

Developing a Typology of Resolutions: A comparative study of the power of resolutions in the Australian and United States Senate*

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Abstract Resolutions are a common item of debate in legislative bodies; however, they are a relatively understudied aspect of parliamentary procedure, particularly in relation to their scope and power. Drawing upon the author's experience in the Australian and United States Senate, this article develops a typology of resolutions to understand the impact of resolutions inside and outside of the chamber. The article proposes that resolutions can be categorised as procedural, opinion, or statutory. Examining the resolutions proposed in both Senate's in 2021, the article finds that they have commonalities in procedural and opinion resolutions but have a significant divergence in their statutory capacity and that these differences can be linked to their respective institutional design.

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INTRODUCTION

Resolutions² are a common measure of debate in legislative bodies. Resolutions vary in their power and scope across different systems of government yet are an understudied aspect of parliamentary procedure. In this article I examine the use and powers of resolutions in the Australian and the United States (US) Senate to create a typology of resolutions. This approach enables an examination of how the differences between parliamentary and presidential systems of government is reflected in the powers of resolutions.

To draw comparisons, I examine the institutional design and role of the Australian and US Senate and discuss the procedural history and current practices relating to the consideration of resolutions in both jurisdictions. From this discussion I develop a typology of resolutions based on whether resolutions are binding and who they bind. I propose that resolutions can be categorised as either procedural, opinion, or statutory. Following, I apply this typology to the Australian and US Senate and examine notices of motion from the Australian Senate and resolutions lodged in the US Senate for the year 2021. I find that the Australian and US Senate have commonalities in procedural and opinion resolutions but have a significant divergence in their statutory capacity. Analysing resolutions through an institutional perspective reveals different interpretations of bicameralism and understanding of concepts relating such as the separation of powers that warrant further cross-jurisdictional study of resolutions.

INSTITUTIONAL DESIGN AND THE ROLE OF THE SENATE

Institutional design affects the role and practices of a legislative body.³ Historically, the Australian and US Senate procedures have been influenced by the practices of the United Kingdom's House of Commons and both legislatures faced the challenge of creating rules for their institutions which reflected their unique institutional design.⁴ Among the many differences in institutional design between the Australian and the US

² Throughout this article the author uses 'resolution' as a standard term due to the differences in the nomenclature between the Parliament and Congress regarding resolutions and orders.

³ Rosemary Laing, 'An Introduction to the Annotated Standing Orders of the Australian Senate', *Papers on Parliament* No. 51, 2009; Walter J. Oleszek, Mark, J. Oleszek, Elizabeth Rybicki and Bill Heniff, *Congressional Procedures and the Policy Process* 10th ed. California: SAGE Publications, 2016, p. 26.

⁴ Laing, *An Introduction to the Annotated Standing Orders of the Australian Senate*. Peter J. Aschenbrenner, *British and American Foundings of Parliamentary Science: 1174-1801*. Oxon and New York: Routledge, 2018, pp. 9-31.

Senate, the core distinction is the relationship between the executive and the legislature.⁵ Australia's system of government, although contested, can be classified as a parliamentary system as its executive is chosen from members of the legislature.⁶ In contrast, the US has presidential system with a directly elected executive outside of the legislature. Its system is founded on popular sovereignty and is composed of a set of 'separate but equal' institutions designed to provide a check against the other.⁷ Despite these differences, the Senates (operating in bicameral, federal systems) in both jurisdictions have a similar role, to represent the states and act as a house of a review,⁸ which provides an opportunity for comparison. While the extent to which these functions persist in the modern day is debated, the differences in institutional design and core features of each Senate influence parliamentary procedure.⁹

UNDERSTANDING RESOLUTIONS

Both the Australian and US Senate have been influenced by the procedures regarding resolutions by the House of Commons, where an 'order' refers to the directions a house gives to its 'committees, Members, its officers, the order of its own proceedings and the acts of all persons whom they concern' and 'resolutions' refer to a declaration of

⁵ James Rowland Odgers, 'United States Senate. Report'. The Parliament of the Commonwealth of Australia, 1956, p. 5.

⁶ See for example: Elaine Thompson, 'The 'Washminster' Mutation' in Patrick Weller and Dean Jaensch (Eds.), *Responsible Government in Australia*. Victoria, Australia: Drummond Publishing, 1980, pp. 32-40; Stanley Bach, *Platypus and Parliament: The Australian Senate in Theory and Practice*. Canberra: Department of the Senate, 2003; Steffen Ganghof, 'A new political system model: Semi-parliamentary government'. *European Journal of Political Research* 57(2) 2018, pp. 261-281.

⁷ Daniel Wirls and Stephen Wirls, *The Invention of the United States Senate*. Baltimore and London: The John Hopkins University Press, 2004, p. 2; Roy Swanstrom, *The United States Senate, 1787-1801: A Dissertation on the First Fourteen Years of the Upper Legislative Body*. Washington, D.C.: US Government Printing Office, 1988; Oleszek, et. al. *Congressional Procedures and the Policy Process*, 2016, pp. 18-20.

⁸ Swanstrom, *The United States Senate, 1787-1801: A Dissertation on the First Fourteen Years of the Upper Legislative Body*, 1988; Meg Russell, 'The Territorial Role of Second Chambers'. *Journal of Legislative Studies* 7(1) 2001, 105-118; Harry Evans and Rosemary Laing (Eds.), *Odgers' Australian Senate Practice*. 14th edition. Canberra: Department of the Senate, 2016, p. 1; Harry Evans, 'The Other Metropolis: The Australian Founders' Knowledge of America', *Papers on Parliament* No. 52, 2009, p. 67.

⁹ See for example: Richard Mulgan, 'The Australian Senate as a 'House of Review'', *Australian Journal of Political Science* 31(2) 1996, pp. 191-204 DOI: 10.1080/10361149651184; James I. Wallner, 'The Death of Deliberation: Partisanship and Polarization in the United States Senate'. Lexington Books, 2013.

an opinion of a house.¹⁰ Resolutions in this manner do not have any direct legal impact (unless there is a deriving source of authority such as statute) but may have varying degrees of political effect.¹¹ Over time each institution developed its own practices and for managing resolutions based on the scope of the Senate's power and how resolutions are used to create orders, express a view, or legislate.

In the Australian Senate, the distinction between orders and resolutions remains. Orders are 'requirements that some action be taken by some person or body subject to the direction of the Senate' whereas resolutions are matters of opinion and expressions of a particular view that do not have a binding impact.¹² In effect all orders are resolutions but not all resolutions are orders. Orders of the Senate commonly include orders for production of documents, requirements for Ministers to attend the Senate, referral of matters to committees, and changes to the Standing Orders. Resolutions differ in that they take the form of an expression of a view and often use language such as 'That the Senate notes', 'calls on', 'encourages' or 'condemns' some form of action. Resolutions lack the enforceability mechanisms that accompany Senate orders.

There are a variety of mechanisms that lead to the creation of an order or resolution, the most common being through a notice of motion (notice). Notices are introduced and, if agreed to, become an order or resolution of the Senate. A notice is also categorised according to its business type. Any notice lodged by or on behalf of a minister which pertains to executive action is government business; business of the senate notices include (among others) disallowance motions and referring a matter to a standing committee; and general business is all other business (except for matters of privilege).¹³ For a notice that falls into the order category, if agreed to, it will become either an order of the day and be listed accordingly on the *Notice Paper*, or the change will be incorporated into the Standing Orders. For orders and resolutions that require

¹⁰ Thomas Erskine May. *Erskine May's treatise on the law, privileges, proceedings and usage of Parliament*. 25th edition. United Kingdom: LexisNexus, 2019, p. 475

¹¹ *Erskine May's treatise on the law, privileges, proceedings and usage of Parliament*, p. 475.

¹² Evans and Laing, *Odgers' Australian Senate Practice*, p. 227.

¹³ Department of the Senate. Categories of Business (Senate Brief No. 10), 2021. Accessed at: https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Brief_Guides_to_Senate_Procedure/No_4; Australian Senate Standing Order 58.

concurrence of the lower house, such as establishing a joint committee, a message is transmitted to the House of Representatives for consideration.

In the US Senate there is a similar concept but different procedures. Historically, resolutions are not binding and deal with facts, principles, and opinions, whereas orders are a command of the House.¹⁴ Resolutions are introduced as either a simple resolution, concurrent resolution, or a joint resolution. Simple resolutions are resolutions of one House of Congress; concurrent are of both houses; and joint resolutions are akin to bill.¹⁵ Simple resolutions are 'restricted to the scope of authority of the Senate acting as a single body of Congress' and concurrent resolutions are restricted to scope of authority of both houses acting in unison.¹⁶ In relation to orders, these may come from within resolutions but may also be the product of other mechanisms, such as unanimous consent agreements which 'order' the routine of business for a certain day.¹⁷

Joint resolutions differ as they can be used for legislative purposes or for constitutional amendments. Unlike simple and concurrent resolutions, joint resolutions must be read three times in both houses before presentation to the President for signature to become law.¹⁸ Typically, joint resolutions are only used for the 'incidental, inferior or unusual purposes of legislation', such as making corrections to existing law, providing national thanks to individuals, providing notice to a foreign government of the abrogation of a treaty, approval for minor appropriations, or other similar matters, as both houses agreed that the proper form of general legislation was through a bill.¹⁹ The President can also veto these measures and the Congress can override a Presidential veto with a two-thirds majority in both houses.²⁰ For joint resolutions which propose

¹⁴ Thomas Jefferson, *A Manual of Parliamentary Practice for the use of the Senate of the United States*. Bedford, Massachusetts: Applewood Books 1801, p. 48.

¹⁵ Floyd M Riddick and Alan S, Frumin, *Riddick's Senate Procedure: Precedents and Practices*. Washington, D.C: US Government Printing Office, 1993, p. 1202; Oleszek, et al. *Congressional Procedures and the Policy Process*, p. 399.

¹⁶ Riddick and Frumin, *Riddick's Senate Procedure: Precedents and Practices*, pp. 442 and 1202.

¹⁷ Riddick and Frumin, *Riddick's Senate Procedure: Precedents and Practices* p. 956.

¹⁸ Riddick and Frumin, *Riddick's Senate Procedure: Precedents and Practices* pp. 228-229; US Senate Standing Rule 14.

¹⁹ House of Representatives. *Manual and Rules of the House of Representatives*. section 397.

²⁰ Elizabeth Rybicki, *Veto Override Procedure in the House and Senate*, Congressional Research Service Report RS22654, 26 March 2019.

constitutional amendments, a two-thirds majority of both houses is required before it is transmitted to the states for approval, and it will not have effect unless approved by three-fourths of the states.²¹

Joint resolutions may also be used to veto executive decisions; however, this is relatively recent. Historically, Congress would include mechanisms for legislative vetoes through resolution (simple or concurrent) into statutes where it had delegated some authority to the executive as an oversight mechanism.²² In 1983 the Supreme Court overruled this procedure in the case of *INS v Chada*. In this case, the House of Representatives, through resolution, vetoed a decision of the Attorney-General. The Supreme Court found that this action was 'essentially legislative' as it had the effect of 'altering the legal rights, duties and relations' of persons outside the legislative branch.²³ As result, it did not conform with the requirements of Article 1 of the Constitution (i.e., all legislative proposals are to be read three times and agreed to in both houses) and violated the legislative principles of bicameralism.²⁴

In Table 1 below, I summarise the different forms of business that result in a resolution and the requirements for approval in both institutions. To compare the most analogous items in the two jurisdictions I focus on notices lodged and categorised as government business, business of the Senate and general business for the Australian Senate, and simple, concurrent, and joint resolutions lodged in the US Senate.

²¹ Richard S. Beth, *Bills, Resolutions, Nominations, and Treaties: Characteristics, Requirements and Uses*. Congressional Research Service Report 98-728, 2008.

²² Oleszek, et al. *Congressional Procedures and the Policy Process*. 2016, pp. 345-364; Louis Fisher, 'The Legislative Veto: Invalidated, It Survives'. *Law and Contemporary Problems* 56(4) 1993, p. 277.

²³ Laurence Tribe, 'The Legislative Veto Decision: A Law By Any Other Name'. *Harvard Journal on Legislation* 21(1) 1984, p. 9.

²⁴ United States Constitution Annotated. 'ArtI.S7.C3.1 The Veto Power'. Accessed at: https://constitution.congress.gov/browse/essay/artI-S7-C3-1/ALDE_00001053/.

Table 1. Forms of resolutions in the Australian and US Senate²⁵

Form of Business	Origin	Requirements for approval	Examples
US Senate			
Joint Resolution	Introduced by a member of either House	Three readings in both houses and approval is granted with a simple majority vote. Bills also require approval by the President. *Requires approval in both chambers by a two-thirds majority vote. If successful, ratification requires approval by three-fourths of the states.	Bill Constitutional amendment*
Concurrent resolution	Introduced by a member of either House	Approval by a simple majority in both houses	Matters regarding the use of the Capitol Complex Joint session of Congress Creation of joint committee Sense of Congress resolutions
Simple resolution	Introduced by a Senator	Approval by a simple majority of the Senate	Establishing, adoption or amendment of chamber or committee rules Matters of privilege, censure, contempt, and expulsion Authorisation of response to subpoena Sense of Senate resolution

²⁵ Adapted from: Richard Beth, *Bills, Resolutions, Nominations, and Treaties: Characteristics, Requirements and Uses* 2008 and The Senate, *Standing Orders and other orders of the Senate*, Senate Table Office, Commonwealth of Australia, July 2021.

Australian Senate			
Government business	Introduced by a Senate Minister	Simple majority of the Senate	Introduction of a bill Exemption of a bill from the cut-off period Referrals to the Public Works Committee Affirmative regulation approval
Business of the Senate	Introduced by any Senator	Simple majority of the Senate	Rejection of an item of delegated legislation New committee inquiry
General business	Introduced by any Senator	Simple majority of the Senate *Motions requiring action by both houses such as establishing a joint committee needs approval by a simple majority in both houses	Order for production of documents Introduction of private senators' bills Establishment of a select or joint committee* Instruction to committee Requirement for ministerial attendance or explanation Statements of opinion

FACTORS AFFECTING THE DELIBERATION OF RESOLUTIONS

The methods for the consideration of resolutions differs between the jurisdictions. In the Australian Senate, there is a routine of business which allocates times to debate measures.²⁶ Notices are most commonly dealt with during the 'discovery of formal business'. 'Discovery of formal business' enables a senator to seek leave of the chamber to move their notice without amendment or debate. This procedure was developed to streamline consideration of matters due to a lack of time afforded to general business in the Senate's proceedings.²⁷ By convention, notices moved during discovery should be non-contentious matters which do not require extensive debate. If formality is granted, the notice will either be determined on the voices or by a division. If formality is denied, the notice is still available for consideration, but it can no longer be taken as formal and must be debated. Generally, it remains on the *Notice Paper* until it lapses at the conclusion of a parliament. Notices may also be debated for one hour on a Thursday afternoon, with the party whips agreeing on a roster for allocation of this time. Senators may use other mechanisms such as requesting leave of the chamber or proposing the suspension of standing orders to allow for the consideration of a matter.

There are other factors which constrict notices, including the requirements of Standing orders 66 and 76. These rules state that notices must relate 'to matters within the competence of the Senate'; general business notices must not exceed 200 words unless it is a reference to a committee or order for production of documents; and provide the President of the Senate with the power to remove extraneous material from notices.²⁸ Additionally recent changes to the standing orders restricted the use of general business notices during discovery to the following matters: the consideration of legislation; alteration the conduct of Senate or committee business; or an order for the production of documents.²⁹ All other general business notices can only be considered during the general business debate time slot.

²⁶ Australian Senate Standing Order 57.

²⁷ Laing, *An Introduction to the Annotated Standing Orders of the Australian Senate*, pp. 242-247; Evans and Laing, *Odgers' Australian Senate Practice* p. 234.

²⁸ Australian Senate Standing Order 66 and 76.

²⁹ Australian Senate Standing Order 66.

In the US Senate, the order of business in the Standing Rules is rarely followed, and daily Senate activity is often based on unanimous consent agreements which cast aside the Senate's rules and specify what and how business will be considered.³⁰ The US Senate conducts its session in either legislative or executive session and a procedural motion must be moved to alternate between these sessions. Unlike the Australian Senate, there are no rules regarding the content of resolutions or requirements to meet word limits. However, there are rules regarding the period between the introduction and debate of a resolution, and rules for specific resolutions such as the concurrent budget resolutions.³¹ Senators lodge resolutions at the table and in most cases they are immediately referred to a committee (based on subject matter) by the Senate Parliamentarian.³² Once a resolution is referred to the committee it is up to the committee to decide how to proceed. Resolutions can be reported to the Senate with or without amendment, and with or without a report of the committee, but most commonly resolutions 'die' in the committee space.³³

Consideration of a resolution cannot occur until it is placed on the appropriate Calendar of Business. If a resolution is reported out of committee and to the Senate, it is placed on the Legislative Calendar of Business as a general order (or on the Executive Calendar if it relates to executive business). Items on the Legislative Calendar of Business are not set for a certain day and can be called on for debate in several ways. The most common mechanism is a unanimous consent agreement. Other measures include a 'motion to proceed' which can be moved by any senator to bring on debate of the resolution. Measures may also be 'hot-lined' which in effect bypasses the regular Senate procedures and is put immediately on the calendar. In addition, any Senator may place a 'hold' on a legislative measure. A hold indicates that there is not unanimous consent for a measure, and it will not be called on for the threat of filibuster.³⁴ A further constraint are the procedures that have been developed to prevent filibusters. One

³⁰ Oleszek, et al. *Congressional Procedures and the Policy Process*, pp. 39 and 213; Martin B. Gold, *Senate Procedure and Practice* 4th ed. Lanham, Maryland: Rowman and Littlefield, 2018, p. 11; Riddick and Frumin. *Riddick's Senate Procedure: Precedents and Practices*, p. 1311.

³¹ US Standing Rules 14 and 15; Senate Manual 2014, section 632; Riddick and Frumin. *Riddick's Senate Procedure: Precedents and Practices*, p. 1290.

³² Oleszek, et al., *Congressional Procedures and the Policy Process*, p. 107; US Standing Rule 14.

³³ Gold, *Senate Procedure and Practice* p. 78.

³⁴ Gold, *Senate Procedure and Practice*, p. 87.

mechanism used is cloture, which limits the time for debate and can also set a time for when a debate occurs. For cloture to be agreed to a three-fifths majority is required. Therefore, while some resolutions only need a simple majority to pass, in effect unanimous support or a three-fifths majority is required to bring on the debate on the resolution.³⁵

DEVELOPING A TYPOLOGY OF RESOLUTIONS

Resolutions can be examined in a variety of ways. The extant literature examines resolutions at one level, in terms of their function as it relates to accountability, legislative, and political purposes. For example, there is analysis on no-confidence motions and the accountability function³⁶ and literature which examines resolutions through lenses such as agenda setting, collective decision making and behavioural analysis, and voting analysis frameworks.³⁷ The literature also examines resolutions through a 'quasi-legislation' perspective in order to understand the role and power of resolutions when they do not have a statutory purpose, such as their ability to influence public opinion or the behaviour of other legislative bodies or the executive.³⁸ Literature from the fields of rhetoric and debate seek to understand the purpose of parliamentary

³⁵ Valerie Heitshusen and Richard S. Beth, *Filibusters and Cloture in the Senate*, Congressional Research Service Report RL30360, 7 April 2017.

³⁶ David Blunt, 'Responsible government: ministerial responsibility and notions of 'censure'/'no confidence''. *Australasian Parliamentary Review* 19(1) 2004, pp. 71-87; Laron K. Williams, 'Unsuccessful Success? Failed No-Confidence Motions, Competence Signals, and Electoral Support'. *Comparative Political Studies* 44(11) 2011, pp. 1474-1499; John D. Huber, 'The Vote of Confidence in Parliamentary Democracies'. *American Political Science Review*, 90(2) 2014, pp. 269-282.

³⁷ Amie Kreppel and Michael Webb, 'European Parliament resolutions—effective agenda or whistling into the wind?'. *Journal of European Integration* 41 pp. 383-404 DOI: 10.1080/07036337.2019.1599880; Samuel E. Finer, Hugh Berrington, and David Bartholomew, *Backbench Opinion: In The House Of Commons 1955-59*. Oxford: Pergamon Press, 1961; Mark Franklin and Michael Tappin, 'Early Day Motions as Unobtrusive Measures of Backbench Opinion in Britain'. *British Journal of Political Science* 7(1) 1977, pp. 46-69; Sarah Childs and Julie Withey, 'Women Representatives Acting for Women: Sex and the Signing of Early Day Motions in the 1997 British Parliament'. *Political Studies* 52 2004, pp. 552-564; Daniel Bailey and Guy Nason, 'Cohesion of Major Political Parties'. *British Politics* 3 2008, pp. 390-417; Roel Popping and Rafael Wittek, 'Success and Failure of Parliamentary Motions: A Social Dilemma Approach'. *PLoS ONE* 10(8) 2015, pp. 1-18.

³⁸ Jacob Gersen and Eric Posner, 'Soft Law: Lessons from Congressional Practice'. *Stanford Law Review*, 61(3) 2008, pp. 573-628.

discourse.³⁹ Within this subfield a typology has developed which classifies resolutions as being of facts, values, or policy.⁴⁰

This literature is useful in thinking about broader questions of the role of the Senate and how parliamentary procedure supports the functions of the institution but it does not examine the nature of resolutions and there has yet to be a comprehensive work of this sort in either jurisdiction. This gap in the literature provides an opportunity to study resolutions at a different level. Before comparing the nature of resolutions in the Australian and US Senate there first needs to be a mechanism to enable effective analysis of the similarities and differences between their use in the two systems, and as such I propose a new typology of resolutions. Typologies are an accepted heuristic tool in political science that enables comparison.⁴¹ The limitations of typologies are well known; however, these limitations do not invalidate this method. I seek to understand substance of resolutions in terms of their powers to draw comparisons of resolutions in a parliamentary and presidential system of government.

I propose a new typology of resolutions as follows: procedural resolutions, opinion resolutions, and statutory resolutions. In creating these categories I have examined examples of resolutions from both the Australian and US Senate and sought to analyse the substance of the resolution based on its effect and have reflected the historical and modern understandings of resolutions in the typology. As discussed above, the parliamentary and congressional texts describe resolutions according to the effect it

³⁹ Cornelia Ilie, 'Parliamentary discourse and deliberative rhetoric' in Pasi Ihalainen, Cornelia Ilie, and Kari Palonen, K. (Eds.). *Parliament and Parliamentarianism: A comparative history of a European concept*. New York: Berghahn Books, 2016, pp. 133-146; Marion Deville and Christopher Lord, 'Parliaments as places of discourse' in Cyril Benoit and Oliveer Rozenberg (Eds.). *Handbook of Parliamentary Studies: Interdisciplinary approaches to legislatures*. United Kingdom and United States of America: Edward Elgar Publishing, 2020, pp. 465-479.

⁴⁰ Chris Harper, 'Running Topicality on Trichotomy'. *Journal of International Public Debate Association* 7(1) 2015, pp. 1-6; Scott Stroud, 'Habermas and Debate Theory: A Putative Link between the Theory of Communicative Action and Traditional Resolutional Typologies'. Paper presented to the National Communication Association/American Forensics Association Conference on Argumentation, Alta, UT, 1999; Geoffrey Brodak and Matthew Taylor, 'Resolutions of Fact: A Critique of Traditional Typology in Parliamentary Debate'. *The Journal of the National Parliamentary Debate Association* 8(1) 2002, pp. 24-34.

⁴¹ Colin Elman, 'Explanatory Typologies in Qualitative analysis' in David Byrne and Charles Ragin (Eds.) *The SAGE handbook of case-based methods*. United Kingdom and United States of American: SAGE publications, 2009, pp. 121-132; David Collier, Jody LaPorte, and Jason Seawright, 'Putting Typologies to Work: Concept Formation, Measurement, and Analytic Rigor'. *Political Research Quarterly* 65(1) 2012, pp. 217-232; Matthias Lehnert, 'Typologies in social inquiry' in Thomas Gschwend and Frank Schimmelfenning, F. (Eds.). *Research Design in political science: how to practice what they preach*. New York: Palgrave Macmillan UK, 2007, pp. 62-83.

has on those within the remit and the varied statutory and constitutional powers the Senate. Below, I define each type of resolution and provide an example from the Australian and US Senate.

Procedural resolutions are those concerned with the regulation of activity in a House of Parliament (or Congress) and are binding on persons and groups within the remit of the Senate's and/or the parliament's power. These resolutions include those which determine the practice and procedure of the Senate and its committee, enable acts to occur within the chamber or parliamentary complex, and other similar matters.

An example from the Australian Senate:

To move on the next day of sitting—That the following bill be introduced: A Bill for an Act to require reporting on electric vehicles, and for related purposes. *Electric Vehicles Accountability Bill 2021*.⁴²

An example from the US Senate:

... That paragraph 11 of rule XXVI of the Standing Rules of the Senate is amended—...

(c) Each committee report shall also contain a detailed analytical statement as to whether, and the extent to which, the increased budget authority, outlays, or revenue produced by the enactment of the bill or joint resolution into law may have an inflationary impact on prices and costs in the operation of the national economy...⁴³

Opinion resolutions are resolutions that express a view of the House and often deal with matters of fact, values or opinions and are not binding on the Senate or those subject to its powers. These resolutions often call for some sort of action, policy or otherwise.

An example from the Australian Senate:

⁴² *Journals of the Senate*, No. 100, Tuesday, 15 June 2021, p. 3515.

⁴³ Senate Resolution No. 327, 117th Congress.

That the Senate— (a) notes:

(i) the horrific mouse plague continues to significantly impact multiple states, including South Australia, Queensland, New South Wales (NSW) and Victoria, costing farmers millions and hurting regional communities...⁴⁴

An example from the US Senate:

That the Senate—

(1) designates November 17, 2021, as ‘National Butter Day’; and

(2) encourages the people of the United States to celebrate National Butter Day with their favorite buttery dishes and baked goods.⁴⁵

Statutory resolutions are those which directly impact on legislation and are binding according to statute. These resolutions either create a new bill or allow or disallow some form of statutory executive action.

An example from the Australian Senate:

That the Industry Research and Development (Beetaloo Cooperative Drilling Program) Instrument 2021, made under the *Industry Research and Development Act 1986*, be disallowed [F2021L00567].⁴⁶

An example from the US Senate:

...That Congress disapproves the rule submitted by the Department of Labor relating to ‘COVID-19 Vaccination and Testing; Emergency

⁴⁴ *Journals of the Senate*, No. 101, Wednesday, 16 June 2021, pp. 3571-3572.

⁴⁵ Senate Resolution No. 453, 117th Congress.

⁴⁶ *Journals of the Senate*, No. 101, 16 June 2021, p. 3562.

Temporary Standard' (86 Fed. Reg. 61402 (November 5, 2021)), and such rule shall have no force or effect.⁴⁷

These categories provide a basis for comparison, however, in any typology, questions naturally arise about the extent to which the measures can neatly fit into one category or if the categories are appropriate. Resolutions may also serve more than one 'purpose' such as serving the accountability, political or legislative functions that have been studied in the existing literature. For example, resolutions that fall into the 'procedural' category, such as establishing a new inquiry, may serve all three purposes. The terms of reference of a committee may seek to scrutinise executive action, however politically motivated this may be, and the end goal of the committee may be to propose new legislation in order fix a policy problem. Similarly, a statutory resolution, such as one disallowing executive action, could be viewed through a lens of its legislative and accountability objectives. These issues are beyond the scope of this article. Below I apply this typology to the Australian and US Senate.

ANALYSING RESOLUTIONS IN THE AUSTRALIAN AND US SENATES

While many measures in Parliament and Congress can result in a resolution, I have limited the scope of my analysis to those resolutions lodged as notices in the Australian Senate and resolutions lodged in the US Senate, to analyse resolutions that are the most analogous between the two institutions. In the application of the typology, as discussed above, there are difficulties in classifying resolutions into one category. It is common in both jurisdictions for resolutions to contain a preamble which is an opinion but also contain a procedural effect such as changing a standing order or requiring the production of documents. Similarly, resolutions that are opinion in nature can contain a procedural element such as requiring transmission to the lower house. In these instances, I have applied the categorisation based on the substantive effect of the resolution. For example, orders for production of documents in the Australian Senate with an 'opinion' preamble have been classified as procedural.

Using the US Federal legislation database and the Australian *Journals of the Senate*, I have examined notices of motions lodged in the Australian Senate and resolutions

⁴⁷ Senate Joint Resolution No. 29, 117th Congress.

lodged in the US Senate for the period 1 January 2021 to 31 December 2021 and their subsequent outcomes. In this period, 540 and 544 were considered in the US Senate and the Australian Senate respectively. I summarise my findings in Table 2 and 3 below.

Table 2. Resolutions by category in US Senate (1 January 2021 to 31 December 2021)⁴⁸

Outcome	Category		
	Procedural	Opinion	Statutory
On the Legislative Calendar	2	6	2
With a committee	32	198	26
Agreed to	53	215	N/A
Became Law	N/A	N/A	4
With the House of Representatives	1	0	1
Total	88	419	33

Table 3. Resolutions by category in the Australian Senate (1 January 2021 to 31 December 2021)⁴⁹

Outcome	Category		
	Procedural	Opinion	Statutory
On the <i>Notice Paper</i>	11	59	8
Agreed to	156	112	5
Agreed to by the House of Representatives	3*	3*	N/A
With the House of Representatives	N/A	1*	N/A

⁴⁸ Figures for Tables 2 and 3 current as of 14 January 2022.

⁴⁹ Total does not equal 544 as notices can be split. Where a notice has been split and the outcome differs for each section, I have recorded these as separate outcomes. If the question was split and all sections were agreed to, I have recorded this as a single outcome. *These numbers are a subset of the total resolutions considered.

Negated	45	48	12
Withdrawn	15	3	74
Ruled out of order	1	N/A	N/A
Did not proceed	1	N/A	N/A
Total	229	222	99

As shown in Table 2 and 3, procedural and opinion resolutions are the most common form of resolutions in both jurisdictions. Statutory resolutions are the least used form. Opinion resolutions greatly outnumber procedural resolutions in the US Senate, whereas in the Australian Senate there were only seven more procedural than opinion resolutions. This is most likely due to recent changes in the discovery of formal business which limits general business and makes up the majority of the opinion category.

Procedural and opinion resolutions are used in similar ways in both institutions although differences emerge in the number of resolutions that reach floor consideration. As noted above, in the Australian Senate there is a set time to consider resolutions, and this is why the majority of resolution reach some form an outcome. For example, a total of 105 resolutions were negated. In contrast, in the US resolutions are referred to committees before being eligible for Senate consideration. For opinion resolutions 198 (47%) are currently with a committee. The rate is slightly lower for procedural resolutions, with 36% remaining in a committee. None of the studied resolutions have been 'negated'. One reason for this occurrence reflects the design of the US Senate being a deliberately slow-moving institution.

Another difference in the classification of resolutions relates to use of resolutions to request documents (generally from the executive). In the Australian Senate, these are known as orders for production of documents. As such resolutions are binding given the powers of the Senate and its relationship with the executive, they have been classified as procedural. The US Senate operates differently in that the Senate and its committees have been given the power to subpoena persons and information.⁵⁰ Requests for documents in resolutions are therefore 'opinion' as they are not binding

⁵⁰ Jane Hudiburg, *A Survey of House and Senate Committee Rules on Subpoenas*, Congressional Research Service Report R44247, 12 November 2021; Todd Garvey, *Congressional Subpoenas: Enforcing Executive Branch Compliance*, Congressional Research Service Report R45653, 27 March 2019.

in the same manner as a subpoena. This could be seen as a reflection of the different institutional design where in the Australian Senate the government is accountable to the parliament in a manner that is different to the US Senate where the executive (namely the president) is accountable to the public. Resolutions can be used as enforcement mechanisms for subpoenas, for example resolutions are used to find persons in contempt of the Senate and/or Congress.⁵¹ It is the subpoena that has the power to order the information and the Senate the power to enforce and resolve compliance.

The core difference between the Australian and US Senate emerges in the use statutory resolutions. While both use statutory resolutions as an oversight mechanism of executive action, there are substantial differences in the numbers of these resolutions. As indicated in Table 2 and 3, the US Senate introduced 33 statutory resolutions compared with 99 in the Australian Senate. For the US, 26 of these are with a committee, 4 have become law, 2 are on the legislative calendar and 1 is with the House of Representatives for consideration. This is a stark contrast to the Australian Senate where 74 of the resolutions were withdrawn, 5 agreed, 12 negatived and 8 remain on the *Notice Paper*.

One reason for the abundance of withdrawn statutory resolutions is that many disallowance notices are lodged as 'protective' notices. This occurs due to procedures prescribed in the *Legislation Act 2003* which states if a disallowance notice is not lodged within 15 sitting days of the instrument being tabled, the Senate is not able to take any other action. Protective notices, particularly from the Chair of the Scrutiny of Delegated Legislation Committee (SDLC), provide time for the SDLC and the Senate to consider the subordinate legislation in detail. It is common that through the SDLC's consultation with ministers and executive agencies that concerns about subordinate legislation are allayed and the notice can be withdrawn.⁵²

The US Senate does not have a similar committee. A joint resolution will be lodged to disallow statutory action and then it is referred to a subject matter committee for consideration. Examining this through an institutional perspective reveals differences in the presidential and parliamentary systems. In the US, the President does have some law-making authority, but the legislative powers rest with the Congress, whereas in

⁵¹ Garvey, *Congressional Subpoenas: Enforcing Executive Branch Compliance*.

⁵² Evans and Laing, *Odgers' Australian Senate Practice*, p. 440.

Australia's parliamentary system, the executive controls the legislative agenda and has greater powers to make delegated legislation.

There are also different requirements for the approval of statutory resolutions in the two jurisdictions. First, the US Congress has the power to make legislation via joint resolution. Second, prior to the finding of the Supreme Court in the case of *INS v Chada*, executive oversight was enriched in individual pieces of legislation through simple or concurrent resolution.⁵³ *INS v Chada* invalidated this method and now joint resolutions must be used to disapprove executive action undertaken according to statute. In contrast, the Australian Senate does not use resolutions as a law-making vehicle but rather as an accountability mechanism through the disallowance process, in which action of only one House of Parliament is required. This process is governed by the *Legislation Act 2003* (and its predecessors since 1904). The rationale for a one house veto is that legislation requires majority support in the two houses. If one house disagrees to a proposal it therefore does not have the required 'double' majority. This reflects the broader institutional design of the Senate.⁵⁴

The *INS v Chada* ruling provides a different interpretation of bicameralism within the context of a presidential system. For example, Tribe, wrote:

...[the] Constitution's rejection of parliamentary government, is to ensure that federal executive power is located under the ultimate direction of a single President chosen by and responsive to a national electorate. Such power is not to be dispersed among a series of ministries selected from the National Legislature, each headed by a congressman answerable only to a local constituency.⁵⁵

This argument reveals the different conceptions of the 'separation of powers' and the institutional design of the executive and legislature in parliamentary and presidential systems of government. In contrast, Fisher argued that the legislative character of simple and concurrent resolutions could be in order if the President had 'consented to the coerciveness' of the resolution by signing into law a bill which contained this mechanism.⁵⁶ In examining whether a similar situation could arise in Australia's

⁵³ Oleszek, *Congressional Procedures and the Policy Process*, pp. 345-346

⁵⁴ Evans and Laing, *Odgers' Australian Senate Practice*, pp. 429-431

⁵⁵ Tribe, 'The Legislative Veto Decision: A Law By Any Other Name'. 1984, p. 9.

⁵⁶ Fisher, *The Legislative Veto: Invalidated, It Survives*, p. 277.

parliamentary system, Gibbs argued that a similar case would be unlikely to come before the Australian courts, given ‘...the theoretical dominance of the legislature in Australia - theoretical because in fact the executive often controls it - that it has never even been suggested that legislation might infringe the executive power’.⁵⁷ This example highlights one element of the different relationship between the legislature and the executive in presidential and parliamentary systems through an examination of resolutions.

CONCLUSION

Resolutions are a common item of debate in the Australian and the US Senate however they have been understudied. I have examined resolutions in the Senate of both jurisdictions and have proposed a new typology of resolutions based on the nature of the resolution and the extent to which and who the resolution binds. The typology consists of procedural, opinion, and statutory resolutions. All three forms are present in the Australian and US Senate. Procedural and opinion resolutions are the most common resolutions in both institutions; however, more resolutions reach an outcome in the Australian Senate given the expedited procedures for their consideration. Statutory resolutions are the least common resolution in both jurisdictions. Analysis of these resolutions has revealed interesting dynamics and interpretations of bicameralism and concepts relating to the separation of powers and accountability that warrant further study of resolutions in presidential and parliamentary systems.

⁵⁷ Sir Harry Gibbs, 'The Separation of Powers – A Comparison'. *Federal Law Review* 17 1987, pp. 151-161.