Framing the First Victorian Constitution, 1853–5

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As the approaching centenary of federation renews interest in Australian constitutional history, it is timely to examine the colonial constitutions that were current law for the framers of the Commonwealth Constitution. They were the result of the first Australian exercises in constitution-making. Many of their provisions are still in force. This article describes the framing of one of the new constitutions of the 1850s, the Victorian Constitution Act of 1855. The work of the politicians who dominated Victoria at the start of the gold rush, it created the framework for the constitutional crises of the 1860s and 1870s and remains the source of many provisions of the Constitution Act 1975 (Vic).

INTRODUCTION

The fame of the federation movement makes it easy to forget that the Commonwealth Constitution was not the first constitution framed in Australia, but the seventh. The legislatures of New South Wales, South Australia, Van Diemen's Land (renamed Tasmania from the start of 1856) and Victoria all produced new constitutions in the early 1850s. Queensland followed in 1867, replacing the constitution drafted for it by the British Colonial Office on separation from New South Wales in 1859, and Western Australia in 1889. Unofficial drafts and outlines of constitutional legislation had been produced in Australia before, but in this period, for the first time, the constitutions themselves were framed in Australia, although still vetted in London.

Power to frame the constitutions came from the *Australian Constitutions Act* 1850 (13 & 14 Vict c 59, UK), itself the result of a prolonged British debate concerning legislative policy for Australia.[1] Section 32 of the Act of 1850 gave the Governors and Legislative Councils of the four existing colonies and the new colony of Victoria power to replace their single chambers with bicameral legislatures. In response to political pressure in New South Wales, the British government effectively extended the power by offering the eastern colonies self-government in local affairs, including local control of revenue from Crown lands.[2] This offer freed the colonies from other legislative constraints on self-government — in particular, British legislation concerning Australian Crown lands.

The resulting acts established some of the lasting characteristics of the State constitutions. Some of their provisions are still in force, consolidated and

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[1] See generally J M Ward, *Earl Grey and the Australian Colonies 1846–1857: A Study of Self-Government and Self-Interest* (1958).

[2] Pakington to FitzRoy, 15 December 1852, Great Britain, *Parliamentary Papers* (1852–3), [1611] 44; Newcastle to FitzRoy, confidential, 4 August 1853, id (1854), [1827] 62. Van Diemen's Land received the same offer in 1854, after the end of transportation: Newcastle to Denison, 30 January 1854, id 166.

re-enacted in the present Constitution Acts. Like the present State constitutions, they dealt mainly with Parliament, and had little to say about the executive branch of government. They were consistent with responsible government, but touched on it only in hints and oblique references. They made no attempt to set out a comprehensive new design, but only made specific changes in the existing system of government.

This article describes the framing of the constitution in one colony, Victoria. Although the process and the constitutions that resulted were similar in all the colonies, there were also many differences. The degree of influence exercised by the Governor and senior government officials varied greatly. In different colonies the framers adopted very different models for the upper house. The Victorian story is therefore distinctive, while it also introduces themes common to all the colonies in this first phase of Australian constitution-making.

THE FRAMING PROCESS

The Legislative Council

The Legislative Council that framed the Victorian Constitution was quite unlike the parliament that succeeded it in 1856. Of its 54 members (increased in 1853 from the original 30), two-thirds were elected and the remainder were chosen by the Lieutenant-Governor, Charles La Trobe.[3] These government nominees were appointed on the understanding, and sometimes the express condition, that they would support the government.[4] The vote for the remaining seats was given to men who owned freehold land worth £100, or occupied houses with an annual value of £10.[5] (For comparison, labourers could be employed for £1 per week in 1853.)[6] Women could not vote. Aborigines were not directly disqualified, but, then as later, other restrictions made it difficult or impossible for them to enrol. The distribution of electorates for elected members favoured country districts at expense of the towns, and there was no separate representation of the goldfields until 1855, after the Eureka Stockade.[7] During 1852, the *Argus* newspaper prefaced its reports of the Council's debates with a warning:

> It is necessary to guard those who read the reports of the proceedings of the Legislative Council against looking upon the decisions of that body as expressing the opinions of the Colonists of Victoria. While our Legislature is so constituted, that it is simply a mockery of representation, this fact should never be forgotten when estimating the value of its decisions.[8]

[3] *Australian Constitutions Act* 1850 (13 & 14 Vict c 59, UK), s 2; 16 Vict no 29 (1853, Vic).
[4] Eg La Trobe to Griffith, 27 September 1851, C J La Trobe, *Letter Book 1851–2*, State Library of Victoria, MS 12618, 25–6; La Trobe to Riddell, 1 October 1851, id 27; La Trobe to Ross, 22 October 1851, id 28.
[5] *Australian Constitutions Act* 1850 (UK), s 4.
[6] C M H Clark, *Select Documents in Australian History 1851–1900* (1955) 179.
[7] 18 Vict no 34 (1855, Vic).
[8] *Argus*, 24 July 1852.

The Legislative Council could block legislation, but it had no other direct control over the actions of the government. When the government faced a no-confidence motion in 1852, the Lieutenant-Governor made a show of indifference. 'If they had carried their motion by an overwhelming majority', he wrote, 'I should have snapped my fingers at them — for I feel that I deserve very different treatment.'[9] The Auditor-General (who performed the function of colonial treasurer) also pointed out that the government would not resign even if the motion were passed.[10]

The Council met in St Patrick's Hall, in Bourke Street. A plaque in the foyer of the Law Institute of Victoria marks the place. It was not a big hall, as one of its members, Charles Gavan Duffy, remembered. 'The low ceiling and narrow space acted as a sort of restraint upon declamatory eloquence' he wrote; 'one might almost as well begin to declaim in a drawing-room.'[11]

The only official records of speeches on the constitution in the Legislative Council are of the debate on the second reading of the bill, leaving newspaper accounts for the rest, including the committee stage. The press reports were quite different from modern Hansard, and their accuracy was a point of contention between the Council and the press at the time.[12] They included verbatim transcripts of much of what the members said, but they left out argument that seemed technical or uninteresting. Some speeches were lost because the reporters could not hear them. In the *Argus* report of the debate on the size of the upper house, for instance, the only note of one speech is that the speaker 'made some lengthened observations which were inaudible in the gallery.'[13]

The government and the select committee

The local administration was headed by the Colonial Secretary of Victoria, John Foster. He had returned to Melbourne in July 1853 after being appointed Colonial Secretary by the British government. A pastoralist, he had been in politics before, as a member of the New South Wales Legislative Council for the Port Phillip District before the separation of Victoria in 1851. Born John Vesey Fitzgerald Foster, he was known as John Fitzgerald Leslie Foster, and eventually changed his name to John Foster Vesey Fitzgerald to comply with his rich uncle's will. His string of initials earned him the nickname of Alphabetical Foster.[14]

[9] La Trobe to Deas Thomson, 13 December 1852, *Deas Thomson Papers*, Mitchell Library, A1531-3, Vol III, 689.
[10] *Argus*, 25 November 1852.
[11] C G Duffy, 'Our First Legislature: A Prelude to the Political History of Victoria' (1878) 3 *Melbourne Review* 1, 9.
[12] *Argus*, 4 March 1854.
[13] Id, 8 February 1854.
[14] *Australian Dictionary of Biography*, Vol IV, 205; Foster explained the first two versions of his name to the Colonial Office on his appointment as Colonial Secretary: Foster to Colonial Office, undated, CO 380/110, fol 405. He gave evidence to a select committee of the Legislative Assembly in 1867 as John Foster Vesey Fitzgerald: *Votes and Proceedings*, Legislative Assembly (Vic) 1st sess 1867, no D18, 1.

Foster had little in common with a modern Premier. He and his subordinates took their instructions from the Lieutenant-Governor and indirectly from the British government. Although La Trobe was Lieutenant-Governor, not Governor, he generally reported direct to London. The titular Governor of Victoria was the Governor of New South Wales, Sir Charles FitzRoy, who was also Governor-General and Governor of the other eastern colonies under the vestigial system of centralisation which survived from Earl Grey's federal schemes of the late 1840s.[15] La Trobe was bound by large and small restrictions contained in instructions from London. Among other things, he could make only provisional appointments to government offices paying more than £200 a year; these had to be confirmed by the British government.[16]

La Trobe seems to have left the work of framing the new constitution to his appointed officials and the Legislative Council. He defended himself to this effect when FitzRoy accused him of interfering. La Trobe wrote that he had not introduced the Constitution Bill, but had followed the same procedure as FitzRoy in New South Wales, that is, he placed the despatches before the Legislative Council and left the rest to them.[17] As he approached the end of his term as Lieutenant-Governor in May 1854, La Trobe left most government business to Foster. Nevertheless, La Trobe discussed the bill in some detail with his officials, as his later comments for the Secretary of State in London show.[18]

Prompted by the British government's concessions, the local officials began the framing process in the second half of 1853. Foster proposed a list of twelve members to make up a select committee of the Legislative Council, which would then produce a draft, but the Council preferred to go through the motions of making its own choice by ballot. As it turned out, it made no changes to Foster's list.[19]

The committee chose Foster as its chairman. Also among its members was his cousin, William Foster Stawell, another Irishman who was serving at the time as the first Attorney-General of Victoria. He later became the second Chief Justice of the Supreme Court. Stawell was the only qualified lawyer on the committee, although Foster had studied at least some law, and Childers was later called to the bar in England.[20]

The third government official on the committee was Hugh Culling Eardley Childers, the first Vice-Chancellor of the University of Melbourne and later Chancellor of the Exchequer and Home Secretary after his return to England. Twenty-seven years old at the time, he was Auditor-General while the select committee was doing its work, and became Collector of Customs at the start

[15] Grey to FitzRoy, 13 January 1851, Great Britain, *Parliamentary Papers* (1851), [1303] 40–1.

[16] Great Britain, Colonial Office, *Rules and Regulations for Her Majesty's Colonial Service*, London, HMSO (1843) 16–18.

[17] FitzRoy to Newcastle, confidential, 4 October 1853, CO 201/466, fol 133; La Trobe to Newcastle, 26 October 1853, CO 309/18, fol 184; FitzRoy to Newcastle, confidential, 17 November 1853, CO 201/467, fol 67.

[18] *Votes and Proceedings*, Legislative Assembly (Vic) 1st sess 1867, no D18, 1; La Trobe to Newcastle, 2 May 1854, CO 309/25.

[19] *Argus*, 2 September 1853.

[20] *Australian Dictionary of Biography*, Vol IV, 205; Vol III, 390.

of December 1853.[21] These three together, and Foster and Stawell in particular, had considerable influence over the final form of the constitution. Yet even they had to carry the committee, and then the Legislative Council, with them for their proposals to be adopted.

Foster, Stawell and Childers were nominee members of the Council. As holders of senior government offices, they were so-called 'official nominees'; most nominee members did not hold such offices. The other nine members of the committee had been elected to the Council.[22] William Clark Haines was a surgeon and farmer, and later the first Premier of Victoria under self-government. He and the three official nominees were the only committee members who had attended university. John O'Shanassy, another future Premier, had pastoral and business interests. Augustus Greeves and Alexander Thomson were both physicians, as was James Palmer (the Speaker of the Council), who had branched out into business and grazing. Henry 'Money' Miller was a financier, John Goodman another pastoralist and businessman, William Nicholson (Premier in 1859–60) a merchant, and John Thomas Smith a publican and landowner. Although their backgrounds and platforms were diverse, together the committee members represented the professional, pastoral and business interests that dominated the Legislative Council. Four members of the committee, O'Shanassy, Thomson, Miller and Nicholson, had voted against the government in the no-confidence debate of November 1852.[23]

There was neither an organised opposition nor a united government front in the committee. But the division lists do show the pattern of disagreement between the more conservative members and their more liberal opponents, with O'Shanassy proposing lower membership qualifications and equal electorates for the new lower house, and Stawell and others opposing him, for example. The three government members did not always vote together. Stawell and Childers often voted on different sides in committee divisions, on issues including the upper house franchise and the term of the lower house.[24]

It was Foster, the chairman, who signed the report of the select committee and was credited with writing it.[25] He was present at all but one of the committee's 28 meetings. As chairman, he voted only when the other members were equally divided, and refrained from introducing motions from the chair, so the minutes reveal his opinions only occasionally. This conceals what was doubtless his active participation in discussion.

Stawell was often absent from the committee, and from the Council debates

[21] S Childers, *The Life and Correspondence of the Right Hon Hugh C E Childers 1827–1896*, (1901) Vol I, 39, 54; *Votes and Proceedings*, Legislative Assembly (Vic) sess 1853–4, Vol III, no C43, 4–5.

[22] Biographical details from K Thomson and G Serle, *A Biographical Register of the Victorian Parliament 1859–1900* (1972); *Australian Dictionary of Biography*.

[23] *Votes and Proceedings*, Legislative Council (Vic) sess 1852–3, Vol I, 265.

[24] *Report from the Select Committee of the Legislative Council on a New Constitution for the Colony; together with the Resolutions and Proceedings of the Committee, and the Draft of a Bill*, *Votes and Proceedings*, Legislative Council (Vic) sess 1853–4, Vol III, no D11, 15, 34.

[25] *Argus*, 3 January 1854.

which followed. He attended 20 meetings, at which he moved some 22 motions, mostly in the form of amendments when the committee reconsidered its draft resolutions towards the end of its work. He was in the minority in ten of the 23 divisions in which he voted. It was his friend Childers who moved the largest number of motions in the committee. Childers came to have a clear and perceptive understanding of the working of the new constitution, as he showed in his long and detailed reply to a request from the Colonial Secretary of New South Wales for information about the new system early in 1856, and his influence in the framing process may have been underestimated.[26]

Foster's speech on the appointment of the select committee on 1 September 1853 shows that the government had already given a good deal of thought to the principles of the new constitution. Key decisions were made before the select committee met, and, although the government was not guaranteed its own way in the committee or in the Council, the intentions Foster stated were general enough and popular enough for there to be little risk that they would be overturned. The new legislature would have two houses, both houses would be wholly elected, and the lower house would have 'the entire control of the revenue', indicating its primacy in financial legislation and the formation of the government.[27]

One member suggested that the Council should first pass a series of resolutions setting out principles for the bill, but this was rejected.[28] The committee began its work guided only by the views the government had already formed and by the constraints, such as they were, of the enabling provisions in the act of 1850 and the instructions received from London. O'Shanassy complained about the conditions he believed the British government despatches imposed, but Stawell disagreed. The requirement in the despatches for a 'civil list' for official salaries was included in return for colonial control of the sale of Crown lands, he said; as for the requirement for two houses and the suggestion that the Australians should follow the Canadian model and adopt a nominated upper house, the Council would agree with the first of its own accord and the second had been rejected.[29] As Stawell saw, the despatches were generally open-handed. The biggest restriction, more often implied than stated explicitly, was that the constitution was to preserve imperial control in all but local affairs; this, though, was generally accepted willingly, both inside and outside the Legislative Council.

[26] Childers to Thomson, 6 March 1856, *Deas Thomson Papers*, Mitchell Library, A1531–3, Vol III, 531.

[27] *Argus*, 2 September 1853.

[28] Griffith in Legislative Council, *Argus*, 2 September 1853.

[29] G Webb, *New Constitution Bill. Debate in the Legislative Council of the Colony of Victoria, on the Second Reading of the New Constitution Bill, Prepared from the Short-Hand Notes of George H F Webb, Assistant Short-Hand Writer to the Council* (1854) 18–19, 67–8.

Preparing the draft

The committee agreed on a series of resolutions setting out the main points of the new constitution, and then gave Stawell the job of embodying them in a bill. He felt constrained to depart from the resolutions in some places, but, in obedience to the committee, he also included provisions with which he disagreed.[30] In the Legislative Council, O'Shanassy complained that there was a 'very great discrepancy' between the bill and the committee's resolutions.[31]

The main features of the bill are considered below, but it is worth noting Stawell's distinctive contributions here. The bill gave legislative power to the Queen acting by and with the advice and consent of the two houses; the committee had resolved that the Governor, not the Queen, was to be an element of the new legislature.[32] The characteristic power of the new legislature to make laws 'in and for the said Colony in all cases whatsoever' also made its first appearance in the bill, in place of the more familiar power, found elsewhere, to make laws for the peace, welfare (or order) and good government of the jurisdiction concerned in all cases whatsoever.[33] The older wording was used in section 14 of the *Australian Constitutions Act* 1850 (UK) to establish the legislative power of the old Legislative Councils.

It seems to have been Stawell who devised this wording and inserted it in spite of the committee's resolution that the parliament 'should be empowered to make Laws for the good government of the Colony of Victoria'.[34] Oddly, though, this resolution appears only in the committee's interim and final lists of resolutions, and nowhere else in its published proceedings, apart from its adoption without comment in the interim list.[35] Who proposed it, and whether Stawell might have opposed it at the time, remain unknown.

The committee resolved that the two houses should together be called the Parliament of Victoria.[36] Stawell objected to this for unknown reasons, and he omitted it from the bill. Augustus Greeves, a member of the committee, tried in the Council to restore the provision, but was defeated after Stawell opposed him for reasons which were not reported.[37] The Legislative Council of New South Wales made the same change to its Constitution Bill, deleting the name 'Parliament of New South Wales' from the substantive provisions but leaving it in a marginal note; the change did not interest the newspapers, which left the Council's reasons unreported.[38] South Australia and Tasmania, on the other hand, both called their new legislatures parliaments from the start.[39] In

[30] Id 68.
[31] Id 29.
[32] Select Committee Report, op cit (fn 24) 7.
[33] Id 37 (Bill, cl 1).
[34] Id 9.
[35] Id 32.
[36] Id 7.
[37] *Argus*, 2 February 1854.
[38] *Empire*, 8 December 1853; *Sydney Morning Herald*, 8 December 1853; *Votes and Proceedings*, Legislative Council (NSW) sess 1853, Vol II, 129–30 (cl 1); *Constitution Act* 1855 (NSW), s 1.
[39] *Constitution Act* 1856 (SA), s 1; *Constitutional Act* 1854 (Tas), s 3.

Victoria, the title was restored by the first act of the new legislature, during Stawell's term as Attorney-General, but again the reported debates are silent on reasons for or against the change.[40] Whatever his objections, they had disappeared by the end of 1856. He defended a reference to the Victorian 'Parliament' in another bill. 'All the similar assemblies in the other colonies called themselves Parliaments, and he did not see why they should be behind hand', Hansard reported him as saying.[41]

The way to characterise a colonial legislature was a contentious issue in Canada, where the correct title and the powers it might imply figured in argument about the scope of the colonial legislatures' privileges. Some of this argument turned on a distinction between the colonial legislatures, whose powers were limited and subordinate, and the British parliament, whose power was theoretically unlimited. From this point of view, a colonial legislature could not properly be called a parliament. On the other hand, legislatures in British colonies outside Canada called themselves parliaments, with British consent, from the start of self-government.[42] Stawell's objections may have been based on the limited power of the Victorian legislature, and may have been removed or overborne with the formal start of self-government at the end of 1855. The evidence for his reasons in this odd difference of opinion is sadly lacking.

Stawell's bill also went beyond the committee's resolutions in its provisions concerning royal instructions to the Governor (clause 43), quorums, presiding officers and resignation of members (clauses 7–11, 19–23), and the power of each house to adopt standing orders (clause 32).

In many cases the committee used the Constitution Bill recently introduced into the New South Wales Legislative Council as a model. This was particularly obvious in the resolutions concerning royal assent, moved in the Victorian committee in rapid order and taken almost verbatim from the New South Wales bill.[43] G W Rusden, Clerk of the Executive Council, commented on the New South Wales influence in a letter to a friend in Sydney a few months before the Victorian select committee started its work:

> Since our Constitution-mongers have commenced their career I have neither heard from nor written to you, and I am curious to know what tendencies have been developed in your Council, for though our would-be great men violently eschew the notion of copying what Sydney does, there is no doubt that considerable influence is exercised upon Victoria by the manner in which the cards are shuffled and played by what they call our 'step-mother'.[44]

There were important differences between the bills passed in New South Wales and Victoria. The most important was the method of appointment of

[40] 20 Vict no 1 s 3 (1857, Vic).
[41] *The Victorian Hansard*, Legislative Assembly, 10 December 1856, Vol I, 102.
[42] F Taylor, *Are Legislatures Parliaments? A Study and Review* (1879) 15–16, 30, 111–13; A Todd, *Parliamentary Government in the British Colonies* (2nd ed, 1894) 682–7.
[43] *Votes and Proceedings*, Legislative Council (NSW) sess 1853, Vol II, 130–1 (cl 2–3); Select Committee Report, op cit (fn 24) 9–10.
[44] Rusden to James Macarthur, 30 June 1853, *Macarthur Papers*, Vol XXVII, Mitchell Library, A2923, 172–3.

the upper house: nomination in New South Wales, direct election in Victoria. The drafting process also produced many differences of detail. When Stawell transformed the committee's resolutions into statutory provisions, the clauses concerning royal assent, for example, became more elaborate than the New South Wales model. The Victorian provisions concerning government finance were also more detailed.[45] These and other differences made the Victorian bill slightly longer overall than its New South Wales counterpart.

In the Council

The select committee presented its report, including its resolutions and the proposed bill, on 9 December 1853. The first reading of the bill in the Legislative Council followed on 15 December and debate resumed in the new year. Foster hoped members would be conscious of the significance of the occasion, and tried to inspire them as he introduced the bill: 'it did not fall to the lot of all', he said, 'to assist at an empire's birth'.[46]

The members understood the importance of the bill, and also knew that Victoria was among the first British colonies allowed to draft their own constitutions.[47] At least one witness, William Kelly, thought they rose to the occasion:

> I always endeavoured, in my visits to the Legislative Council, to hit upon the debates on the Constitution, and although I cannot in candour say that I was impressed, on the whole, with any very elevated notion of the rhetorical powers of the Victorian Senate, I must avow that the speeches, generally, evinced an amount of careful study, and a thorough plain common-sense understanding of the broad and difficult subject, for which I was wholly unprepared, while, in some individual instances, there was a display of constitutional lore, an evidence of oratorical attributes, that would have taken respectable rank in the British House of Commons.[48]

Later historians have disagreed. 'The general intellectual level was abysmal', said Serle, and the record of the debates bears him out.[49] Foster, Stawell and Childers (all praised by Kelly) spoke well, along with one or two others, but away from the more obvious points, such as the franchise and members' qualifications, other speakers floundered. Few other than these three showed any understanding of the introduction of self-government, or the true powers of the new, elected Legislative Council. The government officials, on the other hand, knew exactly what they were doing, as they showed in their comments concerning the upper house, considered below.

[45] *An Act to establish a Constitution in and for the Colony of Victoria* 1854 (Vic) (Reserved for Her Majesty's Approval), s 37–43, 49–61; *An Act to confer a Constitution on New South Wales, and to grant a Civil List to Her Majesty* 1853 (NSW) (reserved for Her Majesty's approval), s 1–3, 51–63.

[46] *Argus*, 16 December 1853.

[47] Webb, op cit (fn 29) 120.

[48] W Kelly, *Life in Victoria: or Victoria in 1853, and Victoria in 1858* (1977) (Historical Reprints Series no 6) 346–7.

[49] G Serle, *The Golden Age: A History of the Colony of Victoria, 1851–1861* (1977) 148.

As in the select committee, the government could not always count on a majority in the Council. It was defeated when it insisted on a two-thirds majority rather than an absolute majority for amendment of entrenched sections of the new constitution, to give one example.[50] Nor did the government officials always vote together; the qualification for membership of the new Legislative Council was one of a number of issues on which they disagreed.[51]

THE NEW LEGISLATURE

Democracy and the elected upper house

The enormous increase in wealth and population during the gold rush brought many problems. To some, like La Trobe, the rush caused apparently endless trouble. 'This miserable gold', he called it; 'these abominable discoveries!'[52] The potential political power of the new arrivals was a special problem for the members of the select committee, who had to consider the likely effects of self-government in the swollen colony. The changes taking place in Victorian society made the issue of democratic control of the new parliament very sensitive for the pre-gold elite who made up much of the Legislative Council.

Their response was to control rather than suppress what they saw as the democratic tendency of the age. The Colonial Secretary explained his approach as he commented on the arguments put by advocates of nominated upper houses in New South Wales and South Australia:

> it appeared to him that the reason why they preferred the form of constitution proposed by them was, that they thought it their duty to stem the overflowing tide of democracy. He (the Colonial Secretary) thought it was very poor policy indeed to attempt to dam up the flood which was now setting in, and that it would be a more true policy to direct that stream into a right channel, and develope [sic] properly that democratic element which no doubt existed in this colony, as in every country where the Anglo-Saxon race was to be found.[53]

For all that, his idea of democracy was characteristic of the time. The democratic state, in his eyes, did not give its citizens representation in the legislature merely according to their numbers.

> He begged the House to understand that by democracy he did not mean the opinions of any mob that might be led away by any demagogue, but those of the educated and the intelligent of every class in the community; and it had been the aim of the committee to ensure by the provisions embodied in the

[50] *Votes and Proceedings*, Legislative Council (Vic) sess 1853–4, Vol I, 121.
[51] Id 114.
[52] La Trobe to Griffith, 30 October 1851, C J La Trobe, *Letter Book 1851–2*, State Library of Victoria, MS 12618, 29; La Trobe to FitzRoy, 20 December 1851, id 40.
[53] *Argus*, 16 December 1853.

> Bill, that all classes of the people should have their legitimate weight and influence.[54]

Many of the framers thought parliament should represent interests or social groups rather than the population at large. A democratic parliament would contain representatives of 'all classes of the people', in Foster's words, but not in proportion to population. The framers expressed this idea in the qualification of members, the franchise, the distribution of electorates and the composition of the upper house.

'It had been the desire of all the members of the committee,' Foster said, 'as far as possible, to introduce into the colony the British constitution; and had it been possible, they would have wished to have introduced that Constitution in its entirety.'[55] One of the features of the British constitution which they could not, or would not, emulate was the House of Lords. How to deal with this was one of the most important questions they addressed.

When the Australian Legislative Councils came to consider the structure and composition of the new upper houses, they continued debates about the structure of colonial legislatures which went back many years. Those debates had centred on Canada and, more recently, Australia. The issue figured prominently in the framing of the *Australian Constitutions Act* 1850, although in the end the Act merely enabled the colonies to create bicameral legislatures, without prescribing the form they should take.

In the past the choice had generally been between an upper house nominated by the Crown, which was the standard pattern for British colonies with bicameral legislatures, and one involving a hereditary element of some sort. The *Canada Act* 1791 (31 Geo III c 31, UK) created Legislative Councils of this second kind for Upper and Lower Canada, although its provisions concerning hereditary members turned out to be a dead letter. The leading politicians of the day thrashed out the issue in parliament against the background of the French Revolution.[56]

Elected upper houses were something of an untried novelty for British colonies, although a precedent of a kind was set in 1850 by the Privy Council's Committee for Trade and Foreign Plantations when it recommended an elected upper house for the Cape of Good Hope.[57] A new constitution with an elected Legislative Council came into force there in 1853.[58] The Committee's reason for this recommendation was the weak status of the existing nominated Legislative Council, and the likelihood that a new nominated Council in a bicameral legislature would be no stronger. The framers in both

[54] Ibid.
[55] Ibid.
[56] G Martin, *Bunyip Aristocracy: The New South Wales Constitution Debate of 1853 and Hereditary Institutions in the British Colonies* (1986) 21–6.
[57] *Report of the Committee for Trade and Foreign Plantations on Establishment of a Representative Legislature at Cape of Good Hope*, January 1850, Great Britain, *Parliamentary Papers* (1850), (1137) 101.
[58] H J Mandelbrote, 'Constitutional Development, 1834–1858', *Cambridge History of the British Empire* (1936) Vol VIII, 376.

Melbourne and Sydney knew about this precedent.[59] The Victorian select committee's first resolution on the form of the new constitution was that the legislature should consist of two chambers. The names 'House of Assembly' and 'Legislative Council' were suggested, but the committee chose 'House of Representatives' and 'Senate' at its first meeting, against the wishes of Stawell and Childers.[60] Later it substituted 'House of Assembly' and 'Legislative Council', on Childers' motion, and more debate in the Council produced the final result of 'Legislative Assembly' and 'Legislative Council'.[61]

When the committee began its work, Foster had already announced that the new upper house would be elected. The committee debated the issue, but agreed without a division, and followed up with a resolution that the Crown should have no direct voice in or veto over the election of members of the upper house.[62] Perhaps nomination of the upper house was discussed; indirect election certainly was. Comparisons with the United States were in the minds of some of the committee members, as the debate about the names of the houses shows. Until ratification of the seventeenth amendment in 1913, the United States Senate was chosen by the State legislatures, under article 1 section 3 of the United States Constitution. Earl Grey had also used indirect election in his constitutional scheme for New Zealand in 1846, albeit for lower rather than upper houses.[63] This scheme was much debated and criticised in eastern Australia after Grey proposed in 1847 to extend it to New South Wales.[64]

Augustus Greeves proposed mediate, or indirect, election of the upper house, but the majority of the committee disagreed, despite Childers' support. Foster would have liked to see the upper house elected by district councils, but this was impossible in the absence of a system of local government.[65] At the committee's third meeting, indirect election by the members of the lower house was ruled out by a resolution that they, like the Crown, should have no direct voice in or veto upon the election of the upper house.[66] Direct election remained the chosen option.

Foster believed, correctly, that the proposal for an elected upper house would be received as a popular measure. In the days of partly-nominated legislatures and government by the representatives of the Crown, direct election seemed to many to be more progressive than nomination or the much-derided aristocracy proposed in New South Wales by W C Wentworth and others. The ingenuity of the Victorian proposal was that this political advantage was combined with others less well recognised, but important for the framers. Election looked at first impression like a bold move towards

[59] *Argus*, 2 September 1853; Sir A Stephen, *Thoughts on the Constitution of a Second Legislative Chamber for New South Wales* (1853) 11.
[60] Select Committee Report, op cit (fn 24) 13.
[61] Id 34; *Constitution Act* 1855 (Vic), s 1.
[62] Select Committee Report, op cit (fn 24) 13.
[63] 9 & 10 Vict c 103 (1846, UK), s 4.
[64] A C V Melbourne, *Early Constitutional Development in Australia*, (R B Joyce, ed, 2nd ed, 1963) 345–53.
[65] Select Committee Report, op cit (fn 24) 13; *Argus*, 16 December 1853, 8–9 February 1854; Webb, op cit (fn 29) 12.
[66] Select Committee Report, op cit (fn 24) 14.

democracy after the unpopularity of the nominee element in the Legislative Council, but in the long run it would be a more effective restraint on the powers of the lower house.

Elected members were likely to have greater weight with the public than nominees in a contest between the two houses, Foster believed.[67] But there were also more concrete reasons for the committee's choice. One had been put forward in 1847 by Archibald Cuninghame, the London representative of the residents of the Port Phillip District, in a letter to Earl Grey concerning separation from New South Wales and the constitutional arrangements that should follow. Cuninghame argued for a single house, because of the lack of suitable candidates to fill two houses, and in order to avoid provoking democratic agitation through clashes between a popularly elected lower house and a conservative upper house.

> I will not, indeed, affirm that a democratic spirit may not be called into existence, should there be frequent collisions of opinion between an Upper and Lower House, but I am sure that in a wisely constituted Single House, such a Spirit would have no existence.[68]

However, he went on to foreshadow the eventual form of the Victorian parliament in his argument concerning the best form of an upper house if the government chose to create one.

> But, my Lord, if some check be required to the Legislative expression of popular opinion, believe me, when I assure your Lordship that it is not to be found in a band of Government Nominees, even when gathered together under the high-sounding title of an Upper House. There is, my Lord, no prestige, in Australia, in favour of such a House, and its weight and influence must be imparted to it by the men who form it. If these be Government Nominees — the representatives of no real class, the exponents of no living principle, they, and their House must quickly become a mere 'caput mortuum', a lifeless, and perhaps corrupt mass, in the midst of a living body. If, then, it is necessary to find some antagonistic force to that of popular Principles, let us look for it among the real and vital forces of the community. And in all Colonial Communities there is but one force which can serve as an equipoise to that of democracy, at once from its power and its antagonism. I mean the wealth power.
>
> The possessors of this are in truth the practical aristocracy in every country, not possessed of an heredatary [sic] Peerage.[69]

Foster is likely to have known about Cuninghame's ideas through their common involvement in Port Phillip politics and the separation movement.

There was an even better reason for trusting to an elected house for the restraint on democracy which the government desired. It was not widely understood, but there were some who knew what it implied. Those who could see ahead to the time when the Governor's actions would be controlled by the majority in the lower house under the conventions of responsible government

[67] Webb, op cit (fn 29) 9–10.
[68] Cuninghame to Earl Grey, 31 October 1847, CO 201/390, fol 355.
[69] Ibid.

understood that nomination would take on a new character, and would eventually be made on the advice of the government. If the franchise and electoral system made the lower house less conservative than the upper house, as the framers' plans already suggested, then anti-conservative governments could use the power of nomination to remove the check which the upper house was intended to impose. This could be done at a stroke, if the number of members of the upper house was unlimited, or gradually, by filling seats as they became vacant.

A government with control of nominations could reduce the Council's power of review and the 'wise and conservative control upon the otherwise unfettered democratic tendency of the Lower House' which Foster and others believed essential.[70] As Childers put it, a nominated upper house under responsible government must be 'a mere reflex of the Lower House', although the later history of New South Wales and Queensland shows that a nominated Council could be more independent than this suggested.[71]

The need to avoid this possibility was one of Foster's reasons for opposing nomination.[72] This was partly because of the effect of responsible government, but also because of the way in which the power of nomination could be used even before the elected ministry took control. The relevant passage in the select committee's report may have been written with both sorts of appointment in mind: personal choice by the Governor (as in the past) and nomination under responsible government.

> They [the committee] are unanimous in advising that the Legislative Council should be wholly elective — that it should represent the Education, Wealth, and more especially the settled Interests of the Country. The universal failure of the Nominee element in the British Colonial System-forming, as it has proved, no check on extreme views, but ensuring a pre — ponderance to whatever party may happen to possess the Supreme power, has determined your Committee to look for an enlightened policy essential to wise legislation, in that portion of the community naturally indisposed to rash and hasty measures.[73]

Once the Governor became obliged to act on ministerial advice, an upper house elected indirectly or on a restrictive franchise would be the strongest check on the power of the lower house. One who came to see this most clearly was Stawell:

> I am satisfied that the only course which is open to a Government with a nominee Upper House, that of throwing in a number of nominees, would have a democratic instead of a conservative tendency. What would be the after career of those men suddenly created nominee members? They would go on carrying out the principles of the class from which they were selected, and I am quite certain that a nominee Upper House is a much more democratic one than an elective one.[74]

[70] *Argus*, 2 September 1853.
[71] Webb, op cit (fn 29) 126.
[72] Id 10.
[73] Select Committee Report, op cit (fn 24) 3.
[74] Webb, op cit (fn 29) 70–1.

La Trobe, too, explained the point in his despatch to the Secretary of State commenting on the new constitution:

> It had been urged in favour of a Nominee Upper House that in case of a serious collision of opinion between the two Houses, a power would under such a system exist in the Executive, of augmenting to an unlimited extent the number of Members of the Upper House, and of thereby coercing it into concurrence with the lower. The wisdom of entrusting such a power to the Ministry of the day may be fairly questioned. The probability, however, of any collision of opinion between both Houses has been considerably diminished by the very ample powers, more especially respecting Money Bills, conferred on the Lower House.[75]

Other political considerations may have been involved in the framers' choice. The Victorian qualification and franchise gave great weight to landowners in the upper house, and mercantile and professional interests may have had a better chance in a nominated Legislative Council. Certainly this has been advanced as one of the reasons for the adoption of a nominated Legislative Council in New South Wales.[76] If this consideration was felt at all in Victoria, it seems to have been outweighed by the perceived evils of nomineeism and the dangers of swamping — and perhaps, of course, by the power of the pastoralists in the Council. Certainly the end result was striking, in barring all but large landholders from membership of the Council.

Relations between the houses

The select committee agreed without a division on a series of key points concerning the new legislature and relations between the two houses. Like their counterparts in South Australia and Tasmania, the Victorians chose to make their elected upper house indissoluble, its members going to the polls only by rotation.[77] The committee settled the Governor's power to dissolve the lower house, the disqualification of holders of offices of profit under the Crown other than ministers (adding more detail to a resolution passed at an earlier meeting), the exclusion of government contractors, and the privileges of the houses. Finally, they gave the lower house the power to originate money bills, and the upper house the power to reject, but not amend, them. This was followed at the next meeting by a resolution that the legislature should have control of Crown lands in the colony, taking up one of the concessions made by the Secretary of State and meeting one of the most persistent demands of the colonial politicians.[78]

How did the framers imagine the new upper house would work? Some saw limits on its power to block proposed legislation, but they were political limits, not constraints to be written into the bill. Most seem to have given little

[75] La Trobe to Newcastle, 2 May 1854, CO 309/25, 35–6.

[76] S G Foster, *Colonial Improver: Edward Deas Thomson 1800–1879* (1978) 122, C N Connolly, 'The Origins of the Nominated Upper House in New South Wales', (1982) 20 *Historical Studies* 53, 60.

[77] *Constitution Act* 1856 (SA), s 2; *Constitutional Act* 1854 (Tas), s 4; *Constitution Act* 1855 (Vic), s 28.

[78] Select Committee Report, op cit (fn 24) 20, 24–5.

thought to the events which would follow a deadlock between the houses, or rather to have accepted that the constitution itself should not qualify the Council's power to reject bills. In short, the bill contained no deadlock mechanism because most of the members who thought about the question were content to rely on political solutions for conflicts between the houses.

Foster described the position of the Council in this way:

> I think that it will always be enabled not perhaps to stop the proceedings of the Lower House and year after year bar their progress, but will be strong enough to check their progress until such calm discussion has ensued as will really test the merits of any measure, and until an appeal can be made to the colonists at large to know whether the Lower House, as then elected, does really express the feelings and opinions of the colonists.[79]

In the end, though, he affirmed its unqualified power to block.

> Sir, I have heard it stated out of doors that one of the objections to the Upper House which we now propose is that it will be so strong as to lead legislation, that, in fact, it will be impossible, if it clashes with the Lower House, for that House to get on at all. I do not think, Sir, that its strength would be so omnipotent, but if it were it is not an argument that weighs much with me against it. Those who argue that they would prefer an upper nominated House because, when it jarred with the Lower House, the minister of the day could swamp it, have not well considered the subject. I believe we create an Upper House not to be swamped . . .[80]

Foster noted at the end of the second reading debate that only one member had supported the idea of a nominated upper house.[81] This was Charles Griffith, who gave two reasons for his opinion. One, discussed below, was his hostility to the republican tendencies of an elected upper house. The other was that nomination to the upper house would make it possible to resolve deadlocks with the Legislative Assembly. Griffith was one of the few to complain that the bill made no provision for resolving disagreements between the houses.

Discussing O'Shanassy's argument that the constitution should establish three independent powers (Governor, Council and Assembly), Griffith raised the problem of deadlocks under the proposed scheme. 'I think', he said 'in this there is no means of bringing into harmony the different branches of the Constitution.'[82]

> Now, it is proposed that this Upper House consisting of twenty-five members, should have the power of absolutely stopping the whole Legislation of the country, and opposing the wishes of the whole people; that is, to thirteen men you delegate this power, and if they choose to hold out against the united wishes of the country, there is no power short of a Revolution which can affect it.[83]

[79] Webb, op cit (fn 29) 10.
[80] Ibid.
[81] Id 141.
[82] Id 38–9.
[83] Id 39.

The choice between election and nomination of the upper house was in part a proxy discussion of the power of the new Council to block proposed legislation. Choosing election affirmed that the Council could not be swamped with new nominees if it opposed the lower house. Griffith proposed nomination of the upper house as a means for resolving deadlocks, much as the threat to create new peers could be used to coerce the House of Lords.[84] Another member, Francis Murphy, argued not only that the Governor should be able to dissolve the upper house, but apparently also that the government should be able to nominate additional members.[85] But the issue attracted little attention. The composition of the upper house, the franchise, the qualifications of members, the electoral distribution, state aid to religion and the names of the houses all attracted more attention than possible deadlocks.

Here was a crucial difference between the Victorian and New South Wales framers, and between their bills. Once his plan for a hereditary element was abandoned, Wentworth, and with him the majority of the New South Wales Legislative Council, opted for a nominated rather than elected upper house. If Wentworth's only object had been to secure the strongest possible conservative safeguard against the democracy he criticised so strongly, this would seem a strange choice. But he was also concerned with relations between the houses, and it was the need to provide for deadlocks that he advanced as his reason. The possibility of new government nominations to break a deadlock was not a disadvantage of the nominated house, but a positive necessity, to provide an essential safety-valve.[86] Sir Alfred Stephen, Chief Justice of the Supreme Court of New South Wales, also endorsed the idea of a safety-valve in his pamphlet on proposals for the new constitution.[87]

The New South Wales *Constitution Act* imposed no upper limit on the number of Legislative Councillors, allowing the government to advise the Governor to appoint any number of new members at any time. The threat of swamping was indeed used in disagreements between the houses, and the government finally attempted to carry it out in 1861.[88] When the Council made unacceptable amendments to the government's land bills, the Governor agreed to add 21 new members to the existing 35. He stressed that the members would have lost their seats almost immediately, since the old Council's five-year term was to expire within days. Its replacement was to be made up of nominees for life.

Wentworth was disgusted at the number of appointees and kind of people the government chose. He never thought when he framed the constitution, he said later, 'that any Ministry in this country would have the audacity to sweep the streets of Sydney in order to attempt to swamp the House by the

[84] Id 39–40.
[85] Id 107.
[86] *New South Wales. Constitution Bill. The Speeches in the Legislative Council of New South Wales, on the Second Reading of the Bill for Framing a New Constitution for the Colony*, (E K Silvester, ed, 1896) 219, 228.
[87] Stephen, op cit (fn 59) 13.
[88] *Constitution Act* 1855 (NSW), s 2; *Sydney Morning Herald*, 11 May 1861, 4–5, 13 May 1861, 2; Young to Newcastle, 21 May 1861, CO 201/518.

introduction of twenty-one members'.[89] (In fact, in 1853 he himself spoke of the Council being expanded to 100 in the event of a deadlock.)[90]

The scheme failed when the President of the Council left the chamber with 15 others and resigned in protest. Without the President and the Chairman of Committees (absent following the death of his daughter), the house was adjourned under the standing orders until the next sitting day. Since the next scheduled sitting day was after the expiry of the five-year term, the old Council never met again. The 21 new members never took their seats, but the new council, appointed for life, passed the land bills at the centre of the dispute.

It was this safety-valve that the Victorians chose deliberately not to provide, with spectacular results in the constitutional crises of the 1860s and 1870s. The lower house, by now elected under universal male suffrage, came increasingly into conflict with the Legislative Council. These experiences had a profound effect on many Victorian politicians, and helped to make them the strongest advocates of a deadlock mechanism during the debates on the Commonwealth Constitution in the 1890s.[91]

Franchise and members' qualification

The qualifications of voters and candidates for the new parliament were among the most contentious issues discussed by the select committee. Members made no attempt, and probably had no desire, to give the vote to all adult men — that was done only in 1857, by the act 21 Vict no 33 (Vic). Instead they debated the level of restrictions best suited to produce a conservative upper house and more democratic lower house.

Their most remarkable decision was to require all members of the upper house to possess freehold property to the value of £10000, or £1000 per year. This was Stawell's proposal, doubling O'Shanassy's suggested £5000 qualification.[92] In the Council, the figure was brought back down to £5000 (or £500 per year), but it was still extraordinarily high. It reflected both the inflated values of the gold rush and the framers' determination to protect the conservative character of the new Legislative Council. In modern terms, they created a house of millionaires. The justification they offered was the superior quality of the people who would meet this test. In the long run, Foster said, 'education and intelligence were to be found in connection with the wealthy classes of the community more than in the other classes'.[93]

Other requirements for membership of the upper house included British citizenship and a minimum age of 30 years. Only men were eligible, and freehold land was the only qualification. Other forms of wealth to the same value were not enough. Not even wealthy pastoralists who held Crown land under leases or licences would qualify. Present and former pastoralists were

[89] *Sydney Morning Herald*, 11 September 1862, 2.
[90] *The Empire*, 5 September 1853, 2703.
[91] J A La Nauze, *The Making of the Australian Constitution* (1972) 158–9.
[92] Select Committee Report, op cit (fn 24) 14.
[93] *Argus*, 16 December 1853.

well represented in the Council, and the committee had no desire to bar such people from the upper house. The most likely explanation for their exclusion of large pastoral lessees and licensees is that pastoralists were already acquiring enough freehold (on their runs or elsewhere) for their membership to be secure even under the new qualification.

If the upper house was to perform its intended function, its franchise too would have to be restrictive. The committee decided, against Stawell's wishes, to give the vote to men who possessed freehold land worth £1000, or £100 per year. They also included three-year leaseholders with an annual rent of at least £300; it was on Stawell's motion that they reduced the period of qualifying leases from five years to three.[94] After amendment in the Council, this became a five-year lease worth £100 a year. With less difficulty, the committee included pastoral licensees with 8000 sheep or 1000 cattle in possession for one year. Five members were to retire every two years. University graduates, lawyers, medical practitioners and ministers of religion all got the vote for the upper house, but not the chance to become members, unless they also possessed property qualifications. These proposals were much debated in the Legislative Council, but the basic outline did not alter. The pastoral licensees were deleted, the details of the leasehold franchise were changed and officers of the armed forces were included.[95] Stawell succeeded in getting the select committee to reduce the size of the upper house from 30 to 25 members, but on O'Shanassy's motion the Council reverted to the higher number.[96]

Dealing with the Legislative Assembly, the committee rejected O'Shanassy's proposal that the members' qualification should be the same as the franchise. They agreed on a qualification of freehold to the value of £2000, or £100 a year (raised to £200 in the act). This, though, was only settled on Foster's casting vote, defeating a proposal to reduce the figure to £1000. Freehold land was again the only qualification. The franchise was settled without a division, giving the vote to men with freehold to the annual value of £5 (or £50 capital value, in the act), leasehold to the annual value of £10, a household of £10 annual value, an annual salary of £100, or a licence to occupy Crown lands for twelve months (so including the holders of a miner's right from 1855).[97] Even under these restrictions, the number registered to vote for the Assembly was more than five times the number registered for the Council at the 1856 elections.[98]

Some thought the Assembly franchise almost equal to universal suffrage: 'nobody can be excluded from it', Foster said, 'except by his own default'. It would exclude no one who would 'honestly and steadily pursue his vocation'.[99] This was a familiar idea at the time, especially plausible during the gold rush: anyone who tried could make a good living in Australia, or so

[94] Select Committee Report, op cit (fn 24) 14–16.
[95] *Constitution Act* 1855 (Vic), s 5.
[96] Select Committee Report, op cit (fn 24) 18; *Argus*, 8 February 1854; *Constitution Act* 1855 (Vic), s 2.
[97] Select Committee Report, op cit (fn 24) 8, 17–18.
[98] Serle, op cit (fn 49) 254.
[99] Webb, op cit (fn 29) 5.

Foster and others thought. Like previous law, the new act did not specifically disqualify Aborigines from voting, but property, residence and literacy requirements made it difficult or impossible for them to enrol.

The framers' version of democracy was established through the distribution of seats as well as the qualification and the franchise. O'Shanassy's proposal for equal numbers of voters in electorates was defeated in the committee and again in the Legislative Council.[100] Instead, the committee laid down a principle to guide the distribution of lower house seats, on Stawell's motion. It allocated one member for every 200 voters in the specified cities, towns and counties of the colony, with an extra member for each whole thousand; a country electorate could thus contain as few as 200 voters, while a city electorate with just under 2000 would return only two members. The distribution of upper house seats would be constrained only by the committee's resolution that there should be five electoral districts for the upper house. Childers' proposal for a single upper house electorate was defeated.[101]

As it turned out, Stawell's formula was not enacted. Rather than leave the distribution of seats until after the next census and the passage of the Constitution Act, the Legislative Council eventually chose to attach a schedule of electorates to the bill.[102] The result at the first election for the new parliament, on Serle's figures, was that at one extreme each of the thirteen members from squatting electorates represented an average of about 250 voters, while at the other the eleven goldfields members represented an average of 1850 voters each. The eighteen members from Melbourne and Geelong averaged 1350.[103]

The duration of parliament was another defining characteristic of the system. Radicals favoured shorter parliaments to keep members in touch with their constituents. The select committee set the maximum term of the lower house at three years, against the wishes of Stawell, who proposed extending it to five. The Council reversed this, on Foster's motion, adopting the five-year term which remained until legislation restored the shorter term in 1859.[104]

OTHER FEATURES

Responsible government

The nature of the movement towards responsible government in colonial Australia has been a contentious issue among historians.[105] Nevertheless, it is clear that it had become a common demand by the time the Victorians were

[100] Select Committee Report, op cit (fn 24) 26; *Argus*, 3 February 1854.
[101] Select Committee Report, op cit (fn 24) 8, 18, 26–7.
[102] *Argus*, 3 February 1854, 24 February 1854.
[103] Serle, op cit (fn 49) 256.
[104] Select Committee Report, op cit (fn 24) 34; *Votes and Proceedings*, Legislative Council (Vic) sess 1853–4, Vol I, 120; 22 Vict no 89 (1859, Vic).
[105] Melbourne, op cit (fn 64) 336, 384–7, 395; A C V Melbourne, 'The Establishment of Responsible Government', *Cambridge History of the British Empire*, Vol VII Pt 1, 276–7; T H Irving, 'The Idea of Responsible Government in New South Wales before 1856', (1964) 11 *Historical Studies Australia and New Zealand* 192; J M Ward,

waiting for the new constitution to commence. Governor Sir Charles Hotham thought that since the Secretary of State's despatches of December 1852, promising increased self-government, there had been a 'heart burning' on the part of the people for responsible government: 'rightly or wrongly they have imagined that benefits are withheld from them which under Responsible Government they would obtain, and therefore month by month their dissatisfaction has increased'.[106]

What did the demand for responsible government encompass? The idea of requiring the executive to command a majority in the legislature was clear enough at the time, as the Durham Report and the report of the select committee of the New South Wales Legislative Council on general grievances in 1844 both show, to mention only two sources.[107] Responsible government in this sense was demanded as the means to achieve self-government in local affairs.

That basic element aside, self-government of a sort could have developed without the full modern doctrine of responsible government, and in particular without requiring the senior government officers to be members of the local legislature. Early calls for responsible government clearly implied self-government in local matters, and perhaps nothing more than that. Other, more detailed elements of the modern conventions of responsible government were hardly thought of and were still developing in Britain. Gradually a more elaborate plan for the mechanism of self-government emerged, including more of the elements of the modern ideas of responsibility, some of which were included in the constitutions of 1854–6.

The framers and the politicians of the time did consider variations on responsible government and different ways of implementing self-government. Government by ministers who were members of the legislature was not necessarily the form self-government would take, and the responsible government advocated in eastern Australia during the 1840s and early 1850s did not necessarily include this detail. Under the Victorian bill, for instance, four ministers, but not all, had to be members of the legislature; the possibility of appointing others from outside the legislature was left open.

There was less debate concerning this issue in Melbourne than in Sydney. Even in the Victorian no-confidence debate of 1852, there was hardly any reference to the principles governing the relationship between legislature and executive, or any demand that the current practice should change. In his speech on the appointment of the select committee in 1853, Foster foreshadowed debate on the question of legislating explicitly for responsible government, or, as he put it, 'whether the responsibility of the officers of the

'The Responsible Government Question in Victoria, South Australia and Tasmania, 1851–1856', (1978) 63 *Journal of the Royal Australian Historical Society* 221; J M Ward, *Colonial Self-Government: The British Experience 1759–1856* (1976).

106 Hotham to Russell, 27 June 1855, Great Britain, *Parliamentary Papers* (1856), [2135] 24.

107 *Lord Durham's Report on the Affairs of British North America*, (C P Lucas, ed, 1912) Vol II, 278–9; CMH Clark, *Select Documents in Australian History 1788–1850* (1950).

Government should be the subject of legislative enactment'.[108] Debate in the Council was sketchy and confused, but the end result was found in sections 17–18 of the *Constitution Act*. The seat of any member of the Council or Assembly accepting an office of profit under the Crown during pleasure would become vacant, but the member would be capable of re-election. (This began the practice of ministerial by-elections, in which ministers had to resign and face re-election after their appointment. These continued until 1915.) At least four out of a list of seven government ministers had to be members of the Council or the Assembly.

Most contentious was the form in which the constitution should give the Governor the power of appointment to public offices, or the power of patronage, as the committee called it. Should the Governor alone have the power, or should the constitution say that the Governor should act with the advice of the Executive Council? After the select committee had discussed several possibilities, the Legislative Council went over the topic again, and produced the workable solution which survives in section 88 of the *Constitution Act* 1975.[109] The appointment to public offices was vested in the Governor in Council, with the exception of the appointment of officers 'liable to retire from office on political grounds' (that is, responsible ministers), which was vested in the Governor alone.

The Victorian bill contained no express vesting of executive power, beyond the provisions on appointment to public offices, and no provision at all on the appointment of the Governor or the constitution of the Executive Council. Henry Miller suggested electing the Governor, but without making any formal proposals; the idea was debated again early in 1856, with equally little result.[110]

The Executive Council was recognised only indirectly, by the references to its advice in the section on appointment to public offices and elsewhere. In this, Victoria followed the same pattern as New South Wales, South Australia and Tasmania, although the South Australian Constitution Act did make listed government ministers *ex officio* members of the Executive Council.[111] The Legislative Council of Van Diemen's Land did not take up the recommendations of its first select committee on the constitution that 'the Supreme Executive power' should be vested in the Governor and that the legislature should have power to remove the Governor by a two-thirds vote in both houses.[112]

[108] *Argus*, 2 September 1853.
[109] Select Committee Report, op cit (fn 24) 11, 20; *Constitution Act* 1855 (Vic), s 37.
[110] *Argus*, 9 February 1854; Serle, op cit (fn 49) 211.
[111] *Constitution Act* 1856 (SA), s 32.
[112] *New Constitution. Report from the Select Committee Appointed to Prepare the Draft of a New Constitution for the Colony, Votes and Proceedings*, Legislative Council (Tas) Vol III (1853) no 80.

Reservation and disallowance

Some of the most distinctive provisions of the bill allowed for the reservation or disallowance of Victorian bills on seven topics involving imperial interests (such as foreign affairs, naturalisation and divorce).[113] They implied that reservation or disallowance would not be permitted in other cases. They also purported to prohibit royal instructions which fettered the Governor's discretion to give or refuse assent to 'Bills of mere local or municipal concernment'.[114] In effect, the bill limited the British government's power of veto over Victorian legislation to the seven listed topics. Bills on these topics would not necessarily be reserved in future; the proposed constitution merely allowed for reservation under the royal instructions, without requiring it. The select committee also agreed on a clause to the effect that the Governor must give or withhold assent to ordinary bills within 30 days, after which assent was deemed to have been given unless it was positively withheld. Stawell objected, and the clause was removed by the Legislative Council.[115]

These provisions were based in the first instance on the New South Wales Constitution Bills of 1852 and 1853, but they also reflected proposals circulating in England and Canada for ten years or more.[116] Adopting them would have required amendment of earlier British acts concerning reservation and disallowance of colonial legislation.[117] After a cabinet debate on the desirability of a formal division of responsibility between Britain and the colonies, the clauses were deleted from the bill before it was introduced into the British parliament, and they never became law.[118] This defeat caused little comment in Victoria. Interest in the original proposal had been slight, a fact that Victoria's representative in England conveyed to the Secretary of State.[119] In this situation, the final outcome was hardly surprising. In June 1855, Edward Deas Thomson, the Colonial Secretary of New South Wales, was still trying to persuade the British government to adopt the separation of local and imperial subjects of legislation by issuing instructions to the colonial Governors to the same effect as the rejected clauses of the Constitution Bills, but this had hardly more appeal to the Colonial Office than the original legislative proposals. Thomson's letter was 'put by'.[120]

[113] *An Act to establish a Constitution in and for the Colony of Victoria* 1854 (Vic) (Reserved for Her Majesty's Approval), s 37–43.

[114] *An Act to establish a Constitution in and for the Colony of Victoria* 1854 (Vic) (Reserved for Her Majesty's Approval), s 43.

[115] Select Committee Report, op cit (fn 24) 44 (Bill cl 36); *cf An Act to establish a Constitution in and for the Colony of Victoria* 1854 (Vic) (Reserved for Her Majesty's Approval), s 37.

[116] P Knaplund, 'Sir William Molesworth's Draft for an Australian Colonies Government Act, 1854', (1929) 13 *Victorian Historical Magazine* 174, 174–5; *Selected Speeches of Sir William Molesworth, Bart, PC, MP, on Questions Relating to Colonial Policy*, (H E Egerton, ed, 1903) 301–4, 398–400.

[117] 5 & 6 Vict c 76 (1842, UK), s 31–3; *Australian Constitutions Act* 1850 (UK), s 33. These provisions continued in force in Victoria under 18 & 19 Vict c 55 (1855, UK), s 3.

[118] Great Britain, Colonial Office, Confidential Print Australia, CO 881/1, nos ix, xiv-xvii.

[119] Great Britain, Parliament, *Hansard's Parliamentary Debates*, HC, 14 June 1855, 3rd series, Vol 138, col 1987.

[120] Thomson to Russell, 5 June 1855, CO 201/492, fol 384–7.

Republicanism

The supposed republican tendency of some provisions in the bill was a recurring theme in the debates. But the link with republicanism was usually oblique or obscure. One of Charles Griffith's reasons for supporting a nominated upper house was that an elected upper house was republican, or would become so, but he provided little explanation.

> As long as they were a colony of Great Britain it would work well enough; but when an independent Government should be established in this country, it would be found impossible to carry out the principle of an Elective Upper House except under a republican constitution.[121]

William Wentworth and James Macarthur both made a similar point in the debates on the New South Wales Constitution Bill, although again without going into detail. They seem to have been influenced by the idea that the powers and functions of the Crown would be curtailed if it no longer had the power of nomination to the legislature.[122] But argument about republicanism took on a slightly different emphasis in the New South Wales constitution debate. There, the proposal for a hereditary element in the new upper house, never favoured by the Victorian framers, provided the context for most of the republican references.[123]

In London, Lord John Russell warned of the effects of responsible government, and the election of Legislative Councils, on the Crown's representative as the one link between the colonies and Britain. 'Thus one by one', he said, 'all the shields of authority are thrown away, and the body of the Monarchy is left exposed to the assaults of democracy.'[124] Governor FitzRoy argued against an elected upper house for New South Wales,

> not only as being a step towards Republican Institutions, and contrary to the Constitutions of the older British Colonies, but as subjecting members in a great degree to popular influences and rendering the Legislative Council as [sic] a body less independent than it would be if Members were appointed by the Crown for life.[125]

So, too, Sir Charles Hotham, in October 1854, after the passage of the Victorian Constitution Act, complained that 'the Constitution consists of three persons but in name, it is a republic in reality.'[126] There are echoes here of Wakefield's comment in 1844 on a plan to make upper houses in colonies elective bodies. 'It is essentially a republican expedient,' he said, 'and alien to the British system of government'.[127] Doubtless many who thought this way had the United States in mind. Some framers were afraid that their bill would

[121] *Argus*, 16 December 1853.
[122] Silvester, op cit (fn 86) 135, 223.
[123] M McKenna, *The Captive Republic: A History of Republicanism in Australia 1788–1995* (1996) 76–9.
[124] Great Britain, Colonial Office, Confidential Print Australia, CO 881/1, no ix, 2.
[125] FitzRoy to Pakington, confidential, 1 November 1852, CO 201/455, 6–7.
[126] Hotham to Grey, separate, 25 October 1854, Great Britain, *Parliamentary Papers* (1855), [1915] 8, 9.
[127] E G Wakefield, 'Sir Charles Metcalfe in Canada', *Fisher's Colonial Magazine*, July 1844, reprinted in E M Wrong, *Charles Buller and Responsible Government* (1926) 244.

have a hostile reception in London if it were too radical or too American.[128]

Most of these comments were sketchy and had little to do with what we would recognise today as republicanism. Wakefield's argument, for example, was merely that the two elected houses would be 'mere echoes of each other', or that they would disagree and that there would be no means for one to prevail over the other. In other cases the real complaint was the weakening of the powers of the Governor and the British government under self-government. This had nothing to do with the position of the Queen, but it was stigmatised as republican because it took control of local affairs away from the Queen's representatives and gave it to the majority in the local parliaments.

Most speakers used republicanism as a theoretical objection or a pejorative epithet, but some thought it was a more immediate threat. La Trobe was very worried about the revolutionary tendencies of immigrants arriving during the gold rush, but the danger seems to have been more apprehended than real.[129] At a meeting in Melbourne on 6 December 1854, just after the Eureka Stockade, someone distributed hundreds of copies of a so-called 'Amended Constitution' calling for the adoption of property taxes, the abolition of property qualifications for the legislature, the leasing of all unalienated Crown land to 'bonâ fide cultivators' in 250-acre farms, replacement of the army and police with a citizen militia composed of the entire adult male population, and the appointment of a 'provisional directory of twelve' to carry out the plan. Yet, in rhetoric at least, the document was hardly republican: it ended with a resounding 'God save our Queen, Victoria!'[130] George Annand's more eccentric proposal for an independent Victorian monarchy under a junior branch of the British royal family was received in the Legislative Council with laughter.[131] So, too, John Dunmore Lang was spreading the idea of an independent Australian republic, and prepared a Declaration of Independence for Victoria, but with little or no effect on the constitutional changes that were actually being made.[132]

The Victorians were nevertheless sensitive about their status in the empire. Members of the Council haggled over the way the bill should refer to Victoria. Was it a 'colony'? Was it 'dependent on and belonging to the said United Kingdom', as the proposed oath of allegiance said? O'Shanassy, for instance, objected to both descriptions; others preferred to call Victoria a 'province'.[133] Stawell's skilful solution was to refer simply to 'Victoria' in the body of the act but add a definition at the end (found in section 62) to deem that this was to mean 'the Colony of Victoria'. The elaborate oath of allegiance was dropped

[128] *Argus*, 1 February 1854, 4 February 1854.
[129] La Trobe to Newcastle, confidential, 17 September 1853, *La Trobe General Correspondence 1840–1869*, State Library of Victoria, MS 650/11, no 511.
[130] H G Turner, *Our Own Little Rebellion: The Story of the Eureka Stockade* (1913) 113–118.
[131] *Argus*, 12 July 1853, 1 November 1854.
[132] Serle, op cit (fn 48) 178–9, 392–3.
[133] Select Committee Report, op cit (fn 24) 52; Webb, op cit (fn 29) 34–5; *Argus*, 1 February 1854.

in favour of a simpler promise, in schedule C of the act, to 'be faithful and bear true Allegiance to Her Majesty Queen Victoria, as lawful Sovereign of the United Kingdom of Great Britain and Ireland, and of this Colony of Victoria'.

OUTSIDE THE COUNCIL

The newspapers wrote at length about the new constitution. The *Melbourne Morning Herald* and the *Argus* published leading articles on the topic throughout the framing process. The *Argus* articles included descriptions of the State and federal constitutions of the United States. These, though, paid attention mainly to electoral systems and the composition of upper houses, and contained little or nothing about their other features, in particular the structure of the executive.

The *Argus* was generally critical of the conservative features of the bill, but in the end gave its overall support. At least one critic thought the paper was treacherously abandoning its earlier ultra-democratic policy:

> the practical test and touchstone of the genuineness of the Argus's democratic principles is the New Constitution; and how has it dealt with this trial question? Why, after a faint show of democratic sentiment, it is actually veering round, and insinuating anti-democratic opinions! Under a pretence of reviewing the various Constitutions of the United States, it is slyly dealing forth small doses of aristocratic principles to its readers! It professes to be hopeless of awakening popular interest in the New Constitution, and it takes advantage of the presumed popular indifference to undermine the popular cause! That very cause of which it still pretends to be the advocate![134]

In giving its eventual support, the *Argus* emphasised the power of amendment as the means of removing objectionable provisions. 'What we have desired has not been so much a perfect system ready-made, as the raw material out of which gradually to construct one for ourselves', it concluded.[135] The *Melbourne Morning Herald*, too, gave somewhat grudging support, following the reduction in the property qualification for the Legislative Council and the removal of the two-thirds majority requirement for constitutional amendments.[136]

The gold-fields saw some political action concerning the constitution, mainly in the form of calls for representation in the legislature. Delegates from a Bendigo meeting sought unsuccessfully to be heard at the bar of the Legislative Council during the constitution debates.[137] Meetings were also held and petitions drafted on the question of state aid to religion, which was the single issue to attract most public comment in the framing process.[138]

[134] 'Caustic', *Anatomy of the Argus* (1854) 13.
[135] *Argus*, 28 September 1855; see also 25 March 1854, 28 July 1855, 16 August 1855.
[136] *Melbourne Morning Herald*, 18 March 1854, 25 March 1854.
[137] Id 2–6 February 1854.
[138] Serle, op cit (fn 49) 151.

Many, though, remarked on the lack of interest. J T Charlton suggested that people might have taken less interest because the old Legislative Council framing the constitution was unrepresentative; Fawkner, because the bill was not available, although there was little noticeable increase in interest once it was published.[139] Foster merely lamented the lack of interest without guessing at causes, although he was at least able to observe that there was probably little violent disagreement with the bill; Dane maintained there was a 'very general feeling amongst the inhabitants of the Colony upon the subject', even if they did not show it in public meetings.[140]

Whatever the other causes, one must have been the absence of the proposal on which so much debate centred in New South Wales: a hereditary element in the new upper house. William Myles put his finger on this in debate in the Victorian Legislative Council.[141] In New South Wales, the initial proposal for a nominated upper house attracted little interest, and the public were roused only after a second select committee proposed the so-called 'bunyip aristocracy'.[142] In Victoria, most of the public did not disagree with the bill, so they did not campaign.

IN LONDON

Because of the limits on the powers of the Legislative Council, enactment in Victoria was not enough to bring the new constitution into force. Section 32 of the *Australian Constitutions Act* 1850 gave the Governors and Legislative Councils of the Australian colonies power to alter the laws in force under the Act, or otherwise, 'concerning the Election of the elective Members of such Legislative Councils respectively, the Qualification of electors and elective Members', and to establish bicameral legislatures. Power to change the electoral districts for the unicameral legislatures, increase the number of members and enact other electoral laws was given by section 11. The legislatures also had the power to alter the financial schedules of the 1850 act, which appropriated funds for salaries, pensions and public worship (section 18).

The concessions the British government had made since 1850 went beyond what had been contemplated in the 1850 act. South Australia and Van Diemen's Land stayed within the limits set in 1850, waiting for the British parliament to extend their powers, while New South Wales and Victoria went ahead, proposing that the British parliament should back them up with complementary legislation. In particular, section 54 of the Victorian *Constitution Act*, as finally enacted, purported to give the legislature power to make laws 'for regulating the Sale, Letting, Disposal, and Occupation of the Waste Lands of the Crown within the said Colony, and of all Mines and Minerals therein.' The power to interfere with the sale or appropriation of Crown lands or the resulting revenue was specifically withheld from the unicameral legislatures

[139] Webb, op cit (fn 29) 43, 85.
[140] Id 1–2, 58.
[141] Id 83.
[142] Silvester, op cit (fn 86) 24.

by section 14 of the 1850 Act, and could not be exercised until section 14 was repealed or amended. For these reasons, the Victorian bill was not to come into force until the repeal of British legislation inconsistent with it.[143]

Independently of the need for British legislation, the enabling provisions of the 1850 act required reservation of the Constitution Bill for the royal assent. La Trobe despatched it in March 1854, but long delays followed in London, exacerbated by the problems of the Crimean War. Victorian politicians grew increasingly impatient. A member of the select committee, Alexander Thomson, went to England to represent Victorian interests and urge rapid action. His task was complicated by several changes of Secretary of State for the Colonies. When Lord John Russell was appointed Secretary of State while travelling in Europe, Thomson went to Vienna to meet him and put the Victorian case for early enactment of the new constitution.[144] The British government's eventual decision was to introduce the Victorian and New South Wales bills into parliament with the minimal changes needed to remove the clauses concerning reservation and disallowance of local legislation. Royal assent was finally given in July 1855.

The British parliament did not enact the bills directly, as it later enacted the Commonwealth Constitution. Instead, it followed the method proposed by the select committees of the New South Wales Legislative Council in 1852 and 1853, and adopted by Victoria.[145] La Trobe sent to London a draft bill by which the British parliament could enable the Queen to give the royal assent to the new constitution. This was not included in the select committee report or discussed in parliament, but was based on a corresponding bill drafted in New South Wales.[146] It used the precedent of a Canadian constitutional change in 1847 which also depended on repeal of British legislation and was implemented by a British act authorising royal assent to a colonial bill.[147] The resulting British act (18 & 19 Vict c 55) merely authorised the Queen to give her assent to the Victorian bill as amended and set out in a schedule; a separate act (18 & 19 Vict c 54) did the same for the New South Wales bill. The act 18 & 19 Vict c 56 repealed the relevant Crown lands legislation. The Queen accordingly assented separately to the British acts and the reserved Australian bills.

There were problems with this plan.[148] The constitution received the royal assent as an act of the Victorian Legislative Council, but the Council, as everyone knew, lacked the power to enact some of its provisions until British

[143] *Constitution Act* 1855 (Vic), s 63.

[144] R H Croll and R R Wettenhall, *Dr Alexander Thomson: A Pioneer of Melbourne and Founder of Geelong* (1937) 45–7; Great Britain, Parliament, *Hansard's Parliamentary Debates*, HC, 17 May 1855, 3rd series, Vol 138, col 732.

[145] Bill for an Act to authorize Her Majesty to Assent to two several Bills of the Legislative Council . . ., *Votes and Proceedings*, Legislative Council (NSW) sess 1852, Vol II, 471; Bill for an Act to authorize Her Majesty to Assent to a Bill of the Legislative Council . . ., *Votes and Proceedings*, Legislative Council (NSW) sess 1853, Vol II, 159.

[146] La Trobe to Secretary of State, 25 March 1854, Public Record Office, Victoria, VPRS 1085/7.

[147] 10 & 11 Vict c 71 (1847, UK).

[148] Great Britain, Parliament, *Hansard's Parliamentary Debates*, HC, 10 May 1855, 3rd series, Vol 138, col 380–1.

legislation was amended. The act retained its Victorian enacting words, but it was no longer in the form in which the Council had passed it, following the British government's amendments. This was a problem which did not arise in the Canadian case of 1847. The Victorian Legislative Council never formally agreed to the amendments made in London.

Reasons for using this method included avoiding an insult to colonies previously told they could write their own constitutions, and avoiding the fuller debate in the British parliament which direct legislation would involve.[149] Another option was to return the bill to Victoria for amendment to meet the British government's wishes, using direct British legislation to give extra powers where needed, but this would have caused even worse delay when the constitution's twelve-month wait for the attention of parliament was already exasperating the Victorians.[150]

The government was happy for these various reasons to give legal effect to what remained bills of the New South Wales and Victorian Legislative Councils, but this left the new constitutions in an awkward position. Were they enactments of the Legislative Councils, as the form of the British acts implied, or of the British parliament? Lord John Russell implied that they depended on the force of the British acts.

> With respect to the objection raised by an hon. Member on a former evening, that even if the Queen gave her assent to those Bills, they would still be null and void, he should only say he conceived that the last clauses of the Bills were sufficient to ensure the accomplishment of the object for which they were intended, because those clauses stated that the measures should take effect in the Colonies from the time the Royal Assent was given to them . . .[151]

That is, the commencement provisions in the two British acts were sufficient to bring the new constitutions into operation and overcome any doubts about the ability of royal assent by itself to give them the force of law.

The remaining uncertainty, and perhaps pique at the British amendments, led to several letters and leading articles in the Melbourne *Herald*.[152] As a result the Legislative Council asked the Attorney-General and the Solicitor-General whether the new constitution possessed the force of law in Victoria.[153] Their brief opinion gave no reasons, but was consistent with Russell's hint.

> We are of opinion that the Bill passed by the Legislature of Victoria, as amended in the schedule to the Act of Parliament, 18 and 19 Vict., cap. 55, possesses the force of law in this Colony. We attribute its efficacy not to the power of the Colonial but of the Imperial Legislature, and the assent given by Her Majesty in Council to the Bill as above amended, such assent having

[149] Cf G Grey to Russell, 30 October 1854, CO 201/390, fol 355.
[150] Great Britain, Parliament, *Hansard's Parliamentary Debates*, HC, 10 May, 14 June 1855, 3rd series, Vol 138, col 381–3, 1956.
[151] Great Britain, Parliament, *Hansard's Parliamentary Debates*, HC, 14 June 1855, 3rd series, Vol 138, col 1957.
[152] *Herald* (Melbourne), 21 January, 22 January, 26 January, 8 February, 12 February, 13 February 1856.
[153] *Argus*, 16 February 1856.

been made by the Imperial Legislature, a condition precedent to the measure coming into operation.[154]

Edward Jenks was still doubtful nearly forty years later, when writing *The Government of Victoria.*[155] But as the Supreme Court noted in *City of Collingwood* v *State of Victoria (No 2)*, echoing Cowen, the *Constitution Act* 1855 is generally regarded as having force of law by virtue of the British act.[156] As Russell pointed out, the terms of the British act were sufficient to bring the new constitution into force. Indeed, the British parliament was the only legislature to pass the constitution in its final form.

CONCLUSION

These events have a twofold significance. First is their place in legal and political history. In framing the new constitutions, the pastoral, professional and business interests that dominated the Legislative Councils of the early 1850s intended to control what they saw as the dangers of democracy. They combined conservative upper houses with freedom for parliament to amend the new constitutions, and thus set the framework for the developments of the 1860s and 1870s, as liberalisation of the franchise and the qualifications of members changed the character of the lower houses. The structure of the upper houses then became a crucial difference between the colonies.

In New South Wales, where resolution of deadlocks was one reason for the adoption of a nominated Legislative Council, it soon become clear that disagreements between the houses would be resolved in the last resort by swamping the upper house. Although the reasons are complex, in New South Wales there was nothing to compare with the protracted crises brought on in the following years by disagreements between the two houses in Victoria. There, the constitution created no legal means for resolving deadlocks between the two elected houses, with disastrous results. The Constitution Act partly constrained and partly reflected the changing political patterns in these events.

The Victorian Constitution of 1855 has another significance, which calls for a different perspective. Even today, after amendment, consolidation and re-enactment, the Victorian *Constitution Act* consists of an accretion of amendments around the vestiges of the nineteenth-century framework. Central provisions in the current Act concerning the parliament, the executive and government finance date back wholly or partly to the 1850s, their source easily overlooked following consolidation in 1975.[157] Their origins are a key to the interpretation of the present State Constitution, and to the understanding of the colonial constitutions that gave the framers of the Commonwealth

[154] *Votes and Proceedings*, Legislative Council (Vic) sess 1855–6, Vol II, no C34.
[155] Edward Jenks, *The Government of Victoria (Australia)* (1897) 202–5.
[156] [1994] 1 VR 652, 659; cf Zelman Cowen, 'A Historical Survey of the Victorian Constitution, 1856 to 1956' (1957) 1 MULR 9, 13.
[157] *Constitution Act* 1855 (Vic), ss 1, 6, 8–9, 16, 20–3, 29, 34, 37, 44–5, 47, 54–8; *Constitution Act* 1975 (Vic), ss 16–18(2)(a), 29–32, 36–7, 39–43, 62–3, 88, 89–93.

Constitution their experience of government. Many issues of the 1850s — the powers and functions of upper houses, safeguards against abuses of majority power, and the relationship between the terms of the constitution and the conventions of responsible government, for instance — are still with us, although modern solutions are sometimes different. The colonial background can deepen our understanding of these features of the modern constitutional landscape.