions raises a basic question: if conventions are defined as reflecting a shared view of accepted political practices, does the vote mean that this list does not comprise the set of conventions?

39. Governor-General Michael Jeffrey, Address at the Opening of the High Court of Australia Centenary Conference (Oct. 9, 2003).

40. HELEN IRVING, FIVE THINGS TO KNOW ABOUT THE AUSTRALIAN CONSTITUTION 23 (2004). Irving notes that many Governors-General, including Michael Jeffrey, who had delivered this speech, had spoken out on partisan issues without being dismissed.

41. WINTERTON, *supra* note 24, at 8. In Australian parlance, appropriations are known as “supply,” and prior to 1975 it was the convention that the Senate did not have the constitutional power to refuse to pass a supply bill that had made it through the House of Representatives.

if anything, can be said about the constitutional status of any of the events involved?

### C. THE CRISIS OF 1975

At the peak of the crisis, despite the fact that convention held the powers articulated in section 62 of the Constitution to be meaningless, Governor General Sir John Kerr used his formal powers under the section to dismiss Prime Minister Gough Whitlam. He also used his powers under section 57 to dissolve both Houses of Parliament despite the fact that Whitlam's government had both parliamentary and popular majority support. The dismissal turned out a legitimate government, and should have been unimaginable under the conventions long thought to be controlling. But it was entirely valid under the explicit terms of the constitutional arrangement, and the contradictions at the heart of the crisis remain unresolved.

The 1975 crisis grew out of the conflict between constitutional text and practice. How would it be possible to reconcile the idea of responsible government with an American-style bicameral legislature in which the majority party in the house might not be the majority party in the Senate? If the Cabinet was responsibly *only* to the House, but the Senate had the ability to block legislation, could a situation arise where the Senate had the power to, in effect, bring down a government? The Framers saw this problem, and attempted to resolve it by limiting the Senate's power to initiate money bills, and by establishing an elaborate process for resolving deadlocks, even to the point where both houses of Parliament would be dissolved and new elections held. More importantly, for seven decades the convention was that the Senate could not refuse to pass supply bills; like most conventions, there was nothing in the Constitution to support it.<sup>42</sup> That balance would not survive through 1975.

The background to the crisis was the election of the Australian Labor Party (ALP) to power in 1972, breaking a twenty-three year domination by the more conservative Liberal/Country coalition. In addition, the new Prime Minister, Edward Gough Whitlam, was a divisive, aggressive politician with a hard-driving style. His agenda was a radical departure from the status quo, including a major expansion of government: he ended the "white Australia" policy which had restricted immigration to those from the British empire or former colonies; proposed national health insurance; introduced a welfare program for families; recognized Aboriginal self-determination; lowered the voting age to 18; re-

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42. Even though the Senate could not amend appropriations or tax legislation, it still had the power to withhold approval.

organized the federal government; and established diplomatic relations with China. An Australian version of the New Deal, it was controversial and bitterly opposed by the coalition.

Whitlam did not, however, have a majority in the Senate. After the 1970 half-Senate election, the ALP held only 26 out of 60 seats. The Liberal/Country coalition also had 26 seats, with the balance of power held by 5 Senators from the Democratic Labor Party (DLP), and 3 Independents. With the ALP holding well short of half the seats, the Senate repeatedly refused to approve bills that were critical elements of the Labor Party's reform program and that had been passed by the House, including supply bills crucial to government operation.<sup>43</sup> Opposition Senators were open about their motivation: they were using their power to block supply, "as leverage to induce Whitlam and his Ministry to request the Governor-General to dissolve the House so that new House elections could take place" alongside the upcoming half-Senate election, scheduled for May 1974.<sup>44</sup> Senate intransigence was, therefore, purely a matter of political calculation.

Seeking to strengthen his position in the upcoming Senate election, Whitlam appointed the DLP leader Vince Gair as Ambassador to Ireland, creating a vacancy that the Labor Party expected to win. The strategy backfired when it became public: Queensland Premier Jon Bjelke-Peterson objected to what he saw as blatant political maneuvering, and asked the Queensland Governor to issue only five writs of election for the May elections rather than the usual six. Whitlam then withdrew his ambassadorial appointment. This set the tone for the events that followed, as time and again conventions were abandoned in the face of divisive political maneuvers.

Having failed in his attempt to essentially pack the Senate, based on the representation of his attorney-general that there were no fewer than six bills that were in deadlock, Whitlam responded to the Senate's obstruction by asking Governor-General Sir Paul Hasluck for a double dissolution under section 57 of the Constitution.<sup>45</sup> Whitlam's hope was that the special election would give him majorities in both chambers. On April 11, 1974, a double dissolution was ordered, but the subsequent election did not work in Labor's favor. Whitlam wound up with an even smaller House majority and little improvement in his party's Senate position. Within the Senate, the ALP and the Coalition were

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43. The most prominent of these was the Health Insurance Act, a predecessor to Australia's modern system of national health insurance.

44. BACH, *supra* note 13, at 84.

45. *Id.* at 86-7.

now tied, 29 seats each, with the balance of power in the hands of one Independent Senator and another from the Liberal Movement. When the new Senate convened in July, it still refused to pass the six bills that prompted the double dissolution. Whitlam then invoked the convoluted deadlock-ending procedures described in section 57. Those provisions, which had never been used before, required one more attempt to pass the disputed bills (which failed), and then a joint sitting of both houses to act as a single legislative chamber. The Government was able to get the disputed bills passed in this session held in August, getting narrow majorities on all six.<sup>46</sup>

The parliamentary situation remained stable until early 1975, when the ALP's position in the Senate further weakened. In February, Whitlam appointed Senator and Attorney General Lionel Murphy to the High Court. Under the controlling conventions, this should have had no effect on the Senate's partisan balance: since the Senate adopted the single transferable vote election method in 1949, the convention had been that "casual" Senate vacancies were filled by Senators from the same political party. In this instance, though, the New South Wales Parliament chose an opposition Senator as Murphy's replacement. When another ALP Senator died, the Queensland Parliament followed suit, naming a known opponent of Whitlam to the seat.

The emboldened Senate, now with an absolute opposition majority, once again refused to pass key bills, insisting that the Whitlam Government submit to a new round of elections (even though it had been only a year since the last). The Senate's repeated efforts to force another election violated another long-standing convention, which held that the Senate did not have the power to bring down a Government. As long as Whitlam had the confidence of the House, his tenure should have been secure. Responsible Government meant responsible to the House, and House only.

In the Summer of 1974 Sir John Kerr had replaced Hasluck as Governor-General. From March through November of 1975, Kerr met with the newly elected head of the Liberal Party and leader of the opposition to Whitlam, Malcolm Fraser, and with other officials including Chief Justice Garfield Barwick. Depending on whose account one accepts, these were either meetings designed to find a way to break the deadlock in the Senate or conspiratorial exchanges devoted to finding ways to get rid of

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46. *Id.* at 87-8.

Whitlam.<sup>47</sup> In November 1975, an emboldened Senate refused three times to consider supply bills already passed by the House. This was in addition to a whole series of other bills that the Senate had already declined to consider.<sup>48</sup> Once again, the opposition Senate majority was open about its reasons for denying supply, demanding that the government agree to new elections before the bills would be passed. This arguably violated one more longstanding convention: the convention that the Senate did not have the power to bring down a government under responsible government because the Prime Minister traditionally answers to the House alone, a parallel to the British tradition in which responsible government requires accountability only to the elected House of Commons. But in a letter dated November 10, Chief Justice Barwick advised Kerr that the Senate had the constitutional authority to "refuse Supply," that is, to cut off funds by denying appropriation bills, and that "a Prime Minister who cannot ensure Supply to the Crown, including funds for carrying on the ordinary services of government, must either advise a general election. . .or resign."<sup>49</sup>

Despite the fact that the Prime Minister still had majority support in the House – the body which, according to convention, was the only one whose confidence matters under responsible government – Governor-General Kerr dismissed Whitlam from the office of Prime Minister on November 11, citing his authority under Section 64 of the Constitution. It was the first time in Australian history this authority had been exercised.<sup>50</sup> Kerr's letter of dismissal to Gough was short and to the point:

Dear Mr. Whitlam,

In accordance with section 64 of the Constitution I hereby determine your appointment as my Chief Advisor and Head of the Government. It follows that I also hereby determine the appointments of all of the Ministers in your Government.

You have previously told me that you would never resign or advise an election of the House of Representatives or a double dissolution and that the only way in which such an election could be obtained would be by my dismissal of you

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47. Competing accounts include GOUGH WHITLAM, *THE TRUTH OF THE MATTER* (1979); JOHN KERR, *MATTERS FOR JUDGMENT: AN AUTOBIOGRAPHY* (1979); and PAUL KELLY, *THE UNMAKING OF GOUGH* (1976).

48. See CHERYL SAUNDERS, *THE AUSTRALIAN CONSTITUTION ANNOTATED* (1997) (containing a list of more than 20 additional stockpiled double dissolution bills).

49. RICHARD HALL & JOHN IREMONGER, *THE MAKERS AND THE BREAKERS: THE GOVERNOR-GENERAL AND THE SENATE VS THE CONSTITUTION* 205 (1976).

50. Section 64 reads "[t]he Governor-General may appoint officers to administer such departments of State of the Commonwealth as the Governor-General in Council may establish. Such officers shall hold office during the pleasure of the Governor-General."

and your ministerial colleagues. As it appeared likely that you would today persist in this attitude I decided that, if you did, I would determine your commission and state my reasons for doing so. You have persisted in your attitude and I have accordingly acted as indicated. I attach a statement of my reasons which I intend to publish immediately.

It is with a great deal of regret that I have taken this step both in respect of yourself and your colleagues.

I propose to send for the Leader of the Opposition and to commission him to form a new caretaker government until an election can be held.

Yours sincerely,

On the same day, Kerr made Fraser the new Prime Minister of a caretaker government. Fraser, in his letter accepting the position, stated "I confirm that I have given you an assurance that I shall immediately seek to secure the passage of the Appropriations Bills which are at present before the Senate, thus ensuring supply for the carrying on of the Public Service in all its branches."<sup>51</sup> The Senate immediately passed the supply bills at the core of the dispute, but the House responded with a quick vote of no confidence in the Fraser Government (which passed because Whitlam still had control of that chamber). But before the Speaker of the House could deliver the results of the no-confidence vote, the Governor General ordered a second double dissolution order under section 57 and called for a new round of elections. These elections were held December 13, 1975; Labor was routed, losing thirty seats, and on December 22 a new Liberal government headed by Fraser took office.<sup>52</sup>

Whitlam's take on what had happened is captured in a letter that he sent to Queen Elizabeth II on December 26th:

The Governor-General used the reserve powers of the Crown to make at least five political decisions. All these decisions favoured one political combination against the other, which happened to be the party with an assured majority in the

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51. The Whitlam Dismissal, *Sir John Kerr's Letter of Dismissal*, available at <http://whitlamdismissal.com/documents/dismissal-letter.shtml> and <http://whitlamdismissal.com/documents/fraser-commission.shtml> (last visited May 22, 2008).

52. The events described here are compiled from a number of sources. For a basic chronology of the events of 1975, see National Archives of Australia, Fact Sheet 240, *The Dismissal, 1975*, <http://www.naa.gov.au/about-us/publications/factsheets/fs240.aspx> (last visited May 23, 2008). For additional documents, see the Australian Parliamentary Library database, <http://www.aph.gov.au/library/pubs/rp/1997-98/98rp05.htm> (last visited May 23, 2008). Compare WHITLAM, *supra* note 47, with KERR, *supra* note 47, for conflicting accounts of the legitimacy of the various actions that were taken. Kerr argues that the Senate had acted within its constitutional authority. By contrast, Whitlam argues that the Senate's actions were illegitimate as a matter of convention, regardless of whether they were authorized by the constitutional text. Whitlam lost his seat in the election of 1977, while Kerr resigned from the post of Governor-General in 1978.

Lower House. At no time did he inform me as Prime Minister of the resolution he had formed to dismiss my government. He refused not merely to accept but even receive my advice recommending steps to bring about an election for half the Australian Senate. He rejected the opinion of the Crown Law officers and accepted the contrary opinion of a private member of Parliament, albeit a former Solicitor-General. Against my express advice, and contrary to all proper practice, he consulted the Chief Justice on a matter that could well have become a matter for judgment by the full High Court itself. He refused to receive the Speaker of the House of Representatives, acting on the express instructions of the House, until Parliament had been dissolved.<sup>53</sup>

All of Whitlam's complaints focus on the accurate observation that Kerr's actions violated the conventions of responsible government; none point to a claimed violation of any provision of the constitutional text.

As dramatic as the dismissal of the Prime Minister was, the double dissolutions ordered by Hasluck and Kerr in 1974 and 1975 also deserve attention. The double dissolution of 1975 was the second in two consecutive years, the first requested by a sitting Prime Minister whose party held a majority in the House, and the second forced upon the House majority. Both had aspects that made them unprecedented events.

Double dissolutions had been ordered on two occasions prior to 1974, in 1914 and 1951, but in both cases the issue had turned on a single bill whose deadlocked status was not contested.<sup>54</sup> In 1974, by contrast, Whitlam secured an order of double dissolution based on the combined effects of six deadlocked bills. The use of "stockpiled" bills to justify an order of double dissolution was one of several issues brought before the

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53. Letter from Edward Gough Whitlam to Martin Charteris, private secretary to Queen Elizabeth II (Dec. 26, 1975), available at <http://naa12.naa.gov.au/scripts/ItemDetail.asp?M=0&B=8815831> (last visited May 23, 2008).

54. There was nothing new about the use of double dissolutions as a political tactic. In 1914, the deadlocked issue involved a preference for union hiring in public employment. The Liberal Party government that called for the dissolution was defeated in the subsequent election, and the issue was not revisited. In 1951, Robert Menzies – again, a Liberal Party Prime Minister (albeit a new version of the Liberal Party formed in 1945) – introduced a bill banning the Communist Party, hoping to use the Labour-controlled Senate's rejection of that bill to call for a double dissolution. Instead, the Senate approved the bill, which was then ruled unconstitutional by the High Court. *Communist Party v. Commonwealth* (1951) 83 C.L.R. 1, 34 (Austl.). Menzies later attempted to call for a constitutional referendum to amend the constitution to permit his anti-communist legislation, but the attempt failed. See LEICESTER WEBB, *COMMUNISM AND DEMOCRACY IN AUSTRALIA: A SURVEY OF THE 1951 REFERENDUM* (1955). Later the same year, however, the Senate blocked a banking bill, and using that deadlock as his justification Menzies got the Governor-General to order a double dissolution and special election, at the end of which Menzies' Liberal Party had clear majorities in both Houses.

High Court during the crisis. Opposition members also filed suits challenging the subsequent approval of the six contested bills in joint session, and the propriety of the special double dissolution election. In all three cases, the Court ruled in favor of Whitlam and the Governor-General, holding that bills can be stockpiled for purposes of determining whether a deadlock exists, that the court has the final say on the validity of legislation passed at a joint sitting, and that the Governor-General has the authority to order a joint seating of the two Houses of Parliament.<sup>55</sup>

Barwick wrote dissenting opinions in several of these cases, although he did not always entirely reject the outcomes. The first of these cases, *Cormack v. Cope*, concerned the stockpiling of double dissolution bills. Barwick included two relevant passages in his opinion. The first of these had to do with the scope of judicial authority: "it is not given to the Governor-General to decide whether or not in fact the occasion for the exercise of the power of double dissolution has arisen. In my opinion, only this Court may decide that fact if it comes into question. But, of course, the Governor-General must make up his own mind whether the occasion has arisen for him to exercise his power of double dissolution and he may recite that it has. But what he determines for himself is in no wise binding." Read in connection with Dicey's familiar distinction between law and convention on the basis that "laws" are things enforceable by courts, Barwick's statement here strongly emphasized the legal textual constitution over mere conventions. As noted earlier, during this period the High Court's justices tended to couch their arguments in textualist terms, and these cases were no exception. In response to an argument by the Attorney General, Barwick sharply distinguished the Australian model of constitutionalism from Dicey's British model: "The courts in the United Kingdom have traditionally refrained from any interference in the law-making activities of the Parliament. It was claimed that this restraint, if not indeed inability, on the part of the courts of the United Kingdom was part of the privileges and immunities of the Commons to which the House of Representatives and the Senate had suc-

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55. *Cormack v. Cope* (1974) 131 C.L.R. 432, 474-75 (Austl.); *Victoria v. Commonwealth* (1975) 134 C.L.R. 81, 83 (Austl.) (holding the three-month period required by section 57 for second passage of proposed measure through House of Representatives following deadlock measured from date of Senate's rejection, not initial approval of the House, invalidating Petroleum and Minerals Authority Act of 1973); *Western Australia v. Commonwealth* (1975) 134 C.L.R. 201, 202 (Austl.) (holding that there is no requirement that a double dissolution be ordered immediately following the Senate's rejection of a bill passed by the House for the second time.).

ceeded in S 49 of the Constitution. But the submission, in my opinion, was basically misconceived. We are not here dealing with a Parliament whose laws and activities have the paramountcy of the Houses of Parliament in the United Kingdom. The law-making process of the Parliament in Australia is controlled by a written Constitution. This is particularly true of the special law-making process for which s 57 makes provision."<sup>56</sup>

At the same time, however, Barwick appealed to British-style conventions to preserve the ethos of the Australian parliamentary system: "I am quite conscious of the fact that such a view of s 57 leaves open the possibility that, as it were, a storehouse of proposed laws could be built up during the life of a Parliament so that after a double dissolution they might be presented at the one time to a joint sitting, thus making a considerable inroad upon the basic concept of the Constitution which provides for a bi-cameral system of Parliament. But whilst this is perhaps a possibility it seems to me it is not to be prevented by what, to my mind, would not be merely a strained but an unwarranted construction of s 57. The control of such a possibility might lie in the formation and observance of parliamentary conventions designed to implement the spirit of parliamentary government as under the Constitution." In a separate case, the High Court also upheld the Whitlam government's use of its executive powers to create the Australian Assistance system. This time Barwick dissented outright, objecting to the idea of "residual" executive powers not specified in the constitutional text. Part of the issue in the case turned on the authority granted to the government by section 81 of the Constitution to expend money "for the purposes of the Commonwealth."<sup>57</sup> A plurality of the justices held that the "purposes of the Commonwealth" were whatever Parliament decided them to be. By contrast, in Barwick's view, only the purposes enumerated in the constitutional text and only disbursements authorized by specific statutes fell within the ambit of section 83; in particular, Barwick rejected the idea of a convention of incidental or inherent executive power.<sup>58</sup>

Barwick's arguments point to the central place of the conflict between convention and text. On the one hand, Barwick rejected the British view which pairs parliamentary supremacy with the supremacy of convention, and indeed with respect to the power of expenditure his view of governmental authority was, if

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56. *Cormack v. Cope* (1974) 131 C.L.R. 432, 452 (Austl.)

57. Section 81 reads: "[a]ll revenues or money raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution."

58. *Victoria v. Commonwealth* (1975) 134 C.L.R. 338, 353 (Austl.).

anything, narrower than that of the United States Supreme Court's post-1937 treatment of New Deal legislation. On the other hand, Barwick felt perfectly comfortable appealing to a tradition of parliamentary convention as the safeguard of the basic values of responsible government. In effect, Barwick was reading responsible government out of the Australian constitution and placing it in Australian political culture.

These arguments concerning the relationship between constitutional text and convention provide the background for a consideration of the dismissal and dissolution of 1975 as an exercise of Australian constitutionalism, as did Barwick's advice to the Governor-General Kerr. That proffer of advice has been a matter of controversy. In his memorandum accompanying the 1975 order of double dissolution, Kerr stated that dissolution was justified by the Senate's refusal to supply lawful authorization for the expenditure of funds required to operate the government, a characterization that is open to question in the 1975 case and is almost certainly not applicable to the dissolution order of 1974. But as Geoffrey Sawer points out, the convention authorizing the dismissal of a government relates to a loss of *confidence* of the House of Commons, not simply an inability to secure appropriations. Barwick, as noted earlier, also advised Kerr that responsible government required the executive to have the confidence of both Houses, again contrary to British practice and established convention. "It was a good illustration," writes Sawer, "of the follies which lawyers can commit when they mix advice on law with advice on convention. The relation between the executive government and the parliament in the Australian system is wholly a question of convention, and the convention is assuredly not that the executive government is responsible to the parliament as a whole."<sup>59</sup> Moreover, Kerr's letter to Whitlam strongly suggests that the dismissal was understood as a step toward double dissolution from the outset, with the intent of securing a new majority in the lower House, thus turning the original convention of responsible government on its head.

The dismissal and dissolution of 1975, while clearly authorized by the Constitution's text, involved cascading violations of many conventions thought to be at the core of responsible government. The message that Barwick has tried to send with respect to stockpiling of dissolution bills had larger application; "conventions" are not enforceable constitutional norms, and in practice they give way in the face of sufficiently sharp political conflict.

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59. Geoffrey Sawer, *Constitutional Issues in Australian Federalism*, 7 PUBLIUS 21, 28 (1977).

At the same time, there is a general consensus among observers that all parties acted in accordance with the authority granted to them under a literal reading of the Constitution, and that all parties (in varying degrees) acted in outright defiance of longstanding conventions. Among the abandoned conventions were the principles: that the government answers to the House; that the Senate does not have the ability to bring a government down, and the implication that the Senate may not thereby deny funding to the government; the practice of replacing a Senator who leaves office in mid-term with a new member of the same party; and the principle that the Governor-General may act only on the advice of his Ministers. In the end, every one of these conventions had been breached.

The 1975 dismissal was thus a direct confrontation between the explicit constitutional text and convention. In one instance after another, the constitutional text won out over the same longstanding conventions that were long viewed as central to the operation of responsible government:

The situation appears to have been reasonably clear. Each of the protagonists – the nongovernmental majority in the Senate, the two state parliaments, and the Governor-General – acted constitutionally, at least according to the text of the document. On the other hand, each acted in an unusual if not unprecedented manner and in violation of established conventions, or so their critics asserted, and all four were charged, though some more than others, with acting for partisan purposes. The text of the Constitution and some of the most important conventions that had developed around it had come into conflict.<sup>60</sup>

The underlying conflicts that prompted the 1975 crisis – the inconsistency between responsibility to the House and a Senate; the difficulty of reconciling apparently real powers vested in the office of the Governor General with the conventions that viewed the office as largely symbolic – have never been resolved.<sup>61</sup> Conventions are still viewed as controlling, even though in the one instance where they came into direct conflict with explicit constitutional text, the conventions gave way, first to hardball political maneuvering and then to the terms of the written text.

The importance of these events might be diminished if it were true that either the dismissal resulted from a unique confluence of events that will never happen again, or that it was a one-time event that brought the country so close to a constitutional

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60. BACH, *supra* note 13, at 98.

61. The one exception is a constitutional amendment, ratified in 1977, specifying that when a Senate seat becomes vacant in the middle of a term – a so-called “casual vacancy” – the replacement Senator will be of the same party as the departing Senator. CONSTITUTION ACT § 15 (1977) (Austl.).

meltdown that no one would risk a second pass. But the uniqueness argument is itself almost entirely a function of convention: indeed, of all the convention-breaking practices of 1974-75, only one is now prevented by constitutional language.<sup>62</sup> The fundamental contradictions of the Senate's power to block supply and the reserve powers of the Governor-General have never been resolved. The weight of constitutional opinion, in any event, is that the Senate in fact does have the constitutional power to block supply.<sup>63</sup> The argument that "it can't happen again" necessarily requires continued faith in the same conventions that were transgressed in the first instance.

As Sawyer explains, the crisis arose out of a fundamental tension that the Framers knew existed, and one which they feared could lead to precisely this result:

Under these circumstances, how could a parliamentary executive be "responsible" to both houses? In particular, how could the financial affairs of the country, given parliamentary control of both taxation and authorization of spending, be managed by an executive if it had to secure majority support for its financial proposals in both houses? . . . The compromise settlement-section 53 of the Constitution-was to give the House of Representatives alone the power to initiate most money bills and deny to the Senate the power to amend tax bills and appropriations for ordinary government expenditure, though leaving it power to *suggest* amendments. The potential conflict between the "federal principle" represented by the Senate and "responsible government" represented by the Representatives, which the compromise left in existence, was acknowledged. However, it was hoped that this would be overcome in practice, partly by the development of conventions and partly by section 57 of the Constitution. The latter offered a mechanism by which a persistent deadlock between Representatives and Senate could be resolved by simultaneously dissolving both houses . . . . In 1974-1975, for the first time in Australian federal history, the situation feared by the Founders occurred.<sup>64</sup>

Nonetheless, the convention of responsible government is still treated as the central element of Australian constitutionalism by both political actors and courts.<sup>65</sup>

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62. In 1977, the Constitution was amended in a public referendum to require states to fill casual Senate vacancies with someone of the same political party as the departing Senator. *Id.*

63. BACH, *supra* note 13, at 103. Bach appeals to propriety as the best protection against another crisis, arguing that political elites should recognize that it is not in their interest to provoke another similar predicament. *Id.* at 110-11.

64. Sawyer, *supra* note 59, at 23.

65. IRVING, *supra* note 40. Emy and Hughes, writing in 1991, pointed out other potential problems at the root of these conventions. These include an ambiguity about whether ministerial responsibility requires ministers to resign when they make

### III. DOES AUSTRALIA HAVE A GENUINE POWERS CONSTITUTION?

Under these circumstances, can it be said that Australia really does have a genuine powers constitution? At the outset, we defined a genuine powers constitution in both functional and structural terms. Functionally, we defined a genuine powers constitution as one that does two things: 1) it establishes a system of governmental institutions with defined powers, and 2) it provides mechanisms for channeling political conflict. A genuine constitution is one in which text, convention, and *ethos* are mutually reinforcing. Does Australia have a "constitution" that satisfies these criteria?

To address this question, consider the ways in which the events of 1974-1975 demonstrate that Australia's form of constitutional rule does not comport with any of the other three cases we have considered here. Certainly, the crisis of 1974-1975 casts doubt on the idea that Australia reiterates the British model of responsible government defined by authoritative conventions. It is important to recall that Dicey's distinction between constitutional law and convention did not lead him to the conclusion that conventions were merely descriptions of past practices or articulations of generalized norms. In the British system, constitutional conventions are the bedrock of constitutional law; and treating conventions as authoritative is central to British constitutionalism. Those conventions, in turn, are taken to be authoritative and binding on government actors. If British politicians ignore those conventions, they have ceased to act in accordance with their constitution, whether or not there is a specified agency such as the courts that has the recognized authority to declare that to be the case.

In 1974-1975, everyone involved, on both sides, abandoned essentially all the relevant conventions of Australian constitutionalism, yet there was no particular discussion of the possibility that the violation of those conventions rendered the actions unconstitutional. Conversely, when the High Court ruled on constitutional questions based on interpretations of the written text, there was no indication on the part of any of the actors that those rulings would be defied or even questioned. At first glance, then, the actions of 1974-1975 seem to fit perfectly with the American model. The text of the written Constitution provided the basis for all parties' assertions of authority. The High Court, to the

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a mistake, or whether it implies merely that they explain themselves to Parliament; a general lack of precedent about how the Governor-General's authority should be exercised; and concern that parliamentary oversight functions poorly when party discipline is strong. HUGH EMY & OWEN HUGHES, *AUSTRALIAN POLITICS* 340 (1991).

extent that it was involved, restricted itself to interpretation of that text, and left the resolution of political questions to the constitutionally empowered actors. The fact that various events were historically unprecedented did not mean that they were in any way contrary to the terms of the written text; to the contrary, it was the specific and exact application of the text that constituted the novelty of the actions.

One answer to the question “Does Australia have a constitution?,” then, is “yes, and it consists entirely of the written text, enforced when necessary by an empowered judiciary.” It is worth noting that while no Governor-General since Kerr has dismissed a sitting Prime Minister, there have been two double dissolutions since 1975 (in 1983 and 1987) and as recently as 2003 there was considerable discussion of the possibility of another. Thus, however surprising the dismissal of Prime Minister Whitlam may have been, one can conclude that, upon reflection, Australians accepted the implication that it was in accordance with the constitutional system under which they had been governed all along.

The problem with this reading is that it results in a complete separation between the Australian powers constitution and Australian constitutionalism. That is, in 1974-1975 Australia turned out to have a constitution different from the one everyone thought they had had all along. To be sure, there is nothing novel about the observation that Australian constitutionalism is different from the British model, nor does that assertion in any way contradict the tenets of Founders’ Originalism. But the “discovery” that conventions are not part of Australia’s Constitution contradicts both prior understandings of how the political system works in practice, and legal and scholarly views in the thirty years since. Two examples demonstrate this tension. First, the “convention” of how casual Senate vacancies would be filled – violated twice in the 1975 crisis – was added to the Constitution itself in 1977. If conventions truly were part of the Constitution, there would obviously be no need for this step; the fact that it was taken confirms the position that conventions do not have anything approaching true precedential status. Second, the convention that the Senate cannot bring down a government changed with the 1975 precedent. Writing in 1980, Colin Hughes noted that “the Senate has been recognized to be the co-custodian of the power to withhold supply, and thereby force a government to the people, or the courts, or dismissal by the Governor-General.”<sup>66</sup>

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66. COLIN A. HUGHES, *Conventions: Dicey Revisited*, in *RESPONSIBLE GOVERNMENT IN AUSTRALIA* 41, 47 (Patrick Weller & Dean Jaensch eds. 1980).

There is an alternative description, to be sure. One might describe the executive powers provisions of the Constitution as essentially emergency provisions, to be invoked in situations of political crisis. As an analogy, consider the fact that the U.S. Constitution permits the impeachment of a President. There are two problems with this description. First, the constitutional provisions do not channel and control political conflict, they exacerbate it; the double dismissal power of the Governor-General is the equivalent of a nuclear weapon rather than a cease-fire. This is the point that was made at the outset about the distinction between a political system governed by a constitution and a constitution that is subordinate to the operation of politics. The double dismissal power is available to political actors – traditionally by the request of the Prime Minister, but in 1975 as the unilateral act of the Governor-General (with some degree of prior consultation with the political opposition). Far from constraining the ability of political actors to engage in unfettered conflict, in other words, the constitutional text is one very powerful weapon among many that are available for use in that conflict. In other words, the constitution lacks the capacity to channel conflict in ways that prevent political contestations from destabilizing the system of government. Thus, to describe the dismissal and removal powers as responses to political crises leads to the peculiar conclusion that in those situations Australia's powers constitutionalism exists to add gasoline to the fire.

The analogy to American impeachment proceedings underscores the essential problem. It is only constitutional and political convention that prevents impeachment from becoming a regular feature of divided government. Prior to the impeachment of President Clinton, such an event was unthinkable. After the impeachment of President Clinton, there was the possibility that America teetered on the abyss of having impeachments become routine weapons in the political arsenal of competing parties.<sup>67</sup> When the Democrats took control of the houses of Congress in 2006, Republicans warned that impeachment proceedings against President Bush would be forthcoming, but the Democratic Party leadership eschewed any such intention and thus far has shown no inclination to move in that direction.<sup>68</sup>

At first glance, none of this seems sharply different from the 1975 dismissals; it is only by virtue of the Democratic leaders'

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67. For a review of these events, see David T. Canon & Kenneth R. Mayer, *Everything You Thought You Knew about Impeachment is Wrong*, in *AFTERMATH: THE CLINTON IMPEACHMENT AND THE PRESIDENCY IN THE AGE OF POLITICAL SPECTACLE* 47 (Leonard V. Kaplan & Beverly I. Moran eds. 2001).

68. Susan Ferrechio, *Pelosi: Bush Impeachment "Off The Table"*, N.Y. TIMES, Nov. 8, 2006.

willingness or desire to restore prior conventions that the Democratic House of Representatives has not heard articles of impeachment already. However, the analogy is a false one. The difference turns on the textual provision of mechanisms for action. An impeachment in the American system is an enormously difficult process; it requires a majority in one house of Congress followed by a supermajority vote in the other, and in between there must be a public trial, all of which ensures very high levels of public awareness and very high barriers to success. In other words, at the point where political conflict has reached a level of intensity such that there might be a serious desire to remove a sitting President, the U.S. Constitution channels, slows, and encumbers the process, all elements that make removal less likely and ensure alternative possibilities for resolution. In contrast, Governor-General Kerr was able to dismiss a sitting Prime Minister with a two paragraph letter.

It is in this respect that the Australian Constitution itself reflects a nearly complete lack of connection with Australian constitutionalism. The response to an “emergency” situation in Australian politics that is provided by the constitutional text is precisely the opposite of that which would accord with Australian constitutionalism. The reason is that periods of very sharp political conflict are precisely the periods in which political conventions are most likely to cease to operate. During normal periods, conventions serve as the mechanism for keeping the text consistent with constitutionalist principles of responsible government and parliamentary supremacy. In the American impeachment example, textual commitments ensure that despite an “emergency” level of political conflict, basic norms of deliberative and representative democracy will remain in force; that is the constitutional consequence of established mechanisms for channeling conflict. In the Australian case, by contrast, dissolution and dismissal could be ordered by a single non-elected actor who has no role whatsoever in the ordinary operations of Australia’s system of constitutional government. In other words, the law that trumps alternative understandings in cases of conflict was a set of written textual provisions that have no resonance or connection with the principles of constitutionalism that govern the operations of government.

The problem, then, is that the dismissal and dissolutions of 1975 cannot be described as the response of the Australian Constitution to an emergency situation. Instead, those events represent the *abandonment* of the Australian Constitution – understood as the combination of text and practice – for an alternative constitution; and the trigger for that substitution was the exercise of political will rather than any constitutional mecha-

nism. In that situation, Australia had no genuine "constitution," it had only an authoritative text subject to the political whims of political actors and unconnected to any deeply held constitutional ideals.

Moreover, the operation of politics during periods of normal operation is revealed to be non-constitutional in the sense that it is supported not by the highest law, but only by the voluntary forbearance of higher authorities. It is not only the courts that would not intervene to enforce conventions against the provisions of the constitutional text in 1975. Despite some heated rhetoric to the contrary, there was no widespread immediate response to suggest that Governor-General Kerr's actions represented an illegitimate coup. In other words, actions by political actors that contradict the normal system of government are not constitutionally *ultra vires*, they are merely unusual. The conventions of responsible government, it turns out, are political rather than constitutional conventions.

None of this necessarily leads to an argument that Australia has no genuine powers constitution, only that it has a different powers constitution from the one that everyone assumed that it had. But the relationship between constitutionalism and politics points to the argument that Australia's "real" Constitution – the one contained in the written text rather than the one expressed in convention – is putative rather than genuine. Part of the reason for this conclusion has already been stated: Australia's real powers constitution does not channel and constrain conflict, it is, rather, a tool of conflict. This observation, however, can be carried further. In a true constitutional system, the constitution not only limits and manages political conflict, it provides essential elements of the vocabulary of political argument. That is the point of looking for unity among text, convention, and *ethos*: to identify the ways in which conventions carry ethos into the interpretation of a text in an American-style system, or the ways in which conventions express elements of the ethos that are expressed in foundational documents in a British-style system. In either case, politics are oriented around constitutional norms, just as the exercise of political power takes place within constitutional limits. Australia is often described in these terms, particularly with reference to the British model.<sup>69</sup> In fact, however, the lesson of

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69. Helen Irving, for example, describes the Australian constitutional text as the expression of an amalgam of different political aspirations and cultural norms – from threads of utopianism, a desire among Australians to be seen as culturally British but politically distinct, and a need to construct an Australian national identity – and not simply a legal document. HELEN IRVING, *TO CONSTITUTE A NATION: A CULTURAL HISTORY OF AUSTRALIA'S CONSTITUTION* (1997). This description is very close to the role played in British constitutionalism by documents such as the

1975 is that Australian constitutionalism reverses the normal arrangements. Instead of a political system oriented around constitutional norms, Australia features a constitution subordinate to political norms. The conventional constitution that operates during normal periods is subject to being set aside by political actors, and the written constitution that comes into effect as a result is itself a mechanism for politics by other means. Put another way, the constitutional text is not connected to constitutional conventions; instead the constitutional text is a mechanism whose utilization is governed by the operation of political conventions. Hence, with respect to those portions of a constitution that relate to the design and operation of a political system it can fairly be said that Australia has no genuine powers constitution. What Australia has is a system of two incommensurate powers constitutions, neither of which satisfy the basic – and we believe non-controversial – criteria that we set out at the beginning of the argument.

At this point a reader might be reminded of the old joke that describes an economist as someone who argues that a system works in practice but is flawed in theory. Australia shows no signs of imminent rebellion, its government does not appear to be on the verge of being taken over by authoritarian autocrats. Australians, moreover, appear reasonably well satisfied with their system of government. Two years after the double dissolution and dismissal of 1975, for example, the Constitution of Australia was amended. One provision of the amendment, which was clearly aimed at the tactics that Whitlam had employed in 1974, established a requirement that when a casual vacancy occurs in the Senate, the replacement must be of the same party as the departing Senator. A second provision ensured that voters in the Australian Capital Territory and the Northern Territory would be permitted to vote in constitutional referenda. Finally, the third provision established a retirement age for federal judges. A constitutional convention in 1983 struck at the heart of the matter, resulting in the formal adoption of “God Save the Queen” as the Royal Anthem and “Advance Australia Fair” as the National Anthem. In 1986, Australia severed its ties with Great Britain; the office of Governor-General was not mentioned, and was presumably left unaffected.

In the 1990s, a far more serious attempt at constitutional revision was undertaken. In 1993, a Republic Advisory Committee was appointed to develop a set of options for transforming Aus-

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Magna Carta and Bill of Rights of 1689, and implies the supremacy of a conventional constitution. Unfortunately, as we have seen, Australian constitutionalism does not feature authoritative constitutional conventions.

tralia into a Republic. In 1999, a national referendum was held on a proposal that would have replaced the Governor-General with a President, and a separate referendum was held on a proposed new preamble to the Constitution. Both referenda were defeated by significant margins; only the Australian Capital Territory voted in favor of replacing the Governor-General, and no territory voted in favor of the new preamble.

Nonetheless, we believe that there are profound and genuine risks that are posed by the contradictions in Australian powers constitutionalism. The first risk of the existing constitutional arrangements is that they are likely to fail precisely when they are most needed, because they reinforce political conflict rather than mitigate it. In addition, the basis for the legitimacy of the Australian constitutional system of government is unclear. The acceptance of the constitutional system is, itself, little more than a matter of political convention without a "principled case for obedience" behind it. In our view, Australian constitutional arrangements depend critically on a belief in government as a benevolent force. Even more, the Australian system depends on the good will of political actors and their willingness to be bound by conventions rather than employing the full range of tactics permitted by the constitutional text. Each of these is likely to be vulnerable during periods of crisis. What would be the "constitutionalism" that would operate if there were a devastating terrorist attack on Australian soil? The "crisis" of 1975 may have been a pale foreshadowing of more dire crises to come.<sup>70</sup>

This is not, it should be emphasized, an argument in favor of a move to a republic. As we have noted throughout, the British Westminster system of responsible government is equally coherent and arguably has been at least as reliable a constitutional system. What we are arguing is that the peculiar hybrid system present in Australia, at a very basic level, does not make sense. The response, as we have also noted, is to argue that Australian political actors can simply be trusted to always act in ways that are benevolent.<sup>71</sup> It is not only commentators and politicians who make this claim: Justice Ian David Francis Callinan ex-

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70. The office of Governor-General has also recently been a source of controversy with the resignation of Dr. Peter Hollingsworth on charges that as an Anglican Bishop he covered up incidents of child sexual abuse and a charge that he had committed a rape. Hollingsworth effectively conceded the first charge, but vigorously denied the second, which was ultimately withdrawn. Advocates of a move to a republican system of government have used the case to renew arguments against the existence of an appointed Governor-General. This is not, however, the sort of "crisis" that we have in mind.

71. In a different context, George Winterton makes a similar argument against judicial recognition of extra-constitutional rights. George Winterton, *Extra-Constitutional Notions in Australian Constitutional Law*, 16 *FED. L. REV.* 223, 234 (1986).

pressed the same sentiment in a public address delivered in 2003. Referring to criticisms that the Australian system offers insufficient safeguards against majoritarian tyranny, he dismissed the application of the phrase “crass majoritarianism” to Australia. “Whatever validity it may, indeed probably does have in relation to other places, it is an expression which I think should be approached with some skepticism in this country. There is no doubt that minorities do need protection . . . But the reality in Australia is that few of its governments are elected on huge majorities, and our system of checks and balances, not invariably, but ordinarily, means that most interests are not overlooked.”<sup>72</sup> These comments are remarkably similar to those of Harrison Moore in 1902, who rejected a proposal for American-style Bill of Rights on the grounds that such formal guarantees expressed a “spirit of distrust” that had no place in Australia, where the “great underlying principle is that the rights of individuals are sufficiently secured by ensuring as far as possible to each a share, an equal share, in political power.”<sup>73</sup> There can never be reason to create structural limits to the representatives of the majority, in this reading, because those representatives are responsive to the majority and can be trusted by the minority.

This, however, is a constitutionalism built on sand. George Winterton puts the matter this way: “Australia is indeed fortunate that extra-constitutional notions should have appeared in so benevolent (indeed beneficial) a context as the protection of human rights and the termination of obsolete British sovereignty over Australia. But our constitutional heritage also includes some darker moments, and we may indeed be thankful that principles of ‘necessity’ which have figured so prominently in the jurisprudence of other countries have largely by-passed us.” Winterton was talking about the idea of extra-constitutional rights guarantees, which will be addressed in the second article. His more general point, however, is salient to the present discussion.<sup>74</sup> As one of us has argued elsewhere, it is one thing to say

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72. Justice Ian David Francis Callinan, *For and Against Constitutional Rights* (Aug. 24-27, 2003), available at <http://www.conservative.com.au/articles/pdf/Constitutional%20Rights.pdf>.

73. Harrison Moore, quoted in Haig Patapan, *Competing Visions of Liberalism: Theoretical Underpinnings of the Bill of Rights Debate in Australia*, 21 MELB. U. L. REV. 497, 500 (1997).

74. Winterton, *supra* note 70, at 238–39. Interestingly, Winterton cites two judicial opinions that, he says, represent the exception that proves the rule. Both are from 1945, a period of obvious emergency, and both rely on the English common law principle *salus populi suprema lex est* (“the good of the people is the supreme law”). The case in which the opinions appear is *Gratwick v. Johnson* (1945) 70 C.L.R. 1, 11–2 (Latham, C.J.), 20 (Dixon, J.) The case involved a National Security Act regulation that prohibited all interstate rail travel without a special permit. The High Court struck down the law, rejecting Latham’s and Dixon’s arguments. This

that a constitution provides emergency powers, but it is quite another to say that the constitution itself ceases to operate whenever there is a general shared understanding that the nation faces an emergency.<sup>75</sup>

Leaving aside the hypothetical case of a national emergency, let us return to a consideration of the role of a constitution as a mechanism for managing internal conflict. In the American understanding, one role of a written constitution is to serve as a buffer between popular opinion and outright rebellion; no matter how odious one might find the present set of government actors, one can rest on the assurance that their powers are checked and their terms are limited. A commitment to the Constitution's binding character supersedes views about the merits of any particular set of incumbents, and dissipates pressures that otherwise might undermine the legitimacy of the government. In the Australian case, the acceptance of unwelcome political outcomes is based on the fact of the acceptance of political outcomes, creating a perfect tautology. The buffering role of a constitution is lost if the "constitution" as it is ordinarily understood itself is treated as non-binding by those self-same government actors who claim for themselves the right to set it aside in favor of a text that provides no clear limits to government powers at all. These conventions purport to be binding, but in practice they can be dispensed with at will by political actors willing to employ the constitutional text to mean exactly what it says.

The problem goes back to the very beginning, the attempt to combine a British-style system of responsible government and parliamentary supremacy with an American-style constitutional text. The solution has been to rely on shared faith in the benevolence of political actors, faith that has largely been justified in Australia's modern history. But the theoretical underpinnings of the constitutional system of government are not nearly as clear. As a result, while the Australian government may be perfectly stable, where the powers constitution is concerned the system of Australian constitutionalism is not.

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outcome was obviously in marked contrast to the U.S. Supreme Court's upholding of the constitutionality of the internment of Japanese and Japanese-Americans in *Korematsu v. United States*, 323 U.S. 214 (1944).

75. See generally HOWARD SCHWEBER, *THE LANGUAGE OF LIBERAL CONSTITUTIONALISM* (2007), especially Chapter VI.