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PARLIAMENT AND THE EXECUTIVE

I INTRODUCTION

This paper draws on the work of Geoffrey Lindell to open up a fresh examination of the place of Parliament in the framework of responsible government. The focus here is on changing relationships between the legislature and the executive and on the need to articulate appropriate standards for assessing a proper balance between these two branches of government. By critically reviewing theories of responsible government in two sources used by Lindell (the two political scientists, A H Birch and R S Parker), I rework traditional standards to accommodate greater parliamentary independence and initiative. Drawing on examples of current parliamentary practice, I seek to provide a principled justification for the trend towards greater parliamentary control over executive government.

II THE LAW AND LINDELL

The general theme for this session is the relationship between 'legislature and executive: separate or not?'. My task in following Professor Winterton is to turn the focus from his topic of the relationship of the two *powers* (legislative and executive) to the relationship of the two *institutions* or 'branches' (the legislature and the executive).

My paper reconsiders the institutional relationship between legislature and executive against the background of the doctrine of responsible government. My argument is that democratic theory implies two forms of separation: not only separation of the legislative and executive powers but also separation of legislative and executive institutions.

Much turns on what precisely is meant by the term 'separation'. Those political philosophers who helped develop theories of responsible government knew that influential formulations of separation of powers, such as that in *The Federalist Papers*, actually denied that complete separation of legislative and executive

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powers made for good government.[1] Thus, much of the language of 'separateness' is shorthand for something else: something like substantial institutional independence or initiative rather than a strict wall of separation between branches of government.

I will try for greater precision below. But the main point now is that my target in this paper is defective doctrines of responsible government which allow executives to value separation of powers while devaluing separation of institutions. This typically occurs when executive governments use their control over parliaments to dominate the use of legislative powers while refusing to comply with claims made by those legislative institutions (such as the Australian Senate, a number of state upper houses, and an increasing number of state lower houses) which are not dominated by executive governments. Such defences of executive initiative and independence often invoke 'Westminster' norms of responsible government. Doctrines of responsible government attempt to spell out the background norms at work in our constitutional systems. With the passing of time, that background is no longer a given. I will try to restate the traditional doctrine in more contemporary terms than it usually receives. And on this grand occasion, I am fortunate to be able to take Professor Lindell's widely cited (and properly so) rendition of this doctrine as my point of departure.[2] This is doubly welcome to me because the Lindell rendition places great store in the responsibilities exercised by the legislature over the executive, consistent with the evolving norms of democratic accountability associated with our constitutional system of representative government.

Although most of my examples will be from the Commonwealth experience, I am using the Commonwealth case as a specific instance of a more general Australian situation relating to responsible government. My enthusiasm for taking my cue from Professor Lindell reflects in part my admiration for his persistent focus on the democratic potential of responsible government doctrines. But this is not all: there is also my support for his refreshing view that our parliaments should be accepted as contributors to constitutional doctrine as well as representatives of community opinion.[3] This is music to my ears: Lindell's invitation to see Parliament as something of a free and independent interpreter of constitutional matters is consistent with my own argument for seeing Parliament not simply as a law-making institution but as a deliberative assembly holding centre-stage in our system of deliberative democracy.

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1 John Uhr, *Deliberative Democracy in Australia: The Changing Place of Parliament* (1998) 82–99.

2 Geoffrey Lindell, 'Responsible Government', Ch 4 in P D Finn (ed), *Essays on Law and Government. Volume One: Principles and Values* (1995) 75–113.

3 Geoffrey Lindell, 'Introduction', in G Lindell and R Bennett (eds) *Parliament: The Vision in Hindsight* (2001) xxiv-xxviii.

This paper deals more with standards than operations, and more with principle than practice. I try to take note of relevant institutional developments in the relationship between legislature and executive, but I do not try to catalogue this relationship. My aim is to characterise rather than catalogue legislative–executive relationships. Like Professor Lindell, I think that one can, and perhaps should, do so in terms of the evolving doctrine of responsible government, which is the traditional medium through which Australians have discussed the political theory underpinning our constitutional system. As I have noted elsewhere, this doctrine has its weaknesses as well as its strengths.[4] And in extending my earlier analysis of this doctrine, I have to declare that I part company with Professor Lindell. This departure is not in relation to his influential contributions to the recent parliamentary debate over contested practices of ministerial responsibility in the parliamentary investigation of the 'children overboard' affair, which I leave to others better placed to comment. The departure is in relation to Lindell's reassuring endorsement of A H Birch's rather unreassuring model of responsible government outlined in his remarkably influential book, *Representative and Responsible Government*.[5] More of this later.

III SEPARATE OR NOT?

What is the point of asking about degrees of separation between legislative and executive institutions? Why should a separation of institutionally-housed powers matter? Separation is not exactly a constitutional category, even though legislative and executive powers and/or institutions (to say nothing of judicial powers and related institutions) are accorded distinct treatment in the Constitution. The Constitution certainly accords each power a separate 'chapter'. Yet the practice of constitutional government requires a high degree of interaction among the three powers and their interacting institutions.

To my mind, the language of separation is useful shorthand to remind us of a core part of the background doctrine of responsible government. A theory about separation of powers is basic to the political regime of liberal constitutionalism because it provides a political justification for the institutional design of constitutional institutions. It is worth emphasising that the doctrine of responsible government is just that: a doctrine or teaching about appropriate forms of *government*. Matters of government are broader, deeper and messier than matters of law. While it makes good sense to try to limit the abuse of governmental powers through forms of constitutional government, governing is an exercise in political judgment or prudence. And political prudence is an art of practical reasoning that is required as much within the legislature as within the political executive. Accordingly, responsible government doctrines build on a political theory about the

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4 John Uhr, above n 1, 66–80.

5 Anthony H Birch, *Representative and Responsible Government* (1964).

appropriate separation of powers, including the two explicitly political powers located in legislative and executive institutions.

Thus by asking whether legislative and executive institutions are 'separate or not?', we are importing an implicit political theory into our constitutional discussion. Sometimes it helps to be blunt and explicit. To ask whether the institutional relationship is 'separate or not?' puts the options in terms of two very stark alternatives. Either the two branches are 'separate' which implies a high degree of institutional autonomy; or they are 'not' which implies any number of degrees of low autonomy, particularly by the more vulnerable institution (the legislature) relative to the stronger institution (the executive). Questions about separation often reflect a genuine interest in trying to promote the rights of the more vulnerable institution to organise itself and act with greater initiative and independence. But we have to ask ourselves the further question about why this greater independence by legislatures is such a good thing. This takes us into the heartland of responsible government theories, where we have no real alternative but to be explicit about the relevant standards for judging responsible uses of executive and legislative powers.

These standards are political in substance even if they become legal in later form. Professor Lindell cites Birch as authority on the general meaning of responsible government and then turns to the contributions of the late Robert Parker for an Australian exposition of its practical operation. Both sources are excellent authorities. But I want to dissent from two aspects of Lindell's assembly of the argument of these two eminent authorities.

The first dissent relates to an unduly conservative account of parliamentary democracy in Birch's model of responsible government. My contention here is that Lindell's case for extensive parliamentary independence is not adequately supported by Birch's account of parliamentary democracy. My conclusion is that we have to modify or go beyond the Birch approach if we want to take the argument further in the Lindell direction of a general theory of democratic government with a place for greater parliamentary control over the executive. I will give Australian examples to try to make my case about the proper place of parliament consistent with democratic theory.

The second dissent relates to a widely under-appreciated component of Parker's exposition of the operational realities of responsible government in Australia. I contend that Parker's account is more radical in its implications for parliamentary democracy than Lindell, in common with most commentators, acknowledges. My conclusion here is that we have to restore Parker's radicalism if we want to take the argument further in Lindell's direction of operational advice on forms of parliamentary independence that are fully compatible with the Australian framework of responsible government. Again, examples will help illustrate the range of possible options open to Australian parliaments.

IV RESPONSIBLE GOVERNMENT IN THEORY

Beginning then with my first concern: parliament in democratic theory. Birch notes that the concept of responsible government post-dates the emergence of the convention of collective ministerial responsibility. He locates the arrival of the concept of responsible government in British debate over the struggle for self-government in nineteenth-century Canada. Birch quotes extensively from the 1839 Durham Report as a pioneering articulation of the responsibility of a ministry to exercise the powers of the executive, so long as they meet the test of collective ministerial responsibility: maintenance of parliamentary confidence in the ministry. Birch emphasises that what is really new about this articulation is the notion of a united ministry under the direction of a chief minister. Historically, the emergence of a chief minister displaced the former pre-eminence of the sovereign as head of government and director of the ministers.[6]

Since those early years, the concept of responsible government in British government has come to mean the right of a party in government and its chosen leader to remain in executive office so long as the governing party maintains its majority position in the House of Commons. With policy disagreements kept within bounds behind cabinet doors, the concept of collective responsibility works by elevating the government and especially its chief minister as the 'clear focus for public discussion' of government policy.[7] Birch is relaxed about the practical limitations to the theory of collective responsibility (at least in the editions up to that used by Professor Lindell, to which my review is limited). He notes that if party government is the problem then one solution might be reform of the electoral system to weaken the domination of parliament by governing parties. Proportional representation is the obvious possibility: but it is rejected out of hand by Birch as lacking popular appeal.[8]

When it comes to testing responsible government against the benchmark of separated institutions, Birch's account proves less helpful. He contrasts the 'parliamentary government' ideals of classical liberalism with the realities of 'party government', and as a result discounts the practical relevance of the classical ideals. Is this the hard road of realism or, as I suspect, the soft option of defeatism?

Claiming the mantle of realism, Birch then links this contrast to the issue of separated institutions. He contends that the classical ideal merged executive into the legislature so that there was no real separation, under a model of genuine parliamentary government. But I think this is a misguided account of the norms of responsible government. In fact, responsible government begins to get lost as Birch

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6 A H Birch, ibid, 131–6. See also J Uhr, above n 1, 59, 66–7.

7 A H Birch, ibid 138.

8 Ibid 150.

marks out two extreme ends of the playing field. Birch's eye strays from responsible government as he describes the two extremes: an unattainable ideal of *parliamentary* government and the unavoidable reality of *party* government. His arresting contrast loads the dice in favour of party government, which he understands to be the only version with an effective separation between legislative and executive institutions. Of course, this separation elevates the power and prestige of the executive relative to parliament, which is separated from effective power and drained of institutional initiative and independence.[9] So if we want separated institutions then, according to Birch, party government is the version to favour, and prime-ministerial rule is what we have to learn to live with.

Birch concedes that the classical ideal lingers on, informing our constitutional mythology and providing us with a critical vocabulary for constructing an idealised framework of democratic government based on notions ('misleading' in Birch's own view) of parliamentary sovereignty.[10] But putting dreams to one side, Birch accepts the reality of party government, which he finds valuable because it opens up a new version of the separation of powers. In his account, the party-government version of responsible government separates out and thereby saves executive power and institutions from the potentially suffocating medium of Parliament. Birch's account promises an exposition of responsible government but actually delivers a defence of prime-ministerial government, with the chief minister being revealed as the real power behind the throne of collective ministerial responsibility. To say the least, this is not a promising start for promoting Professor Lindell's cause of greater parliamentary control over government.

Are there Australian examples against which we might test these approaches to responsible government? Briefly, let me mention three, one for each of the three core functions of parliaments as I understand them: representation; law-making; and accountability.[11] My aim in bringing forward these three examples is to show from the bottom-up, as it were, that Birch's orientation to responsible government does not match Australian Commonwealth experience. When faced with a conflict between a theory and a set of practices, I tend to side with the practices and begin the search for a more satisfactory theory that properly accounts for the institutional developments opened up by the historical practices. My message here is that the Australian political regime deserves a theory of responsible government that is more open to parliamentary initiative and independence than the conventional wisdom. Using Commonwealth examples, I hope to convey a broader picture of a richer and more complex Australian pattern of responsible government.

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9 Ibid 165–6.

10 Ibid 238.

11 J Uhr, above n 1, 49–55.

A *First Example: From the Function of Representation.*

What is the significance for theories of responsible government of the parliamentary adoption of proportional representation (PR) as the basis for Senate representation? One measure of significance is the new deal for minority interests, candidates and parties in what was traditionally a majoritarian system. As mentioned above, Birch dismisses PR as inconsistent with popular interests and lacking popular support. This attitude is typical of 'Westminster' which rewards parties with a modest plurality of votes with a disproportionately high share of parliamentary seats. The fact that Australia has deviated, and arguably was originally intended to deviate, from this defective system of representation means that we have to rethink the very electoral basis of our models of responsible government to accommodate more effective democracy.[12]

B *Second Example: From the Function of Law-Making.*

What is the significance for our theories of the emergence of parliamentary scrutiny of budget legislation dealing with government estimates of annual expenditure? Nothing is as sacred to the rights of executive governments as the integrity of their annual budgets. But integrity comes in many shapes and sizes: contrast the *partisan* integrity of an unaltered budget with the *public* integrity of a transparent budgetary process. The development of estimates hearings by Senate committees has not necessarily altered line provisions in government budget bills but it has transformed the transparency of the budget process once it leaves the monopoly control of executive budget agencies. The form of legislative review has become in substance a performance audit, with the legislative powers being used to lever open a secretive executive, with valuable consequences for other aspects of parliamentary review of government operations. Traditional theories of responsible government shudder at the prospect of such energetic uses of legislative powers by non-government legislators.

C *Third Example: From the Function of Accountability.*

What theoretical significance is there in the emergence of parliamentary scrutiny of the executive's use and abuse of delegated legislation? Traditional theories of responsible government tend to reinforce the delegation of legislative powers to ministers and hold out very little hope for any 'value-added' contribution by parliamentary bodies. But once again Australian experience cuts in the other direction, with the Commonwealth properly regarded as a world leader in active

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12 John Uhr, 'Rules for Representation', Ch 6 in G Lindell and R Bennett (eds), above n 3, 249–90.

parliamentary control of delegated legislation.[13] This is an object lesson in parliamentary reform, illustrating the pathways open to parliaments willing to use law and parliamentary practice to set appropriate standards for executive law-making and for transparent regulation of executive compliance with these Parliament-imposed standards. Either we accept the legitimacy of Australian practices or we accept the traditional fictions of responsible government theorists: but we cannot accept both.

V RESPONSIBLE GOVERNMENT IN AUSTRALIAN PRACTICE

I turn now to the interesting use that Professor Lindell makes of the work of Robert Parker when applying theories of responsible government to Australian circumstances.[14] Parker wrote extensively about responsible government, with many provocative contributions to our understanding of the extent to which Australian national government can be judged in terms of 'the Westminster system'.[15] This is not the time to explore the richness of Parker's various taxonomies of Australian governance. But this *is* the place to note the unused potential available in Parker's work to promote Lindell's cause of parliamentary separateness or independence or initiative, to use a variety of terms compatible with greater control over the executive by the legislature.

Lindell identifies the importance of Parker's famous formulation of Australia as emulating 'the Westminster syndrome'. This choice of terms reflects Parker's discomfort with 'the Westminster model' and its purported precision. I think that it helps to see Parker's new formulation against the backdrop of increasingly heated public exchanges over the merits of public service reforms by energetic executive governments and of claims of executive accountability made by equally energetic parliamentary bodies. Both sides in these exchanges tended to invoke 'the Westminster model' as justification for their conduct. The original context for Parker's formulation was the growing doubt that Australian practices could or should not be measured against the traditional standards associated with 'the Westminster system'. Not to beat around the bush, this context reflected Australian confusions over the events of 1975, which threw into upheaval conventional pieties about appropriate institutional relationships between the executive and the legislature. Lindell correctly suggests that Australian reliance on traditional

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13 Robert Walsh and John Uhr, 'Parliamentary Disallowance of Delegated Legislation', *Legislative Studies Newsletter* (later *Legislative Studies*), no 10, 1986, 11-20.

14 See, eg, G Lindell, above n 2, 76–7.

15 Lindell uses Parker's classic 'Responsible Government in Australia', originally published in P Weller and D Jeansch (eds), *Responsible Government in Australia* (1980) and republished in Robert S Parker, *The Administrative Vocation: Selected Essays of R S Parker* (1993) 119–38.

Westminster standards and categories makes no more sense than do contemporary British invocations of Westminster. Hence the relevance of Parker's substitution of a 'Wesminster syndrome' (that is, a set of concurrent symptoms, not themselves the cause of the deeper condition) in place of a supposed 'Westminster model'.

To be sure, Lindell supports Parker's general endorsement of Australian compliance with some components of the responsible government model, such as collective ministerial responsibility. But I have already suggested that this term is now something of a fancy phrase for party government which itself is a platform for prime-ministerial government.[16] Lindell notes Parker's commitment to clarity of classification, before quietly moving on to identify the component parts of Australia's new world of governance: including more regular executive scrutiny performed by parliamentary committees, particularly in upper houses free from domination by the governing party; the 'new administrative law' package of tribunal oversight of executive government; and constitutional restrictions on executive powers to call early elections.[17]

As Parker's presence recedes in Lindell's survey of this new world of governance, one begins to wonder about the source and authority of the standards of responsible government informing the emerging framework. Who or what is the authority for the standards used by contemporary constitutional reformers: if not Birch and Parker, then who? One of Lindell's favoured authorities is the Hawke government's 1985–1988 Constitutional Commission (the Byers Commission).[18] I want to contrast this typically collaborative source of *legal* authority with Robert Parker's refreshingly personal source of *political* authority. In essence, Parker leaves it up to the parliaments themselves to experiment with new parliamentary practices of executive control. Subject to the Constitution, the legislature is free to manage the legislative powers as it sees fit. If one house of the legislature is reconciled to domination by the governing party, then there is no good reason to prevent another house not so dominated from taking up the slack and tightening the ropes of accountability around the executive. Where the Constitutional Commission sought to map out a new constitutional order involving formal alterations to the Constitution, Parker's working rule is that parliaments should be left free to experiment along any lines that are not expressly prohibited by the Constitution.

Three comparative advantages of the Parker approach are that: it explicitly expresses itself as a political rather than a legal exercise, to be judged according to political criteria; it frees itself from the traditional spell of 'the Westminster system' and its associated analytical categories; and it reshapes responsible government in

16 A H Birch, above n 5, 76–8.
17 G Lindell, above n 2, 97–103.
18 Ibid 77, 90–91, 93–94.

the image of contemporary requirements of democratic accountability. Together, these three qualities reinforce the capacity of legislative institutions to use legislative powers with greater initiative and independence. Parker's significant contribution is to revise the institutional design of responsible government while preserving the integrity of 'the Westminster syndrome' which survives as a valuable way-station along the route to what Parker calls 'genuine popular democratic government'.[19]

What deserves attention here are Parker's doubts about the capacities of Westminster-derived systems of government to measure up against contemporary standards of democratic good governance. Responsible government has worked well enough at the level of *collective* ministerial responsibility but increasingly poorly at the level of *individual* ministerial responsibility. The explanation for both success and failure come down to the same thing: the compatibility of party or prime-ministerial government with domination of parliamentary bodies by governing parties, and the compatibility of executive resistance to demands for parliamentary accountability by the very same party governments. Parker asks if the Australian architecture of responsible government measures up against 'the test of popular, democratic government'. Note the two terms: popular and democratic.[20] In his hands, the 'popular' test opens up consideration of collective ministerial responsibility through greater parliamentary control over the political executive; and the 'democratic' test invites reconsideration of individual ministerial responsibility through greater parliamentary control over ministers and their portfolios of executive administration.

Parker's line of argument deals more with the search for appropriate standards than with reports of empirical evidence. Reflecting interests that many constitutional scholars might find out of scholarly or disciplinary bounds, Parker explicitly asks: 'What is the measure of the shortfall from democratic government?'.[21] Sceptics, of course, might ask in turn: where is the evidence that our system of Westminster-derived governance is letting us down? Parker's reply is that our very reliance on Westminster categories such as collective ministerial responsibility illustrates our bias towards standards of good governance that suit executive governments. The trick is to appreciate that democratic systems are very much works-in-progress, slowly widening the influence of the democratic political assembly while restricting the reach of political and bureaucratic oligarchies attracted to executive power. Taking democracy seriously means taking advantage of the opportunities to democratise systems of governance by fencing in the tendency to oligarchy by executive power-holders.[22]

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19 R S Parker, 'Responsible Government in Australia', above n 15, 127–8.

20 Ibid 127–8.

21 Ibid 132.

22 Ibid 131.

This warning about unchecked oligarchy might sound unfamiliar to many of those who think they are familiar with Parker's various writings on responsible government. But with characteristic understatement, Parker left it to his readers to catch on to many of his most unconventional interpretations of the Australian political order.[23] His democratic reading of responsible government reflects Parker's political judgment about the institutional deficiencies in conventional systems of responsible government. In his view, the underlying problem is one of 'over-mighty rulers' who continue to emerge from the 'trends towards concentrated power, *consistent with the letter of the Westminster syndrome*'.[24] The Australian framework of responsible government is flexible enough to roll backwards in the interests of governing parties or roll forward in the interests of the governed citizenry. The real challenge is not so much to locate the pieces of the constitutional puzzle that match a Westminster-model of responsible oligarchy, but to fit-out the constitutional framework to promote responsible democracy.

Never one for bold declamation, Parker did however go so far as to argue that responsible democracy required 'extra-Westminster checks' which he hoped could operate 'as a supplement to the Westminster rules'.[25] His examples include many sub-constitutional reforms associated with the 'new administrative law' welcomed for similar reasons by Professor Lindell, such as the Ombudsman, review tribunals, and freedom of information law. Parker asks us 'to ponder these and other checks and balances in the context of the effort to limit governmental power'. But Parker's examples do not stop there. He reconsidered the core constitutional institutions of national governance and asked us to think of 'supplementary Australian precepts' which might go well beyond Westminster norms in invigorating legislative–executive relations and promoting responsible democracy.[26]

'Precepts' are instructions rather than rules. Parker had in mind institutional practices capable of shaping or forming political conduct: institutional arrangements which help teach public officials how to exercise their public responsibilities. Think of this as a set of practices which lay down instructions rather than laying down the law. By 'precepts', Parker is referring to processes of standards-setting, including the possibility of parliamentary precepts for executive officials, bureaucratic and ministerial. The Senate's 1988 resolutions on privilege might make an interesting example of a parliamentary precept or instruction, responsibly including the standards against which the conduct of the Senate itself should also be judged.[27] This language of precepts is notable because it invites us to think of institutional innovations which are very much sub-constitutional in

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23 Consider John Uhr, 'Introduction' in R S Parker, above n 15, xiii-xxiii.

24 R S Parker, above n 15, 134–5 (emphasis added).

25 Ibid 135.

26 Ibid 120, 135.

27 J Uhr, above n 1, 171–4.

character. In particular, as my Senate example might suggest, it invites us to think of sub-parliamentary possibilities, to the extent that one parliamentary house alone can take the initiative and responsibility for setting standards for the executive.

VI FUTURE OPTIONS

What are other examples? Here I want to foreshadow three types of parliamentary precepts that might meet the Parker test of setting new standards for responsible government in Australia. The spirit of these innovations can be conveyed through Parker's chosen counter-example illustrating the existing preceptorial power of the political executive. This counter-example is Prime Minister Whitlam's 'eloquent' declaration denying Senate access to public service departmental secretaries during the 'loans crisis' of July 1975.[28] By implication, the Parker approach would be to encourage parliamentary claims on executive officials, consistent with the underlying trend to which this Whitlam counter-claim is the exception.

The trend-line is better illustrated through the slow acceptance within executive government of the responsibility that government agency heads have to participate, even without formal invitation, in many parliamentary examinations of executive activities. No case is more strikingly relevant than the now-routine appearance of executive officials before Senate estimates hearings. Of course, political executives can and do try to buck this trend by directing government officials not to appear before unwelcome parliamentary inquiries, and this can trigger a war of political calculation by the opposing parliamentary interests. The 'children overboard' affair is a good illustration of this situation. Nothing that I have said should detract from or disguise the prudential resolution of such claims and counter-claims, with elected politicians doing what they do best, which is the art or practice of parliamentary politics. Politicians use their separated and dispersed powers in the political assembly to structure the process and order of public deliberation, based on concrete calculations of political prudence (however highly or lowly applied) rather than on abstract reckoning about constitutional rights and wrongs.

A *Precept Example One, In Relation to the Function of Representation.*

Parliaments around the world go on their merry ways, legislating here and scrutinising there, while voter turnout and public confidence spiral downwards. What can be done about this growing 'disconnect' between the electorate and their elected representatives? Traditional models of responsible government put the burden of responding on the shoulders of the executive leadership, with the implication that their responsibility is to rise above adversarial politics in order to restore public trust in government. Where is there scope for parliamentary initiative

[28] R S Parker, above n 15, 135.

in this same cause? The most promising Commonwealth parliamentary instrument is the Joint Standing Committee on Electoral Matters which is officially responsible for monitoring the links between voters and those voted in to parliament.[29] A Parker-like suggestion would be for this well-placed parliamentary committee to lift its head from the sands surrounding the fate of the established parties and to open up inquiries into the situation of declining public trust, masked as it is in Australia by compulsory voting. It is remarkable that this parliamentary committee has spent more time investigating the concerns of party oligarchies than the concerns of distrustful voters.

B *Precept Example Two, In Relation to the Function of Law-Making.*

Non-government members of Parliament have few opportunities to prepare, introduce and arrange debate over their own legislative proposals. Traditional models of responsible government tend to reinforce this situation, in the belief that the only legislation likely to pass parliament is that supported by the government of the day. This is less true now of state parliaments than it is of the Commonwealth, where the government of the day retains a powerful veto over the fate of all legislative proposals. The result is that our elected legislators do their most concentrated 'legislating' almost solely in relation to government bills. A Parker-like suggestion here is that non-government parties be allocated legislative time proportionate to their parliamentary strength, which would substantially assist the rights of the opposition in the House of Representatives, not to mention the Senate. Any reduction in the parliamentary monopoly held by governing parties would be a welcome move in legislative–executive relations.

C *Precept Example Three, In Relation to the Function of Accountability.*

The framework of responsible government is meant to promise much in the area of individual ministerial responsibility. Practice frequently disappoints, in part because executive claims about their own high-standards are undercut by exemptions and excuses authorised by prime ministers when defending ministers from parliamentary attacks. But another part of the explanation is that Parliaments themselves are too reactive, hoping to catch the executive in breach of its own standards. A Parker-like suggestion here is that Parliament and not simply the political executive should resolve standards of public conduct expected of ministers. Responsible government is consistent with greater parliamentary initiative in setting publicly-credible standards with terms and conditions for

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[29] Consider John Uhr, 'Rules for Representation: Parliament and the Design of the Australian Electoral System' in G Lindell and R Bennett (eds), Parliament: The Vision in Hindsight (2001), 249, 285–9; and John Uhr, 'Parliament and Public Deliberation: Evaluating the Performance of the Parliament' (2001) 24(3) *University of NSW Law Journal* 719–22.

parliamentary holders of ministerial office. These parliamentary standards need not displace executive codes of ministerial conduct but could provide a more sustainable and legitimate foundation for public debate over the parliamentary accountabilities of ministers.[30]

VII CONCLUSION

Lindell frankly concedes that the original constitutional framework of Australian responsible government demonstrates no more than 'a partial instalment of democracy'.[31] But he reminds us that this same framework enabled 'Parliament to deliver the remaining instalments of democracy' consistent with developing community standards. What is refreshing about Lindell's approach is that it highlights the Commonwealth Parliament's achievement as interpreter of its own place in the constitutional system of government: that is, Parliament's 'independent role in interpreting the scope of its own powers under the Constitution'.[32] Inspired by the constitutional re-interpretations of the role of Congress by noted US political scientist Louis Fisher,[33] Lindell is open to a similar re-interpretation of the unacknowledged initiative and independence of the Australian legislature.

Of course, the parallels with the US are inexact. Lindell's comparison serves his interest in breaking the mould of traditional models of responsible government, and is not really designed to reshape Australian constitutional relationships on the US pattern. In addition, the issue here is not Parliament versus the High Court but Parliament versus the Executive. As I mentioned at the outset, our task in this session is to turn from the general topic of the separation of powers to try to chart the degree of institutional separation appropriate to legislative–executive relations. Lindell suggests that we begin by reflecting on the degree of existing independence marshalled by Parliament. Parliament has often claimed, but just as often been rebuffed (by constitutional scholars as often as not), co-operative authority with the political executive over many constitutional matters, with an equal right to interpret the appropriate constitutional balance between the legislature and the executive.
To state the obvious, this Australian tension between the two political branches is at its most heated in cases of Senate claims of accountability against executive government, illustrated either in disagreements between the two parliamentary houses or in more direct disagreements between the Senate and serving executives. Lindell notes the distance we are travelling away from what he now describes as

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30 A similar scheme is recommended by the government majority on the Senate Finance and Public Administration Legislation Committee, *Report*, August 2002, eg 25–50.

31 G Lindell, above n 3, xix.

32 Ibid xxiv.

33 Consider Louis Fisher, *Constitutional Conflicts between Congress and the President* (1985) and *Constitutional Dialogues: Interpretation as Political Process* (1988).

'British responsible government',[34] and notes the constructive role played by parliamentary committees which 'may help to steer our own Parliament in a similar direction as that followed in the United States'.[35] Just as we have finished celebrating the centenary of Australian Federation, this scholarly comment might convey something of central importance about the nature of the next century of constitutional preoccupations. Despite the best efforts of executive government to curb parliamentary 'separateness', I conclude that we have entered a new period of parliamentary initiative and independence, for which traditional frameworks of responsible government are poorly suited. To oversimplify, when thinking of the institutional dimension of legislative–executive powers, the choice is between the two approaches I have associated with Birch's traditionalism and Parker's innovation. It is a measure of Lindell's achievement that the choice is so clear.

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34 G Lindell, above n 3, xxvi, xxxiv.

35 Ibid, xxvii.