innovatory elements (such as the inclusion of peoples’ rights and individual duties alongside civil and political rights and economic social and cultural rights) and linking this to African values as a distinctive contribution to the development of human rights discourse. Similar approaches were also taken to the—at best—idiosyncratic fashion in which civil and political rights were couched. In retrospect, these writings have the feel of an apologia about them—seeking to explain away features which might otherwise be considered open to question. The opening chapters of this work (which I suspect were felt to need less by way of revision) retain this quality. But this is now matched—and overtaken—by the frank robustness of some of the subsequent criticisms of both the structural and normative elements of the Charter, and this has been made possible by the generally balanced and nuanced way in which the Commission has interpreted and developed it. When the Commission is doing so well in making sense out of the Charter’s provisions, it is not so necessary to explain away its textual shortcomings. It is, then, perhaps not surprising that it is in precisely those areas where the Commission has had little to say (for example, as regards the content of peoples’ rights and individual duties) that the voice of the apologist still seems strongest (eg the title to Chapter IV remains ‘The Duties of Individuals: Much ado about nothing?’, not to mention the claim at 414 that Article 27(2) of the Charter should be seen as protecting rather than potentially limiting the enjoyment of individual rights). Likewise, the chapter devoted to the Protocol establishing the African Court of Human and Peoples’ Rights is perhaps less critical than might have been expected. On the whole, however, one can almost ‘hear’ the maturing of both the author’s critical voice and, through it, of the Charter system as one reads through this work.

Arguably, the book would have profited from some rigorous pruning, or at least restructuring. There are very valuable sections detailing the approach of the Commission to reporting and communication procedures in Chapter VII as well as some valuable explorations of the developing contours of civil and political rights in Chapter III but these do get rather submerged by the material that surrounds them. The rather lengthy and speculative discourses on peoples’ rights, however, are less convincing at times. Some may also question aspects of the discussion regarding the possibility of general derogations being made to the Charter (where it is concluded that rebus sic stantibus and/or the doctrine of necessity might in certain limited circumstances permit derogations). There are also some forays into comparative analysis of both practice and procedure with the UN Human Rights Committee, the European Court of Human Rights and the Inter-American Commission and Court. As a result the book is rather unwieldy. But it is certainly a most valuable contribution to the literature and—if made suitably accessible—will be of considerable practical value as working tool for those involved in human rights promotion and protection in Africa, and beyond.

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Federalism and Second Chambers: Regional Representation in Parliamentary Federations—the Australian Senate and German Bundesrat Compared By WILFRIED SWENDEN [Peter Lang Brussels 2004. ISBN 90–5201–211–3 423pp. £32 (Pbk)]

In long-standing democracies, not to mention the newer democracies, the structure and role of Upper Houses are again on the agenda. This book makes an empirical study of two of the older federal Upper Houses in the world, the German Bundesrat and the Australian Senate. In doing so, it makes a valuable contribution not just to empirical political science, but also to constitutional law.

That having been said, the detailed study, which is at the heart of the book, will probably be of more interest to political scientists. The author designed and distributed a questionnaire which was sent to Australian Senators and leaders of political parties in the Australian states. He analyses in some detail the behaviour of the Australian Senate in dealing with four major government
Bills in the 1990s. Such detailed information, while not perhaps belonging to the sphere of (comparative) constitutional law, has nevertheless the potential to inform constitutional lawyers of the consequences of institutional design in federations. Looking at the Bundesrat, the author takes a more broad-brush view, dividing the period under discussion—the whole period of the Bundesrat’s existence since its creation in 1949—into a number of eras by reference to the identity of the ruling coalition in the federal sphere. Whether fairly or not, one has the impression that perhaps by this stage the author’s eagerness to finish his doctoral thesis—for that is what the book is based on—or a word limit came to the fore. That is something of a shame, as a comparison of the Bundesrat’s working at the same level of detail as was undertaken for the Australian Senate might have yielded even more material on which the author could have based further conclusions. It would also have helped to make the German Bundesrat, an institution which is not as well known as it could be in the English-speaking world, more accessible to those who are unfamiliar with its day-to-day workings. But the book is nevertheless worth reading for the conclusions it draws, and its novel comparison. The author has in fact chosen his comparison well. Both the German Bundesrat and the Australian Senate have powerful Upper Houses in relatively homogeneous federations. Each country has a Westminster-style parliamentary democracy in which the Lower House determines the composition of the government. In both Germany and Australia, the Upper House does not merely represent the States, but is also a House of review, as the government must seek its approval for proposed legislation. However, the powers of the Australian Senate and those of the Bundesrat do not precisely coincide, as the latter is limited to a suspensory veto only over many Bills. Crucially, however—and this is principally what makes a comparison worthwhile—the method of selection also differs. The Bundesrat consists of delegations by the governments of the German Länder, while the Australian Senate is directly elected by proportional representation, each State forming one electorate for the purpose and having the same number of Senators. We might expect that the Bundesrat would accordingly be more responsive to the needs of the States (or their governments at least) than the Australian Senate. But this cannot be assumed without empirical work. The book confirms that this is in fact so. At the same time, it qualifies that finding in important respects by pointing out that lobbying by Senators from smaller States and other mechanisms can in fact result in expression being given to States’ interests on important Bills. The picture is not all black and white, as perhaps Professor Crisp painted it in dismissing that argument as ‘a desperate resort’.¹

In Australia, we are in fact used to the proposition that the Senate may have had some success as a house of review, but has failed as a States’ House. (Indeed, it is noteworthy that it is the smaller States’ seats in the Lower House, not the Upper, which caused the major parties at the recent federal election to devote considerable attention to smaller States such as South Australia). The book enables us to see, in a comparative framework, the workings of a more federal Upper House, while at the same time considering, using detailed empirical evidence, the aforementioned proposition about the Australian Senate. The author makes an acute observation linking the strength of Upper Houses as representatives of the States to the strength of federalism. ‘Paradoxically’, he points out, ‘without a Bundesrat, German federalism might have remained more decentralised’,² as the existence of an effective States’ House increases the willingness of the States to permit powers to be exercised by the centre. On the other hand, its selection by governments can reduce the Bundesrat’s effectiveness as a house of review. This is not so much because of any ‘democratic deficit’, but because the government majority in the Lower House may be faced with a merely obstructionist opposition majority in the Upper House. Clearly, there is a tension between roles here.

² Swenden Federalism and Second Chambers: Regional Representation in Parliamentary Federations—the Australian Senate and German Bundesrat Compared (Peter Lang Brussels 2004) 347.
The author rightly points out that the method of election of the Australian Senate renders it most unlikely to be dominated by either the government or the opposition. The Bundestag, on the other hand, is fairly frequently dominated by the opposition. The book highlights the great difference that this makes to the workings of the two polities. Unlike the founders of the Australian Constitution, to whom the electoral system to be adopted for the Senate was so unimportant that they left it to be regulated by future Parliaments, the author shows that this difference is a result not merely of the choice to have the Australian Senate elected (in which the Australian founders anticipated the change to direct election of the Senate in the United States), but also of its method of election. This reminds us that details of electoral systems are by no means unimportant in a democracy, and that constitutional lawyers neglect them at their peril.

The author does not express a final view on which model of Upper House he finds preferable. That, to some extent, is of course a matter of taste; but the book’s conclusions suggest that, in a relatively homogeneous federation, the representation of State interests can be assured only by adopting an Upper House which is nominated by State governments and thus unelected, on the German model. This is a price which not everyone will be prepared to pay, especially as, for the reasons given earlier, it limits the effectiveness of the Upper House in its other role as a house of review. But in the German system, in which, as the author points out, the Constitution requires a considerable degree of cooperation between the centre and the regions, such an arrangement may make more sense than in settings like the Australian, in which no such degree of cooperation is required. Certainly, though, the evidence of the book is that elected members of an Upper House cannot be expected to take much heed of State interests—although they do sometimes—if their voters do not vote along State lines, which in homogeneous federations will be the exception rather than the rule.

Finally, the book is marred not only by its adoption of American spelling conventions—an odd choice for a work emanating from St Antony’s College Oxford—and its lack of an index, but by one or two factual errors which occur to the informed Australian reader and should have been eliminated by running the manuscript past an Australian. The author refers to the South Australian Upper House in 1850, although such a beast did not exist until 1857. One is startled by the information at page 108 that certain Australian colonial Upper Houses were elected by universal male suffrage, when it is well known that a number of them never were, as they did not lose their property qualifications until well into the twentieth century, and the Upper House of New South Wales was not popularly elected until the mid-1970s. Perhaps Lower Houses were meant here. And the name of the Australian Prime Minister, no less, is spelt incorrectly at page 244.

Despite these quibbles, and the fact that further work on the topic could have been done, the book remains an interesting contribution at the boundary of constitutional law and political science. It is to be hoped that further similar comparisons of Upper Houses will be made. The book finishes with a survey of various other Upper Houses, and while it is too general to be of much more than informative value, it points out the direction in which future studies can be made.

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3 Ibid 75.