

REVIEW ESSAY

**A GREAT SWINDLE?:
AUSTRALIA'S CONSTITUTION AND THE PEOPLE:
ORIGINS AND AMENDMENT**JAMES A THOMSON^{*}

The Great Constitutional Swindle: A Citizen's View of the Australian Constitution by PETER BOTSMAN (Australia: Pluto Press, 2000) pp xiii + 231. Recommended retail price \$24.95 (ISBN 1 86403 0623).

So it was that a flawed text [the Commonwealth Constitution¹], written by a relatively unknown Australian [Andrew Inglis Clark²] and authorised by a minority of Australians [via election of delegates to the 1897-1898 Constitutional Convention³ and 1898, 1899 and 1900 referenda⁴], became the frozen constitution of Australia for 100 years.

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1 *Commonwealth of Australia Constitution Act*, 63 & 64 Vict., ch. 12 (1900) (UK). See also note 74 *infra* (discussing post-1900 amendments, via s 128 referendums, to the Constitution and possibility that the United Kingdom Parliament, via s 15 of the *Australia Act* 1986 (UK), may have amended s 128 of the Constitution).

2 See note 13 *infra* (providing biographical details).

3 See note 83 *infra*.

4 See *ibid*.

5 P Botsman, *The Great Constitutional Swindle: A Citizen's View of the Constitution*, Pluto Press (2000), p 58. "[I]n reality, the constitution was never approved by a majority of Australians; it was in large part written by a man whose ideas and principles were never acknowledged or articulated; its imperfections were glossed over; and, worst of all, it could only be changed with the greatest of difficulty". *Ibid*, p 50.

1. INTRODUCTION

Juxtaposition of antagonists is an intriguing phenomenon.⁶ Of course, even in Australian federation history⁷ that is not a novel experience.⁸ Indeed, despite

6 Compare, for example, historiographical controversies over post-Civil War (1861-1865) Reconstruction (1865-1877) in the United States. See, for example, E Foner, "Reconstruction Revisited" (1982) 10(4) *Reviews in American History* 82; E Foner, *Reconstruction: America's Unfinished Revolution 1863-1877*, Harper & Row (1988) pp xix-xxvii (describing various historical interpretations of Reconstruction; their revision and subjugation; and emergence of new interpretations). For a Canadian example see G Baker, "The Province of Post-Confederation Rights" (1995) 45 *University of Toronto Law Journal* 77. See also note 13 *infra* (providing references to similar historiographical controversies over the origins of the 1787 U.S. Constitution and 1867 Canadian Constitution). See generally R Gordon, "Historicism in Legal Scholarship" (1981) 90 *Yale Law Journal* 1017.

7 See generally S Macintyre, "Did the People Make Laws?" in I Copland and J Rickard (eds), *Federalism: Comparative Perspectives from India and Australia*, Manohar (1999), pp 209-14 (summarising historiographical controversies concerning the people's relationship to the Australian Constitution's origins). See also G Winterton, H P Lee, A Glass and J A Thomson, *Australian Federal Constitutional Law: Commentary and Materials*, LBC Information Services (1999), pp 906-10 (bibliography of scholarship on "Historical Background" to the Australian Constitution). For the continuing flow of scholarship see, for example, B Mathews, *Federation*, Text Publishers (1999); K Dermody, *A Nation at Last: The Story of Federation*, AGPS Press (1997); R Evans, Clive Moore, K Saunders and B Jamison, 1901: *Our Future's Past: Documenting Australia's Federation*, Macmillan (1997); R Russell and P Chubb, *One Destiny: The Federation Story - How Australia Became A Nation*, Penguin Books (1998); S Foster, S Marsden and R Russell (compilers), *Federation: The Guide to Records*, Australian Archives (1998); H Irving (ed), *The Centenary Companion to Australian Federation*, Cambridge University Press (1999). Also a new specialist journal (of 8 issues) is being (June 1998 to December 2001) published: *The New Federalist: The Journal of Australian Federation History*. Like the High Court (see, for example, *Cole v Whitfield* (1988) 165 CLR 360), does this represent a turn to history? Compare B Friedman, "The Turn to History" (1997) 72 *New York University Law Review* 928 (describing and analysing this turn in American constitutional law and scholarship); L Kalman, "Border Patrol: Reflections on the Turn to History in Legal Scholarship" (1997) 66 *Fordham Law Review* 87 (evaluating legal scholarship's use of historical scholarship and the difference between "lawyers' legal history" and "historian's legal history"). See also M Flaherty, "History 'Lite' in Modern American Constitutionalism" (1995) 95 *Columbia Law Review* 523 (criticising quality of constitutional theorists' scholarship and advocating greater depth, breadth and credibility for constitutional history); M Flaherty, "History Right?: Historical Scholarship, Original Understanding, and Treaties as 'Supreme Law of the Land'" (1999) 99 *Columbia Law Review* 2095 at 2097-105 (outlining rigorous historical standards and methodology required in such legal and constitutional scholarship); S Sherry, "Using and Misusing History" (1997) 25 *Reviews in American History* 337 (urging lawyers and historians to engage in "serious and productive dialogue" and to recognise and utilise the difference between understanding and using history); Symposium, "The Critical Use of History" (1997) 49 *Stanford Law Review* 1021-222 (discussing and applying numerous theories and methodologies for undertaking constitutional history); Symposium, "Fidelity in Constitutional Theory" (1997) 65 *Fordham Law Review* 1247, 1587-701 ("Fidelity through History").

8 Similar historiographical debates occur concerning the origins of the USA and Canadian Constitutions. On the United States see J Thomson, "Looking For Heroes: History, Framers and the Australian Constitution" (1996) 3 *Deakin Law Review* 89 at 95 n 15 (citing references). On Canada see, for example, C Moore, *1867: How the Fathers Made a Deal*, McClelland & Stewart Inc (1997); R Vipond, *Liberty and Community: Canadian Federalism and the Failure of the Constitution*, State University of New York Press (1991), pp 15-45 (challenging, by revealing provincial autonomy concerns, the "conventional view" that Canadian framers "were all animated by a powerful antipathy to the whole federal principle") (footnote omitted).

Professor Peter Botsman's⁹ protestations in 2000 emanating from *The Great Constitutional Swindle: A Citizen's View of the Australian Constitution*¹⁰ — that a 'triumphalist' view of Australian democracy which left the [Australian] people out of the picture"¹¹ has prevailed resulting not only in "the ultra-federationist' view of a momentous alliance of people and great men moving Australian democracy ineluctably forwards"¹² but also "many of the most interesting people [for example, Andrew Inglis Clark,¹³ Henry Bournes Higgins,¹⁴ George Richard

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- 9 Professor of Public Policy, University of Queensland; Executive Director of the Brisbane Institute; Convenor of the Republican Andrew Inglis Clark Society. See generally P Botsman, "The Federation Follies" (2000) 73(3) *Australian Quarterly* 7; P Botsman, "Makarrata-dreaming" (1999) 71(6) *Australian Quarterly* 2; P Botsman, "Our history should be celebrated at home" *Australian Financial Review*, 5 May 2000, p 39; P Botsman, "Time to wish our lilac Queen well – and wave her goodbye" *Australian Financial Review*, 31 March 2000, p 35. But see D Flint, "Crown shines in Australia" *Australian Financial Review*, 14 April 2000, p 36 (challenging Professor Botsman's assertions about curbing the Crown's powers).
- 10 P Botsman, note 5 *supra*. Initial reviews include J Williams, "Book Review" (1999) 2(3) *Constitutional Law & Policy Review* (forthcoming).
- 11 P Botsman, note 5 *supra*, p xii. See also *ibid*, pp 39 ("narrow, triumphalist history of federation"), 50 ("a triumphant history"). Similarly see S Macintyre, note 7 *supra*, pp 210 (characterising the original participant's "narrative history of Australian federation . . . [which] regarded the Commonwealth Constitution as the zenith of liberty, the culmination of national progress" as a "celebratory vision"), 211 (characterising Professor John Hirst's 1984 revival of the thesis that the people were intimately involved in and responsible for the Constitution's development and approval as "the post-revisionist interpretation of federation"); S Macintyre, "After Corowa" (1994) 65(2) *Victorian Historical Journal* 98 at 99 (characterising as "the deliberatory version of [the 1893] Corowa [conference]" Prime Minister Paul Keating's 31 July 1993 statement: "The Corowa Conference gave the people of Australia the opportunity to claim their own destiny – to forge a new national entity from a far-flung colonial population. And the people grasped the opportunity") (footnote omitted).
- 12 P Botsman, note 5 *supra*, p 32 (footnote omitted). See also *ibid*, p 50 (quoted note 80 *infra*). Contrast P Botsman, note 5 *supra*, p 50 (quoted note 5 *supra*).
- 13 Born 24 February 1848 – died 14 November 1907; delegate to 1890 Federal Conference and 1891 National Australasian Constitutional Convention; Chairman of 1891 Convention's Judiciary Committee; Member of 1891 Convention's drafting Committee; Member of the Tasmanian Parliament's House of Assembly 1878-1882, 1887-1898; Tasmanian Attorney-General 1887-1892, 1894-1897; Tasmanian Supreme Court Justice 1898-1907. For a plethora of scholarship on Clark see J Thomson, "Andrew Inglis Clark and Australian Constitutional Law" in M Haward and J Warden (eds), *An Australian Democrat: The Life, Work, and Consequences of Andrew Inglis Clark*, Centre for Tasmanian Historical Studies, University of Tasmania (1995), pp 59, 236-7 n 1 (bibliography); J Thomson, "Quick & Garrahan's Australian Constitution in Retrospect" (June 1998) 1 *The New Federalist: The Journal of Australian Federation History* 74 at 76 n 6 (citing references), 77 n 26 (citing references); J Thomson, "American and Australian Constitutions: Continuing Adventures in Comparative Constitutional Law" (1997) 30 *John Marshall Law Review* 627 at 639-641; R Ely, "New Light on Andrew Inglis Clark from some old documents" (December 1998) 2 *The New Federalist: The Journal of Australian Federation History* 77; P Heerey, "Andrew Inglis Clark, Australian Federation and the Tasmanian Club" (June 1999) 3 *The New Federalist: The Journal of Australian Federation History* 100. Given the quantity and quality of scholarship on all aspects of Clark, it is difficult to agree with assessments that "until recently, [Clark] has been seen as a relatively minor figure in the story of federation"; that his "ideas and principles were never acknowledged or articulated" and he was or is "a relatively unknown Australia". P Botsman, note 5 *supra*, pp 5, 50, 58. For example, in addition to that scholarship, Sir Samuel Griffith on 18 December 1890 wrote to Clark urging him to attend the 1891 Australasian Convention so that Griffith and Clark could discuss "many things of importance" because of Clark's superior knowledge compared to other prospective delegates. J Williams, "A Toast To Absent Friends" (June 1998) 1 *The New Federalist: The Journal of Australian Federation History* 23 (partial reproduction of letter). See also notes 90, 91 *infra*.

Dibbs,¹⁵ Albert Bathurst Piddington,¹⁶ Thomas Price,¹⁷ George Houstoun Reid,¹⁸ Charles Cameron Kingston¹⁹ and Rose Scott²⁰] and confronting issues [for example, proposals for a unitary, rather than a federal, system of government in Australia²¹ and that a simple majority of Australian electors or the Commonwealth Parliament²² be able to amend the Commonwealth Constitution²³] have been edited out of even the most sophisticated contemporary histories of federation [so that Australians] have only heard a one-dimensional story of how Australian federation came about [without] the arguments of those who were opposed to [federation], who wanted alternatives or who foresaw problems²⁴ — the antithesis may be the dominant tradition and prevailing perception.²⁵ From this antithetical position “a conservative counter

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- 14 Born 30 June 1851 – died 13 January 1929; member of the Victorian Parliament's Legislative Assembly 1894-1900; delegate to the 1897-1898 Australasian Constitutional Convention; member of House of Representatives 1901-1906; Commonwealth Attorney-General (1904); Justice of the High Court 1906-1929; President of the Commonwealth Arbitration Court 1907-1921. See J Thomson, “Judicial Biography: Some Tentative Observations on the Australian Enterprise” (1985) 8 *University of New South Wales Law Journal* 380 at 389-92, 397 (bibliography); G Fricke, *Judges of the High Court*, Hutchinson (1986) pp 51-8.
 - 15 Born 1834 – died 1901. See P Botsman, note 5 *supra*, p 167 n 27 (biographical details and references).
 - 16 Born 9 September 1862 – died 14 June 1945. See G Fricke, note 14 *supra*, pp 77-83; L F Crisp (J Hart (ed)), *Federation Fathers*, Melbourne University Press (1990), pp 121-37, 181-2; G Phillips, Justice Unknown: A Biography of Albert Bathurst Piddington (1987) (Legal History Research Paper, Adelaide University); M Roe, “Piddington, Albert Bathurst” in G Serle (gen ed), *Australian Dictionary of Biography*, Melbourne University Press (1988), vol 11, pp 224-6; M Graham, *A B Piddington: The Last Radical Liberal*, University of New South Wales Press (1995); F Cain, “Good old Piddo’ and the search for wage and working equity” (7-13 September 1995) *Campus Review: University of New South Wales* 20; J Bassett, “Who’s Piddington?” (July 1995) 172 *Australian Book Review* 14.
 - 17 Born 19 January 1852 – died 31 May 1909. See L F Crisp, note 16 *supra*, pp 121-9, 137-55, 182-3; S Weeks, “Price, Thomas” in G Serle (gen ed), *Australian Dictionary of Biography*, Melbourne University Press (1988), vol 11, pp 287-9.
 - 18 Born 25 February 1845 – died 13 September 1918. See Crisp, note 16 *supra*, pp 1-48; W G McMinn, *George Reid*, Melbourne University Press (1989); W McMinn, “Reid, Sir George Houston” in G Serle (gen ed), *Australian Dictionary of Biography*, Melbourne University Press (1988), vol 11, pp 347-54.
 - 19 Born 22 October 1850 – died 11 May 1908. See M Glass, *Charles Cameron Kingston: Federation Father*, Melbourne University Press (1997); J Playford, “Kingston, Charles Cameron” in B Nairn & G Serle (gen eds), *Australian Dictionary of Biography*, Melbourne University Press (1983), vol 9, pp 602-5.
 - 20 Born 8 October 1847 – died 20 April 1925. See J Allen, *Rose Scott: Vision and Revision in Feminism*, Oxford University Press (1994); J Allen, “Scott, Rose” in G Serle (gen ed), *Australian Dictionary of Biography*, Melbourne University Press (1988), vol 11, pp 547-9.
 - 21 P Botsman, note 5 *supra*, pp 27 (“Federation was not Labor’s choice, a unified state was their preference”), 39-40 (Dibbs 1894 proposal “for a unified Commonwealth”). See also note 159 *infra*. See text accompanying notes 158-76 *infra* (criticising these unification proposals for creating the possibility of majoritarian tyranny and disregarding federalism’s structural bill of rights).
 - 22 Compare the *Constitution Alteration (Power of Amendment)* 1930 which proposed to amend the Constitution by giving the Commonwealth Parliament “full power to alter the Constitution”. *Alterations That Have Been Proposed to the Commonwealth Constitution*, Australian Constitutional Convention (November 1974), p 57. See also J Thomson, “Altering the Constitution: Some Aspects of Section 128” (1983) 13 *Federal Law Review* 323 at 327 n 11, 333 n 53 (references).
 - 23 P Botsman, note 5 *supra*, p 38 (Higgins’ proposal). See also note 158 *infra*.
 - 24 P Botsman, note 5 *supra*, pp 4-5. See note 31 *infra*.
 - 25 See, for example, J Thomson, note 8 *supra* at 94, 120.

revolution”²⁶ is required. For example, the 1995 biography of a conservative founding father²⁷ - Sir William McMillan²⁸ - postulates:

‘bourgeois’ leaders are relatively forgotten in Australia’s written history because of historians’ concentration on Labor. Perception of a history seen principally through a single lens distorts the broad, total picture of that history. [F]our federation fathers’ biographies only begin to widen the lens of history’s camera so that the resulting picture can be a balanced and complete portrayal of a particularly critical period of Australia’s past.²⁹

Inevitably, struggles over this historiographical question – Has Australian Federation history been skewed? – are premised on and infused with other debates and controversies.

Examples include: linkages between economic factors, motivations and influences and the Australian Constitution’s formation; and, whether Australia’s Constitution is a beneficent living document requiring little or no amendment or an obsolete relic needing extensive renovation, perhaps, eradication and replacement. Jostling with such polemics are related conundrums: what and where are the Constitution’s antecedent documents; what were the framers’ intentions (on specific substantive issues and general themes); and what relevance are those intentions and broader historical contexts or panoramas in which the Constitution evolved to the processes and principles of constitutional decision-making?³⁰

Within this quagmire, *The Great Constitutional Swindle*’s position is clear. In both periods – pre and post 1901 history – Professor Botsman denigrates conservatives and extols the “[d]issenters” who had “an alternative view of” and “were the far-seeing critics of federation”.³¹ Before federation, the former included Henry Parkes,³² Sir Samuel Griffith,³³ Edmund Barton,³⁴ Alfred

26 *Ibid* at 120 (omitting footnote comparing Australian and American historiography).

27 Is it incorrect to refer to ‘Founding Fathers’? For affirmative arguments see *ibid* at 91 n 3 (discussing issues and providing references); S Magerey, “Catherine Helen Spence and The Federal Convention” (June 1998) 1 *The New Federalist: The Journal of Australian Federation History* 20. See also note 20 *supra* (Rose Scott).

28 See J Thomson, note 8 *supra* (reviewing P M Gunnar, *Good Iron Mac: The Life of Australian Federation Father Sir William McMillan*, KCMG, Federation Press (1995)).

29 *Ibid* at 70. See also P M Gunnar, note 28 *supra*, p x (asserting that “Australian historiography was, at [least in 1980], so weighted towards Labor and Labor politicians that [William] McMillan’s life story had to be written”. The “four federation fathers’ biographies” are: A W Martin, *Henry Parkes: A Biography*, Melbourne University Press (1980); W G McMinn, *George Reid*, note 18 *supra*; J A LaNauze, *Alfred Deakin: A Biography*, Melbourne University Press (1965) 2 volumes; R B Joyce, *Samuel Walker Griffith*, University of Queensland Press (1984).

30 J Thomson, note 8 *supra* at 94-7 (footnotes omitted) (citations to opposing views).

31 P Botsman, note 5 *supra*, pp 5, 41. Compare the debate over the role, significance and remembrance of the Anti-Federalists in the formation of the 1789 United States Constitution and 1791 Bill of Rights. See S Cornell, *The Other Founders: Anti-Federalism and the Dissenting Tradition in America, 1788-1828*, University of North Carolina Press (1999); S Cornell, “Moving Beyond the Canon of Traditional Constitutional History: Anti-Federalists, the Bill of Rights, and the Promise of Post-Modern Historiography” (1994) 12 *Law and History Review* 1; C Duncan, *The Anti-Federalists and Early American Political Thought*, North Illinois University Press (1995); Symposium, “Roads Not Taken: Undercurrents of Republican Thinking in Modern Constitutional Theory” (1989) 84 *Northwestern University Law Review* 1 at 1-249.

32 Born 27 May 1815 – died 27 April 1896. See generally A W Martin, note 29 *supra*; R Travers, *The Grand Old Man of Australian Politics: The Life and Times of Sir Henry Parkes*, Kangaroo Press (1992).

Deakin,³⁵ Josiah Henry Symon,³⁶ Simon Fraser,³⁷ Andrew Joseph Thynne,³⁸ William John Downer,³⁹ Bernard Ringrose Wise,⁴⁰ John Quick⁴¹ and Robert Garran.⁴² They were “the bearded men”,⁴³ “the spell-binders”,⁴⁴ the “establishment politicians”,⁴⁵ and ventriloquists⁴⁶ “who had to drag the [Australian] population along to federation”.⁴⁷ Prominent among pre-1901 “dissenters” were Clark, Higgins, Dibbs, Piddington, Price, Reid, Kingston and

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- 33 Born 21 June 1845 – died 9 August 1920. See J Thomson, note 14 *supra* at 393 (bibliography); G Winterton et al, note 7 *supra*, p 919 (bibliography); J Williams, “Samuel Griffith and the Australian Constitution: Shaking Hands with the New Chief Justice” (December 1999) 4 *The New Federalist: The Journal of Australian Federation History* 37; G Bolton, “Sir Samuel Griffith: Behind the Scenes Operator” *ibid* at 45; J M Macrossen et al, *Griffith, the Law, and the Australian Constitution*, Royal Historical Society of Queensland (1998).
- 34 Born 18 January 1849 – died 7 January 1920. See J Thomson, note 14 *supra* at 393 (bibliography); G Bolton, “The Making of ‘Australia’s Noblest Son’” (December 1998) 2 *The New Federalist: The Journal of Australian Federation History* 4; G Bolton, *Edmund Barton*, Allen and Unwin (2000).
- 35 Born 3 August 1856 – died 7 October 1919. See J Thomson, note 8 *supra* at 121 (bibliography).
- 36 Born 27 September 1846 – died 29 March 1934. See D Wright, “Symon, Sir Josiah Henry” in J Ritchie (gen ed), *Australian Dictionary of Biography*, Melbourne University Press (1990), vol 12, pp 156-8; D Wright, “Sir Josiah Symon, Federation and the High Court” (1978) 64(2) *Journal of Royal Australian Historical Society* 73; W McMin, “The High Court Imbroglio and the Fall of the Reid – McLean Government” (1978) 64(1) *Journal of Royal Australian Historical Society* 14.
- 37 Born 21 August 1832 – died 30 July 1919. See E Redmond, “Fraser, Sir Simon” in B Nairn, G Serle and R Ward (eds), *Australian Dictionary of Biography*, Melbourne University Press (1972), vol 4, p 216.
- 38 Born 30 October 1847 – died 27 February 1927. See B Stevenson, “Thynne, Andrew Joseph” in J Ritchie (gen ed), *Australian Dictionary of Biography*, Melbourne University Press (1990), vol 12, pp 228-9.
- 39 Born 6 July 1843 – died 2 August 1915. See P Bartlett, “Downer, Sir John William” in B Nairn & G Serle (gen eds), *Australian Dictionary of Biography*, Melbourne University Press (1981), vol 8, pp 330-2.
- 40 Born 10 February 1858 – died 19 September 1916. See J A Ryan, BR Wise: An Oxford Liberal in the Free Trade Party of New South Wales (1996) MA thesis, University of Sydney; J Ryan, “Wise, Bernard Ringrose” in J Ritchie (gen ed), *Australian Dictionary of Biography*, Melbourne University Press (1990), vol 12, pp 546-9.
- 41 Born 22 April 1852 – died 17 June 1932. See M Mathews, “A Forgotten ‘Father of Federation’: Sir John Quick” (December 1998) 2 *The New Federalist: The Journal of Australian Federation History* 55; J Thomson, “Quick & Garran’s” note 13 *supra* at 76 n 8 (bibliography).
- 42 Born 10 February 1862 – died 11 January 1957. See J Thomson, “Quick & Garran’s” note 13 *supra* at 76 n 9 (bibliography); S Bennett, “Book Review” (June 1999) 3 *The New Federalist: The Journal of Australian Federation History* 93; R Else-Mitchell, “Book Review” (December 1999) 4 *The New Federalist: The Journal of Australian Federation History* 107.
- 43 P Botsman, note 5 *supra*, pp 22, 27, 177.
- 44 *Ibid*, pp 35, 40, 184.
- 45 *Ibid*, p 67.
- 46 *Ibid*, p 33 (quoting S Macintyre, “Corowa and the voice of the people” (March 1994) number 33 *Canberra Historical Journal* (New Series) 2 at 7 (characterising ultra-federationists’ use of the people as a “conception of politics involv[ing] an act of ventriloquism”) (reprinted in *The People’s Conventions: Corowa (1893) and Bathurst (1896)*, Papers on Parliament: Number 32, Department of the Senate (December 1998), pp 1, 12).
- 47 P Botsman, note 5 *supra*, p 67.

Scott.⁴⁸ They were “far-seeing”;⁴⁹ “rightly critical of various aspects of the 1891 federation Bill”;⁵⁰ the “forgotten father[s] of federation”⁵¹ and, in stark contrast to the conservatives, “[w]hat mattered to [these dissenters] was the best interests of the Australian people”⁵² so that for Professor Botsman the result is obvious, perhaps, inevitable: “one cannot help but think that one day soon [these dissenters] will be remembered better and studied more.”⁵³

Of course, in *The Great Constitutional Swindle* that also does not apply to post-1901 conservatives. In this context, two Prime Ministers – Sir Robert Menzies⁵⁴ and John Howard⁵⁵ – are major villains. The former “gave voice to the ideology of constitutional monarchism”⁵⁶ and, from April 1950 to September 1951, was responsible for an “anti-communist campaign”,⁵⁷ the *Communist Party Dissolution Act* 1950 (Cth)⁵⁸ and the 1951 s 128⁵⁹ communist party referendum proposal.⁶⁰ John Howard not only “swindled [Australia] of its destiny [by]

48 See notes 13-20 *supra*. For other “dissenters” and their views see, for example, R Campbell, “A Watchful Attitude Towards Federation: Tocsin’s Approach to the Draft Constitution Bill 1897-1900” (1977) 11 *Melbourne University Law Review* 252; H Anderson (ed), *Tocsin: Radical Arguments Against Federation 1897-1900*, Drummond (1977); P Botsman, note 5 *supra*, pp 37-8, 185 n 6 (quoting and referring to *ibid*); F Bongiomo, “From Republican to Anti-Billite: Bernard O’Dowd and Federation” (December 1999) 4 *The New Federalist: The Journal of Australian Federation History* 49; D Headon, “Tocsin for the Times: O’Dowd, Whitman and the ‘Internal Brotherhood’ of Federation” *ibid* at 58.

49 P Botsman, note 5 *supra*, pp 38, 41.

50 *Ibid*, p 40.

51 *Ibid*, p 41.

52 *Ibid*, p 41.

53 *Ibid*, p 41.

54 See A W Martin, *Robert Menzies: A Life*, Melbourne University Press (volume 1: 1894-1943) (1993) (volume 2: 1944-1978) (1999).

55 See D Barnett, *John Howard: Prime Minister*, Viking (1997).

56 P Botsman, note 5 *supra*, p 9. Note the perjorative characterisation “ideology”. Apparently, Professor Botsman considers Menzies’ only redeeming feature was that he “did his bit to update the ‘horse and buggy’ constitution in the famous Engineers case” when Menzies argued this case before the High Court. Subsequently, Professor Botsman demotes this into “a good yarn”. P Botsman, note 5 *supra*, pp 90, 75-6, 194-5 n 2. See also note 58 *infra* (discussing *Engineers* case).

57 P Botsman, note 5 *supra*, p 112. See generally A W Martin, note 54 *supra*, volume 2, pp 169-200; L Maher, “Downunder McCarthyism: The Struggle Against Australian Communism 1945-1960” (1998) 27 *Anglo-American Law Review* 341 (Part 1), 438 (Part 2); L Maher, “Tales of the Overt and the Covert: Judges and Politics in Early Cold War Australia” (1993) 21 *Federal Law Review* 151; L Maher, “Dissent, Disloyalty and Disaffection: Australia’s Last Cold War Sedition Case” (1994) 16 *Adelaide Law Review* 1. See generally S Macintyre, *The Reds: The Communist Party of Australia from Origins to Illegality*, Allen & Unwin (1998).

58 P Botsman, note 5 *supra*, pp 112-14 (discussing *Australian Communist Party v Commonwealth* (1951) 83 CLR 1). See Winterton et al, note 7 *supra*, pp 933-4 (bibliography). See also note 148 *infra*.

59 On section 128 see generally P H Lane, *Lane’s Commentary on the Australian Constitution*, LBC Information Services, (2nd ed, 1997), pp 852-8; *Final Report of the Constitutional Commission*, AGPS (volume 2, 1988), pp 851-93; J Crawford, “Amendment of the Constitution” in G Craven (ed), *Australian Federation: Towards the Second Century*, Melbourne University Press (1992), pp 177-92, 231-4; A Mason, “Constitutional Issues Relating to the Republic as they Affect the States” (1998) 21 *University of New South Wales Law Journal* 750; J Thomson, note 22 *supra*. See also note 132 *infra* (framers’ intent and drafting history).

60 P Botsman, note 5 *supra*, pp 114-16. On this 22 September 1951 referendum see J Thomson, note 22 *supra* at 325 n 7 (bibliography); M Kirby, “H V Evatt, The Anti-Communist Referendum and Liberty in Australia” (1991) 7 *Australian Bar Review* 93; *Seeing Red: The Communist Party Dissolution Act and Referendum 1951: Lessons for Constitutional Reform*, Evatt Foundation (1992).

cleverly devis[ing] a referendum question that would split the vote [on 6 November 1999] for an Australian republic”⁶¹ but also he delivers “[s]tuttering, unrehearsed words”,⁶² not, presumably, reasons or persuasive and principled arguments. Oddly, given that this characterisation appears, at least by implication, to be derogatory and Professor Botsman’s general panegyric to the people and democracy, this manner of speaking is what *The Great Constitutional Swindle* expects from and suggests “sometimes resonate[s] more [with] ordinary blokes” in Australia.⁶³ Diametrically opposite are post-1901 “iconoclastic politicians, such as Billy Hughes, Jack Lang, Bert Evatt, Gough Whitlam and Paul Keating, and public figures such as Donald Horne, Tom Keneally and Malcolm Turnbull, [who] make the pace”.⁶⁴ To that august patheron, *The Great Constitutional Swindle* adds, at some length,⁶⁵ another Labor Party member: Lionel Keith Murphy.⁶⁶ Unfortunately, opposing views and perceptions, for example, about Murphy’s alleged s 72(ii)⁶⁷ “misbehaviour”⁶⁸ and legacy of his implied constitutional rights jurisprudence,⁶⁹ are not revealed.

61 P Botsman, note 5 *supra*, p x. Professor Botsman concedes that the 6 November 1999 referendum’s failure was not all or solely Howard’s “responsibility”. *Ibid.* The referendum question was: “A proposed law: To alter the Constitution to establish the Commonwealth of Australia as a republic with the Queen and Governor-General being replaced by a President appointed by a two-thirds majority of the members of the Commonwealth Parliament. Do you approve this proposed alteration?” Australian Electoral Commission, “Yes/No: Referendum 1999: Your official Referendum pamphlet” (1999), p 6 (sample Ballot Paper). See generally G Williams, “Where to Now?” (1999) 24(6) *Alternative Law Journal* 299; C Saunders, “Reflections on the Referendums” [Summer 2000] *Reporter: Australian Law Students’ Association* 5; C Munro, “More Daylight, Less Magic: The Australian Referendum on the Monarchy” [2000] *Public Law* 3; J Faulkner and R Orr, “The Republic Referendum” (unpublished paper delivered on 8 March 2000 to the Australian Government Solicitor’s 2000 *Constitutional Law Forum: The Constitution and Good Government*, at Old Parliament House, Canberra) (providing information about the referendum, its processes, constitutional issues, voting statistics and, in contrast to Professor Botsman, noting Prime Minister Howard’s proposal for the February 1998 Constitutional Convention and that the Commonwealth Government, in contrast to the Labor Party Opposition, “did not adopt a partisan position on the republic referendum proposal”). See also Commonwealth of Australia Gazette number S 570 (30 November 1999) (referendum voting statistics).

62 P Botsman, note 5 *supra*, p 7.

63 *Ibid.*, p 7.

64 *Ibid.*, p 7. Similarly see *ibid.*, p 68.

65 *Ibid.*, pp 79-83.

66 See J Thomson, “Swimming in the Air: Lionel Murphy and Continuing Observations on Australian Judicial Biography” (1998) 4 *Australian Journal of Legal History* 221 at 229 nn 1 and 3 (bibliography and biographical details).

67 High Court justices can only be “removed . . . by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity”. See generally J Thomson, note 66 *supra* at p 236 n 23 (bibliography).

68 See *ibid.*, pp 227-8, 241-2 (indicating at least three unresolved questions). See also E Campbell, “Judicial Review Proceedings for Removal of Judges from Office” (1999) 22 *UNSWLJ* 325; J Thomson, note 66 *supra*, at 227-8, 241-2.

69 See, for example, G Winterton, “Murphy: A Maverick Reconsidered” (1997) 20 *University of New South Wales Law Journal* 204 at 207 (evaluating “Murphy’s Legacy”).

Consequently, putting aside obvious errors,⁷⁰ such a unidimensional focus, which does not always articulate, develop or respond to opposing views, arguments or conclusions,⁷¹ raises an obvious question: What does *The Great Constitutional Swindle* have to offer? Commendably, in addition to providing statistical data⁷² and “dissenters” reasons, premises and preferences, Professor

70 Five examples are indicative: First, the conclusion that “most of the [Convention] delegates in 1891 and 1898 knew little about a federal system of government. Only [Andrew Inglis] Clark had studied the structure of federations in any depth”. P Botsman, note 5 *supra*, p 25. But see, for example, Thomson, “Australian and American Constitutions” note 13 *supra* at 641–4 (Isaacs’, Griffith’s and McMillan’s extensive knowledge of American constitutional law); H Evans, “The Other Metropolis: the Australian Founders’ Knowledge of America” (December 1998) 2 *The New Federalist: The Journal of Australian Federation History* 30; Z Cowen, *Isaac Isaacs*, Oxford University Press (1967 rep ed 1993), p 56 (Isaacs’ Convention “speeches revealed detailed and well-digested knowledge of the legal and political experiences of federation in the United States, Canada and Europe”). For framers’ 1890s publications dealing with legal, constitutional and political aspects of federations see J A La Nauze, *The Making of the Australian Constitution*, Melbourne University Press (1972), pp 358–9. Second is the assertion that there has been a “constitution of Australia for 100 years”. P Botsman, note 5 *supra*, p 58. However, the Constitution came into operation on 1 January 1901 almost 1 year and 2 months less than 100 years before *The Great Constitutional Swindle* was published in 2000 and Professor Botsman’s “Foreword”, dated 7 November 1999 (*ibid*, p xiii), was written. Third are propositions that “[n]o-one foresaw that the senate would become dominated by the political party system and would not be a protectorate of states’ rights” and “[n]one of the founding fathers foresaw the strength of parties”. P Botsman, note 5 *supra*, pp 84, 97. However, at least John Macrossan, Isaacs and Deakin envisaged and discussed these issues. See J A La Nauze, *supra*, pp 44, 119, 287; J Thomson, note 8 *supra* at 104 n 59; B Galligan, *A Federal Republic: Australia’s Constitutional System of Government*, Cambridge University Press (1995) pp 81–5. Interestingly, Professor Botsman elaborates one of the reasons Rose Scott (who was not a framer, see note 20 *supra*) “totally” opposed federation: “she did not endorse the creation of a ‘party parliament of aggressive politicians’ . . . [and] would have banned political parties”. P Botsman, note 5 *supra*, pp 43, 44. Fourth is Professor Botsman’s claim that section 51 of the Constitution confers legislative power on the “Commonwealth government”. *Ibid*, p 77 (emphasis added). Legislative power is conferred on the Commonwealth Parliament, not the government. Given that Parliament includes the Senate (see s 1 of the Constitution) and that the Commonwealth government may not have a majority of votes in the Senate, the difference – legally, politically and practically – is, as amendments to and compromises on the government’s legislative proposals (for example Native Title and GST) demonstrates, enormous. Finally, to suggest that “[u]nder the Australian constitution, the governor-general . . . is placed in a position of absolute executive authority” (*ibid*, p 96) disregards High Court decisions (including judicial recognition of the doctrine of responsible government) and constitutional limitations on the scope and exercise of Commonwealth executive power (including reserve powers). See, for example, J Thomson, “Executive Power, Scope and Limitations: Some Notes from a Comparative Perspective” (1983) 62 *Texas Law Review* 559; G Winterton, *Parliament, The Executive and the Governor-General*, Melbourne University Press (1983); T Blackshield and G Williams, *Australian Constitutional Law and Theory: Commentary and Materials*, Federation Press (2nd ed, 1998), pp 425 (“powers of the executive are not unlimited”), 438–42 (“The Role and Powers of the Governor-General”), 500 (non-justiciability doctrine in relation to “exercises of executive power . . . appears to be weakening”). See also note 137 *infra* (discussing Governor-General’s s 128 power); J Thomson, “History, Justices and the High Court: An Institutional Perspective” (1995) 1 *Australian Journal of Legal History* 281 at 289–91, 305–8 (adumbrating opposing views about whether the Governor-General is the guardian of the Constitution).

71 Occasionally this occurs via fleeting criticism of Clark and Higgins. P Botsman, note 5 *supra*, pp 25 (Clark “idealistic”), 29–30 (“significant omission and weakness” in Clark’s draft Constitution), 30 (Clark “too uncritical of the US federal system and he failed to recognise the conundrums of state rights issues”), 56 (Clark “romancing American democracy”), 57 (Higgins’ wrongly predicted Senate “would be dominated by small sectional state interests”). For an indication that some opposing positions exist see *ibid*, pp 3, 31 (people’s participation in Constitution’s formation). See also notes 80, 81 *infra*.

72 See, for example, P Botsman, note 5 *supra*, pp 3, 34, 52, 53 (quoted in text accompanying note 88 *infra*), 52 (referendum results of 1898, 1899 and 1900).

Botsman enunciates a laudable objective: “to create [and, presumably, maintain and continue] a new dialogue with Australians about their foundation laws and structures”.⁷³

2. MAKING A CONSTITUTION: THE PEOPLE’S ROLE

Even *The Great Constitutional Swindle* concedes that the Australian people had some role in the Commonwealth Constitution’s formation prior to 1901.⁷⁴ However, that merely exposes the more troubling issue: to what extent and how effectively did the Australian people⁷⁵ (both electors and persons who did not or could not vote) contribute to the inclusion and exclusion of all provisions comprising the text – preamble, covering clauses and s 9 (in 1901 containing 128 sections) – of the *Commonwealth of Australia Constitution Act 1900* (UK)?⁷⁶ Textually, an unequivocal response – “Whereas the people . . . have agreed to unite . . . under the Constitution hereby established”⁷⁷ – is provided by the

73 P Botsman, note 5 *supra*, pp xi-xii. Similarly see *ibid*, pp 3, 10, 35.

74 For post-1901 framers see Thomson, note 14 *supra* at 89-90 note 2. Would Professor Botsman agree that the people (or, at least, the electors) participated in and influenced the Constitution’s post-1901 amendments? See G Winterton, “Popular Sovereignty and Constitutional Continuity” (1998) 26 *Federal Law Review* 1 at 3-10 (indicating High Court justices’ acceptance of popular sovereignty as the post-1901 source of the Constitution’s authority because of the people’s acceptance, recognition, maintenance (and, perhaps, amendment) of the Constitution); L Zines, *The High Court and the Constitution*, Butterworths (4th ed, 1997), pp 393-7; L Zines, “The Sovereignty of the People” in M Coper and G Williams (eds), *Power, Parliament and the People*, Federation Press (1997), pp 91-107; M Kirby, “Deakin: Popular Sovereignty and the True Foundation of the Australian Constitution” (1996) 3 *Deakin Law Review* 129. Do the post-1901 amendments include an amendment to s 128 by s 15(3) of the *Australia Act 1986* (UK)? See L Zines, *The High Court and the Constitution*, *supra*, pp 305-7; Winterton, *supra* at 8-9; J Thomson, “American and Australian” note 13 *supra* at 644 n 297. See also *Sue v Hill* (1999) 163 ALR 648 at 665-6 (indicating that, as to United Kingdom statutes enacted after 3 March 1986, s 1 of the *Australia Act 1986* (Cth) “denies their efficacy as part of the law of the Commonwealth, the States and the Territories”).

75 Non-Australians participated (directly and indirectly) in the Australian Constitution’s formation including the United Kingdom’s Colonial Office and members of the United Kingdom Parliament who debated, voted on and enacted the Constitution Bill. See P Botsman, note 5 *supra*, p 40 (“seventeen [British Colonial Office] changes”); J Thomson, note 8 *supra* at 90-1 n 3(iv) & (v); J Thomson, “Australian and American Constitutions” note 13 *supra* at 646 n 117; W G McMinn, note 18 *supra*, pp 137-8, 298; K Buckley and T Wheelwright, *No Paradise for Workers: Capitalism and the Common People in Australia 1788-1914*, Oxford University Press (1988) p 231.

76 See note 1 *supra*.

77 Other sections, for example, 7, 24 and 25, in the Constitution also use the phrase “the people”. “People” is also used in covering clauses 3 and 5. In stark contrast s 128 refers to “electors”. For the (numerical) difference, even in the 1890s, see note 79 *supra*. See also G Craven (ed), *The Convention Debates 1891-1898: Commentaries, Indices and Guide*, Legal Books (1986), pp 335-6 (preamble’s drafting and textual evolution). Compare the United States Constitution’s preamble (“We the people”). See also note 78 *infra* (distinction between people and electors).

preamble.⁷⁸ However, movement away from the Constitution's text, for example, to practical effects of legal restrictions on voting eligibility,⁷⁹ statistics and the events and circumstances of the 1890s produces at least four positions: "ultra-federationist";⁸⁰ cautious; Professor Botsman's "counter theory";⁸¹ and synthesis. First, "[t]he orthodox view of federation"⁸² emerges in response to a direct question: "Did [the 1893] Corowa [Conference] and [1896] Bathurst [Convention] really signal involvement of the people in the making of the

78 Even though the preamble omits the people of Western Australia, covering clause 3 refers to Queen Victoria being "satisfied that the people of Western Australia have agreed" to the Constitution. For the decision that this condition was (via the 1900 Western Australian referendum) satisfied see C Howard and C Saunders, *Cases and Materials on Constitutional Law*, Law Book Company (1979), pp 27-9 (reproducing official correspondence and Queen's 17 September 1900 Proclamation). For a preamble's substantive, interpretative and symbolic significance see, for example, A Winckel, "The Contextual Role of a Preamble in Statutory Interpretation" (1999) 23 *MULR* 184; D Himmelfarb, "The Preamble in Constitutional Interpretation" (1991) 2 *Constitutional Law Journal* 127; M Handler, B Leuter & C Handler, "A Reconsideration of the Relevance and Materiality of the Preamble in Constitutional Interpretation" (1990) 12 *Cardozo Law Review* 117; C Lawson, "The Literary Force of the Preamble" (1988) 39 *Mercer Law Review* 879.

79 For details of sex, race, property, age and residence restrictions on the right to vote during the 1890s see P Botsman, note 5 *supra*, pp 41-2, 51; J Thomson, "Australian and American Constitutions" note 13 *supra* at 644 n 113; J Thomson, note 8 *supra* at 91 n 3; A Twomey, "The Federal Constitutional Right to Vote in Australia" (2000) 28 *Federal Law Review* 125 at 143-6. In assessing Professor Botsman's statistics other aspects must also be taken into consideration. First, a (large) proportion of the people (or population) may have been children. Compare "adult" in s 41 of the Constitution interpreted in *King v Jones* (1972) 128 CLR 221 and *R v Pearson; Ex parte Sipka* (1983) 152 CLR 254. Secondly, voting was voluntary. L F Crisp, *Australian National Government*, Longmans (5th ed, 1983) p 12.

80 P Botsman, note 5 *supra*, p 32. See also note 11 *infra* ("triumphalist", "deliberatory"). "The story of federation has . . . been . . . [that of] the Australian people at the heart of a triumphant history and a new national democracy". P Botsman, note 5 *supra*, p 50. Some "post-revisionist" scholars (see note 11 *supra*) endeavour to reinstate the people, democracy and popular sovereignty without supporting or sustaining the conservative conspiracy thesis. See note 102 *infra* (separation of these themes or elements).

81 P Botsman, note 5 *supra*, p 32.

82 *Ibid*, p 31. See also *ibid*, p 32 (quoted in text at note 12 *supra*). Revival of this view is labelled "post-revisionist federation history". See note 11 *supra*.

[Australian] Constitution?"⁸³ *The Great Constitutional Swindle* recognizes that some scholars "certainly think so".⁸⁴ Other historians also agree:

"[W]ho then were 'the people'? Between 1893 and [1 January 1901] . . . the concept of the people was to acquire great significance. Although the term was in circulation, and the idea that there was a single 'people' across the colonies functioned as one of the strong arguments for Federation from the start, it was not until the Corowa Conference of 1893 that the idea of 'the people' as part – indeed as an essential part – of the formal process of federating began to emerge.

...

The people had become the legitimating force behind Federation. Through the Corowa Plan and the concept captured at the [1896] Bathurst People's Convention, through election of delegates and the referendum process for ratifying the Constitution . . . the people were recognised, or deferred to as the sovereign agent. Acting through their representatives in Parliament was not enough.

...

But which is more significant: the rate of [voter] turnout, or the rate of [voter] approval? It is impossible to know [in 1997] why individuals [in the 1890s] failed to vote . . .

83 P Botsman, note 5 *supra*, p 31. Opportunities for the people to participate directly in the federation process also included voting for delegates (except WA delegates) to the 1897-1898 Convention and 1898, 1899 and 1900 referenda and participation in the prior election and referendum campaigns. More indirect participation included lobbying (which, for example, Griffith and Clark did after 1891) parliamentarians and Convention delegates who deliberated on and suggested amendments to the draft Constitution Bills in colonial Parliaments and the 1897-1898 Convention. *The Great Constitutional Swindle* concentrates on the Conventions and referendum voting. However, substantial work has been done on the people's involvement in other aspects such as the election of 1897-1898 Convention delegates and referendum campaigns. On the former see, for example, J Thomson, note 8 *supra* at 104 n 58; H Irving, "'Old Familiar Hacks' Just When They're Needed: The NSW Delegation" (June 1998) 1 *The New Federalist: The Journal of Australian Federation History* 39; S Bennett, "The Tasmanians: The Convention Election" *ibid* at 51; J Bannon, "The Gathering of Tribunes and Oligarchs" (March 1998) Number 41 *Canberra Historical Journal* (New Series) 2. On the latter see, for example, J Thomson, note 8 *supra* at 91 n 3(vi), 94-5 n 15; H Irving, "Referendums in the Air: New South Wales in June 1898" (December 1998) 2 *The New Federalist: The Journal of Australian Federation History* 9; S Bennett, "Tasmania's Referendum Choices, 1898/9" (June 1999) 3 *The New Federalist: The Journal of Australian Federation History* 3; H Irving, "Saying 'Yes': The Referendums of 1899" (December 1999) 4 *The New Federalist: The Journal of Australian Federation History* 2; K Saunders, "The North Comes In! The 1899 Referendum Campaigns in North Queensland" *ibid* at 7; D Peel, "Patriotism, Politics and Personalities: Aspects of the 1899 Referendum in a rural Electorate" *ibid* at 72; J Bannon, "Trust in the Hands of the People: South Australians, the Press and the First Federation Referendum" (December 1998) 2 *The New Federalist: The Journal of Australian Federation History* 17. See also D Drinkwater, "'A Living Part of People's Lives': Literary and Debating Societies, Self-Improvement and Federation" (December 1999) 4 *The New Federalist: The Journal of Australian Federation History* 90; J Bannon, *The Crucial Colony: South Australia's Role in Reviving Federation, 1891 to 1897*, Federalism Research Centre, Australian national University (1994).

84 P Botsman, note 5 *supra*, p 31 (referring to and quoting from James Warden and John Hirst). See also notes 11 and 80 *supra* ("post-revisionist federation history"). Others include N Stephen, "The Referendum as an Australian Institution" (September 1998) number 42 *Canberra Historical Journal* (New Series) 2.

Federation was, by the second half of the 1890s, a popular process, to begin with because its formal procedures (the election of [1897-1898] Convention delegates [and members of colonial parliaments who considered and proposed amendments to the draft Constitution Bills], and the [1898, 1899 and 1900] referendums) were now to be conducted according to a mechanism which *required* popular involvement. Neither the British authorities nor the colonial parliaments could proceed without the approval of the voters. Seeking that approval demanded and generated public participation: public meetings, petitions, press commentary. The decision of some key urban newspapers greatly to increase their print-run at the time of the referendums is an indicator of the level of public involvement, as were the great crowds gathered outside the newspaper offices waiting for the referendum results to come in. Federation was also . . . a matter on which almost everyone had an opinion, something discussed popularly, even if individuals were not mobilised or actively politicised by it . . .

However they were counted, the people had become the body which alone could contract to form a nation, the body to which politicians, whether sincere or not, had at least to appear to defer.

...

The concept of the people resulted not only in the employment of mechanisms for ratifying and amending the Constitution, but also in a general democratisation of [the Constitution's] provisions (like directly electing the Senate and ruling out plural voting) beforehand, in part on the ground[] that the people would not be disposed to accept the Bill otherwise.⁸⁵

Secondly, there is a more cautious approach:

The making of the Australian constitution was neither representative nor inclusive of the Australian people generally. It was drafted by a small, privileged, section of society. Whole sections of the community were excluded from the Conventions or from voting for the draft constitution. While the mechanism was certainly flawed in that it excluded the direct participation of many Australians, it did create a field of public debate and a climate in which the Australian people could move towards federation under a constitution that had their acquiescence, if not their direct support.⁸⁶

Thirdly, Professor Botsman⁸⁷ builds "a counter theory" on statistics and arguments. For example:

[F]or the people, Australian federation was a non-event: 84 per cent of the people . . . could not or did not vote in the federation referendums of the late 1890s.

...

85 H Irving, *To Constitute a Nation: A Cultural History of Australia's Constitution*, Cambridge University Press (1997), pp 134, 153-4 (footnote omitted) (emphasis in original). See generally *ibid*, pp 134-55 ("The People"). See also H Irving, "The People and their Conventions" in M Coper and G Williams (eds), note 74 *supra*, pp 113-25.

86 G Williams, *Human Rights Under the Australian Constitution*, Oxford University Press (1999), p 30 (quoted in P Botsman, note 5 *supra*, p 3). Professor Botsman retorts: "A nation built on acquiescence explains a lot!" *Ibid*. Of course, "acquiescence" may mean consent. In this context, that would make a very significant difference. However, Williams had previously argued that "the constitution cannot be said to be the people's document because of their support in the referenda [of 1898, 1899 and 1900]". G Williams, "The High Court and the People" in H Selby (ed), *Tomorrow's Law*, Federation Press (1995), p 271 (quoted in P Botsman, note 5 *supra*, p 53).

87 See also P Botsman, note 5 *supra*, pp 32-3, 53 (quoting Professor Stuart Macintyre and George Williams). See S Macintyre, note 7 *supra*; S Macintyre, note 11 *supra*; S Macintyre, note 46 *supra*. See also note 86 *supra* (Williams).

Within two years of the [1896] Bathurst convention a Commonwealth [Constitution] Bill was submitted [to] and approved by a majority of voters, consisting of just over 11 per cent of the population of Australia.

...

[I]n reality, the [Australian] constitution was never approved by a majority of Australians; it was in large part written by [Andrew Inglis Clark] whose ideas and principles were never acknowledged or articulated; its imperfections were glossed over ...

[T]he result [of the 1899 Victorian referendum] was a landslide for federation: 152,653 for and 9,805 against ...

It is important to note the very small number of voters involved: 152,653 ... Even in 1899 this was only 12.9 per cent of the total Victorian population.

...

In 1899 at the second referendum 377,988 Australians [excluding Western Australians] voted for federation and 141,386 voted against ... But in Queensland the majority [was only] ... 7,492, and the people of Brisbane actually voted against federation; similarly the people of Sydney voted against federation by a margin of 199 votes and it was only a relatively large majority of 24,968 country voters that got New South Wales [the required majority] ... [A] strong majority, as much as 85 per cent of the [Australian] population did not vote for [the Commonwealth] constitution or for federation. [O]nly about 15.9 per cent of Australians in 1899 voted [for the Constitution].⁸⁸

To bolster the conclusion — pre-1901 the people's involvement in and influence on the Constitution was virtually non-existent⁸⁹ — radiating from that numerical evidence, *The Great Constitutional Swindle* adumbrates at least five supporting propositions. First, even if “the people became involved, from 1893 to [1900] ... , there was relatively little change to the constitution drafted by

88 P Botsman, note 5 *supra*, pp 3, 34, 50, 53 (footnotes omitted). See also *ibid*, p 52 (referenda results); L F Crisp, note 79 *supra*, p 12 (referenda results). But see L Fredman, “Economic Interpretation of the Constitution: Australian Style” (1968) 1 *University of New South Wales Historical Journal* 17 at 23 (noting that the Constitution Bill “was endorsed by 73% of those voting at the [1899] referendum”); H Irving, note 85 *supra*, p 153 (devaluing voting statistics’ importance and significance).

89 Consequently, there is a corresponding reduction in (or elimination of) popular sovereignty as a pre-1901 basis of or source of authority for the Australian Constitution. Compare note 74 *supra* (post-1901 popular sovereignty). See also J Thomson, “Australian and American Constitutions” note 13 *supra* at 644 n 106 (discussions of popular sovereignty and President Lincoln’s aphorism: “government of the people, by the people, for the people”). See also note 99 *infra* (American debate).

Inglis Clark and edited by Sam[uel] Griffith in 1891".⁹⁰ However, in this context a good deal depends upon the scope of "relatively" and a quantitative as well as a qualitative assessment of the changes or "the inexorable transformation of Clark's draft 1891 Constitution into the 1901 Australian Constitution".⁹¹ Secondly, Professor Botsman maintains that "a range of radical views were ignored".⁹² Thirdly, from the assertion that "few Australians [in the 1890s had] . . . any love [for] or understanding of [the Constitution's] sections or clauses" an inference is drawn that "the Australian people were [not] closely involved in the making of the constitution".⁹³ Of course, absence of "love or understanding" does not necessarily negate the people's involvement in or influence on the Constitution's formation. More importantly, verifiable empirical linkage between that assertion and linkage is required. Fourthly, there is Rose Scott's 1897 assertion that "[u]nlike the women of South Australia . . . [Victorian women] are utterly powerless to voice [their] views in the national referendum . . . The sentiment among women in the colony [of Victoria] is (as a rule) against the [Constitution] Bill".⁹⁴ Fifthly, *The Great Constitutional Swindle* fleetingly mentions, without indicating its significance for this "counter-theory", that UK

90 P Botsman, note 5 *supra*, p 32. See also *ibid*, pp 5 (Clark "was the man most responsible for the substance of the Australian constitution"), 162-4 (table of "Sections of the Australian Constitution Derived From Clark's Draft Constitution"). See also J Thomson, "Australian and American Constitutions" note 13 *supra* at 640 n 78 (comparison of Clark's Bill, 1891 Constitution Bill and US Constitution). Also, prior to Clark's February 1891 Constitution Bill, Samuel Griffith had drafted and revised the Federal Council of Australasia Bill 1884 and in November 1890 drafted a detailed division of legislative powers to implement a federal (not a territorial) division of Queensland into three districts – Southern, Central and Northern – with a central legislature. See J Thomson, note 14 *supra* at 387-9; J Thomson, "Drafting the Australian Constitution: The Neglected Documents" (1986) 15 *Melbourne University Law Review* 533; K McConnel, "'Separation is from the Devil while Federation is from Heaven': The Separation Question and Federation in Queensland" (December 1999) 4 *The New Federalist: The Journal of Australian Federation History* 14; J Williams, note 33 *supra* at 38-9. For earlier draft constitutional provisions see J Brownrigg, "An Early Proposal for a Federal Constitution: William Smith O'Brien, Launceston, 1853" (December 1999) 4 *The New Federalist: The Journal of Australian Federation History* 84.

91 J Thomson, "Australian and American Constitutions", note 13 *supra* at 640 (footnote omitted). For example, Senators' appointment by State Parliaments in Clark's draft Constitution was replaced by Senators being "directly chosen by the people" in s 7 of the Australian Constitution. For implications and consequences of a similar change to the United States Constitution via the 17th Amendment see L Kramer, "Putting the Politics back into the Political Safeguards of Federalism" (2000) 100 *Columbia Law Review* 215 at 224 n 33; T Zywicki, "Senators and Special Interests: A Public Choice Analysis of the Seventeenth Amendment" (1994) 73 *Oregon Law Review* 1007; R King and S Ellis, "Partisan Advantage and Constitutional Change: The Case of the Seventeenth Amendment" (Spring 1996) 10 *Studies in American Political Development* 69; J Bybee, "Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment" (1997) 91 *Northwestern University Law Review* 500; R A Rossum, "The Irony of Constitutional Democracy: Federalism, the Supreme Court, and the Seventeenth Amendment" (1999) 36 *San Diego Law Review* 671; C H Hoebcke, *The Road to Mass Democracy: Original Intent and the Seventeenth Amendment*, Transaction Publishers (1995).

92 P Botsman, note 5 *supra*, p 32.

93 *Ibid*, p 32.

94 *Ibid*, p 43 (quoting J Allen, *Rose Scott*, note 20 *supra* at 146 (quoting Scott's unpublished 1897 speech on federation)).

colonial office officials secretly formulated amendments which were, at their behest via George Reid, inserted into the Constitution.⁹⁵

Prior to Professor Botsman, other scholars, without attributing central importance to numerical extrapolations, also minimised the people's participation and attributed very significant importance to the politicians.⁹⁶ However, their failure to exclude the people quite so far as *The Great Constitutional Swindle* was conducive to the promulgation of a fourth position. Consequently, a synthesis of opposing – “ultra-federationist” and “counter-theory” – views emerged. Prominent expositions include suggestions that:

[c]learly ‘the people’ were critical in the development of the [Australian] Constitution However, their actions cannot be divorced from the political process that was at the heart of the Constitution’s authorship.⁹⁷

In many senses the [1897-1898] Convention delegates were the oligarchs of colonial politics and society. But they had ultimately to answer to an electorate – their oligarchy was being democratised, and they represented that aspect of oligarchy or rule of the few in its classic sense But the delegates could also be seen as tribunes of the people trying to express and represent the aspirations of Australians not present at the Convention.⁹⁸

Assume that the “counter-theory” is correct or, at least, the most plausible position regarding the people's involvement in and influence on the Australian Constitution. Two large consequences ensue: First, it removes democratic legitimacy as an empirical and normative foundation and popular sovereignty as a source of authority for the 1901 (unamended) Constitution.⁹⁹ Of course, “ultra federationists” separated democratic legitimacy, which was bestowed by the people, from the Constitution's legal source of authority which, in accordance with traditional orthodox views, flowed from enactment of the Commonwealth Constitution Bill by the United Kingdom Parliament¹⁰⁰ in the exercise of its parliamentary sovereignty.¹⁰¹ Secondly, the “counter-theory” makes more plausible “the radical view that the federal constitution was a conspiracy for the

95 P Botsman, note 5 *supra*, p 40. See also note 75 *supra*.

96 See J Thomson, “Quick & Garran’s” note 13 *supra* at 76 n 35 (references to scholarship by Professors Macintyre, deGaris and McMinn).

97 J Williams, “Book Review” (1997) 3 *Australian Journal of Legal History* 253 at 256 (reviewing H Irving, note 85 *supra*). See also Williams, *supra* at 256 (suggesting that “the difficulty with the concept ‘of the people’, and its legitimising presence, is the inconsistent rhetorical deployment to which it is subject”).

98 J Bannon, “The Gathering” note 83 *supra* at 10.

99 For post-1901 see note 74 *supra*. For pre-1901 see note 89 *supra*. Compare the debate over popular majoritarian sovereignty and constitutional moments as alternative (to Article V of the United States Constitution) amendment procedures and sources of power. See J Thomson, “American and Australian” note 13 *supra* at 677-8 (noting supporters and critics of Professors Amar’s and Ackerman’s theses); Symposium, “Moments of Change: Transformation in American Constitutionalism” (1999) 108 *Yale Law Journal* 1917 at 1917-2349 (discussing and critiquing Ackerman’s theoretical claims, historical evidence and interpretations concerning constitutional moments and their transformation or amendment of the United States Constitution without complying with Article V amendment procedures).

100 See note 1 *supra*. On the United Kingdom parliamentary proceedings see J A LaNauze, note 70 *supra*, pp 248-69, 356-7.

101 See J Thomson, “Australian and American Constitutions” note 13 *supra* at 646 n 120 (references and quotations). See also note 74 *supra* (post-1901).

preservation of privilege in Australia".¹⁰² Of course, if Professor Botsman is wrong or, at least, if other positions are more persuasive obverse consequences ensue: First, there was no "great swindle or sting"¹⁰³ of the Australian people. Secondly, efforts of counter-theorists to sustain or revitalise the conservative conspiracy thesis are undermined. Indeed, if simultaneously or in conjunction the people were significantly involved in constitution making and the conservative conspiracy thesis is discredited, "post-revisionist federation history"¹⁰⁴ may emerge triumphant.

3. A CONSERVATIVE CONSPIRACY?

Is the Commonwealth Constitution a conservative bulwark to protect individuals' economic, property and financial interests against governmental and legislative assaults, deprivation and destruction?¹⁰⁵ If so, was this secretly or conspiratorially intended by "ultra federationists"? A positive response was promulgated as early as 1949:

It was for the most part the big men of the established political and economic order, the men of property or their trusted allies, who moulded the federal Constitution Bill. The pastoralists, merchants and lawyers-turned-politicians, tough-minded men of affairs, made solid and often decisive contributions to the new, practical framework of national government. They intended it to accommodate further development of Australian economic and social life along essentially established and accepted lines. Although at that time Australia was to countries of the Old World in some respects a symbol of social experiment, a substantial majority of her leaders at the Conventions saw federation as an expedient provision of extended governmental machinery and in no sense as a facilitation of major social change, much less of social revolution. Time and the interpretations of the Courts have vindicated the shrewder conservatives: the Commonwealth Constitution has been made a splendid bastion of property.

102 See J Thomson, "Australian and American Constitutions" note 13 *supra* at 645 n 115 (scholarship on parliamentary sovereignty).

103 P Botsman, note 5 *supra*, p 50.

104 See notes 11 and 80 *supra*.

105 "Was Federation just an expression of economic interests, driven by class difference, materialistic, self-interested and utilitarian?" J Bannon, "Birth of a Nation" (February 1998) *The Australian's Review of Books* 10 at 11. For a general discussion see W G McMinn, *Nationalism and Federalism in Australia*, Oxford University Press (1994), pp 151-64 ("A Popular Movement?"), 165-81 ("Hard Bargaining").

The Abbotts, McMillans, McIlwraiths, Bartons, Turners, Bakers, Downers, Forrests, Lee Steeres and Braddons of the Conventions did not explicitly enshrine the established social order or the "rights of property" in the draft constitution. But as they shaped its provisions, and especially as they allocated the powers and resources of government between Commonwealth and States, their choices were undoubtedly guided by their conservative philosophies. Their minds on occasion were even consciously moved by consideration for particular established private interests.¹⁰⁶

This conservative conspiracy thesis was reiterated in 1981:

The leading bourgeois politicians of Australia were drafting a constitution for Australia which would preserve the interests of their class for generations to come. They wanted a constitution which would assist them to defend their country against foreign attack: they wanted a constitution which would protect them from the tyranny of the majority. That as [Henry] Parkes knew and Sam[uel] Griffith knew, and affable Alfred Deakin knew, and Andrew Clark knew, and John Downer, and all their fellow delegates . . . in Sydney in . . . March 1891 [at the Constitutional Convention knew] . . . was the twin advantage of a federal constitution. It was a fortress against both the enemy without and the enemy within.

....

At the first formal meeting [of the 1897-1898 Convention in Adelaide on 22 March 1897] the liberals won the day: Charles Cameron Kingston was elected president: a majority took the view that they had been sent there by the people to begin at the beginning and draft a new constitution. A smile of hope stole over the face of Alfred Deakin: a cloud moved over the faces of J.H. Symon, Simon Fraser and all those who wanted safeguards against the tyranny of the majority and popular passions. The middle-of-the-road-men such as Edmund Barton bided their time. The great debate had begun: the political servants of the bourgeoisie were about to draft a constitution to protect their interests for generations to come.¹⁰⁷

Similarly, in 2000, *The Great Constitutional Swindle* exemplifies another regurgitation: First, without juxtaposing contrary perspectives,¹⁰⁸ conservative

106 L F Crisp, note 79 *supra*, p 14. This book was first published as L F Crisp, *The Parliamentary Government of the Commonwealth of Australia*, Longmans (1949). See L Fredman, note 88 *supra* at 17 (noting that "the first chapter [of L F Crisp, *Australian National Government*, Longmans (4th ed, 1965)] has remained substantially unaltered since 1949"); J A La Nauze, "Who are the Fathers?" (1969) 13 *Historical Studies* 333 at 333 n 2 (same). This thesis is reiterated in L F Crisp, note 16 *supra*, pp 2-4. Professor Manning Clark suggested that Crisp "reject[ed] as ill-founded the radical view that the federation constitution was a conspiracy by the conservatives for the preservation of privilege in Australia" (*ibid*, p v (Foreword)) and Professor Botsman suggests that Crisp's book – *Federation Fathers*, note 16 *supra* – "sews the seeds of an alternative view of the coming of federation and re-opens these issues for . . . debate, discuss[ion] and re-examin[ation]". P Botsman, note 5 *supra*, p 5. See also Obituary, "'Fin' Crisp – academic, public servant" (22 December 1984) *Canberra Times*, p 7.

107 M Clark, *A History of Australia: The People Make Laws 1888-1915*, Melbourne University Press (volume 5, 1981), pp 68, 143 (footnotes omitted) (quoted in P Botsman, note 5 *supra*, pp 17-18, 26). This theme is reiterated in M Clark, "The People and the Constitution" in S Encel, D Home and E Thompson (eds), *Change the Rules!: Towards a Democratic Constitution*, Penguin Books (1977), p 9. With regard to Edmund Barton, "without [whom, Professor Botsman concludes] there could have been no Australian constitution" (P Botsman, note 5 *supra*, p 25), Clark suggests that he may have had a "cynical belief that compromise preserved the way of life he loved, that life of ease of the members of his own class, the patricians of Sydney who had inherited the power first held by the ancient nobility of New South Wales". Clark, *A History*, *supra*, p 74 (quoted in P Botsman, note 5 *supra*, p 24). See also S Holt, *Manning Clark and Australian History*, University of Queensland Press (1982); C Bridge, *Manning Clark: Essays on His Place in History*, Melbourne University Press (1994).

108 See notes 120, 122, 123 *infra*.

conspiracy advocates are approvingly quoted.¹⁰⁹ Next, is a conclusion: "Those attending the [1891 and 1897-1898] federation conventions were generally lawyers, liberal politicians and land-owning conservatives".¹¹⁰ Then, "the great tensions and passions of the 1890s"¹¹¹ – "striking shearers"; "great strikes and lockouts"; "the world's greatest banking disaster"; "waterfront disputes"; "booms and busts" and "very high unemployment"¹¹² – set the scene. "Queensland was on the brink of civil war" and "Lawson's radical revolution" postulated that "blood [might] stain the wattle". In Australia, "national tumult" characterised the last decade of the nineteenth century.¹¹³ Indeed, it was "a time of federation or revolution".¹¹⁴ Given that "[t]here was virtually no involvement from the developing labour movement",¹¹⁵ two consequences ensued. Most obviously, "[f]ederation [, which] was not Labor's choice, [prevailed over] a unified national state [which] was [Labor's] preference".¹¹⁶ More cleverly, perhaps conspiratorially, the conservatives – Griffith, Barton, Symon, Fraser, Thynne, Downer and Wise – erected a Constitution which protected the bourgeois' property, financial and class interests and values against the people's passions and majoritarian tyranny.¹¹⁷

Contrary to impressions *The Great Constitutional Swindle* conveys, more than one view occupies this historical terrain.¹¹⁸ Opposing views have been

109 See notes 106 (Professor L F Crisp), 107 (Professor Manning Clark) *supra*.

110 P Botsman, note 5 *supra*, p 22. For other assessments see G McDonald, "The Eighty Founding Fathers" (1968) 1 *Queensland Historical Review* 38; J Bannon, "The Gathering" note 83 *supra*. On the 1890 Australasian Conference see P Botsman, note 5 *supra*, p 14; J A La Nauze, note 70 *supra* pp 7-19; R Sharwood, "The Australasian Federation Conference of 1890" in G Craven (ed), note 77 *supra*, pp 41-73.

111 P Botsman, note 5 *supra*, p 6. See also *ibid*, p 16 ("1890s were times of national tumult").

112 *Ibid*, pp 15-17.

113 *Ibid*, pp 15-16 (footnotes omitted) (quoting Henry Lawson's 16 May 1891 poem: "Freedom on the Wallaby"). See C Roderick, *Henry Lawson: A Life*, Angus & Robertson (1999).

114 P Botsman, note 5 *supra*, p 17 (footnote omitted) (referring to M Clark, *A History*, note 107 *supra*, pp 129-76, "Federation or Revolution"). See also J Rickard, *Class and Politics: New South Wales, Victoria and the Early Commonwealth, 1890-1910*, Australian National University Press (1976); K Buckley and T Wheelwright, note 75 *supra*; S Macintyre, *A Concise History of Australia*, Cambridge University Press (1999), pp 86-121 ("In thrall to Progress, 1851-1888"), 122-54 ("National Reconstruction, 1889-1913"); B Kingston, *The Oxford History of Australia: 1860: Glad Confident Morning*, Oxford University Press (vol 3, G Bolton (gen ed), 1988).

115 P Botsman, note 5 *supra*, p 22 (footnote omitted). But there was "one delegate, William Trenwith from Victoria, [who] represented working men and women". *Ibid*, p 27. However, Trenwith supported the Constitution Bill. See Fredman, note 88 *supra* at 22, 25; McDonald, note 110 *supra* at 46-7; B Scates, "Trenwith, William Arthur" in J Ritchie (gen ed), note 36 *supra*, pp 258-60. Also, there were "dissenters". See text accompanying notes 31, 48-53.

116 P Botsman, note 5 *supra*, p 27. See also *ibid*, p 26 (quoting M Clark, *A History*, note 107 *supra*, p 142 that "bourgeois politicians . . . believed that the interests of the bourgeois would be best served by federal union under the Crown"). Post-1901 has Labor's preference been achieved? Does the Commonwealth Parliament's pre-eminent constitutional position or dominance – via the exercise of expansive legislative and financial powers combined with section 109 of the Constitution – enable, for most practical purposes, the creation of "a unified national state"? See generally Winterton et al, note 7 *supra*.

117 See, for example, P Botsman, note 5 *supra*, pp 15-18, 22-7.

118 See note 121 *infra* (similar interpretation of United States Constitution's formation by C Beard, *An Economic Interpretation of the Constitution of the United States*, Macmillan Company (1913, 2nd ed 1935)). See also L Fredman, note 88 *supra* at 17-18, 26-7 (summarising Beard's theory and critics' responses).

promulgated.¹¹⁹ Indeed, two classic refutations,¹²⁰ as well as a similar confrontation over the formation of the United States Constitution,¹²¹ pre-date *The Great Constitutional Swindle*:

[T]he economic interpretation . . . emphasised [in L F Crisp, *Australian National Government*] is mistaken . . . and . . . a comparable interpretation of the American constitution has been overturned in recent years.

...

If economic interests were so important, they should predominate in the voting and clash of opinion at the convention of 1897-98. There were several voting alignments with some overlap between them. First there was the alignment of large states versus small states. The vital division which limited the Senate's power over money bills . . . does not correspond to the division of radical and conservative . . . This was regarded [in 1897] and later as the test vote on states – rights which overlapped but was hardly identical with the division between Liberal and conservative.

The split between radical or Liberal and conservative should be indicated by the vote on Higgins's motion to add the arbitration power to the constitution. [Higgins] was close to the Labour party and later joined their leaders in Victoria in opposing ratification of the [Constitution] Bill . . . Actually, it is difficult to spell out a clear division on this vote as the opponents offered different reasons . . .

The vote on Higgins's proposal also shows the delegations from the two large colonies more or less on opposite sides. The split between large states and small states or between Liberal and conservative was limited. The vote also shows a third type of alignment, when one colony was isolated, with fragmented support against the rest . . .

Then there was the interesting and neglected division on federal control of the railroads [in s 51(33)] . . . As the discussion was meagre, there are a dozen possible explanations of this vote. Did the Liberals want a stronger central government? Did businessmen see commercial advantage in uniform control? Was acquisition of railroads inherent in the power to assume the public debts of the colonies? Did colonial M.P.s regard their railroads as a useful means of patronage? To sum up, "the conservative men on property" appear a strangely disorganised collection, their fixity of purpose and self-interest constantly wrestling with other alignments and with the despised influence of "sentiment" . . .

Another means of indicating that selfish economic interests were influential is to point out that Labour opposed the Bill and Bruce Smith and Cardinal Moran had urged Federation in order to prevent the colonies moving towards Socialism. The implication is that the Federal leaders wished to obstruct the emerging Labour party and social reform

119 See J Thomson, note 8 *supra* at 94-5 n 15 (bibliography).

120 For others see *ibid.* See also L Fredman, note 88 *supra* at 25 (criticising thesis that "regional economic interests . . . played a decisive part in the [Australian] federation movement").

121 See J Thomson, note 8 *supra* at 95 n 15 (bibliography on "the American debate").

The Cardinal and perhaps Smith too were not typical and prominent Federalists . . . Labour was not united in opposition to the [Constitution] Bill. . . . However, some Labour leaders in Western Australia and Queensland supported the Bill . . . [William Arthur] Trenwith [the only trade unionist and official Labour delegate at the 1897-1898 Convention] proved a very effective campaigner [for the Constitution Bill] in Victoria . . . Cardinal [Moran] over a long period had carefully distinguished between the rights of Labour, which he supported, and doctrinaire socialism, which he opposed . . .

...

The leaders of the organised Federation movement were not spokesmen of business or opponents of the emerging Labour movement. On the other hand, they were not theorists or armchair patriots blind to the importance of material interests and the need for social reform . . . Federation was a matter of sentiment, and also of [money].¹²²

Similarly, opposing the stance regurgitated in *The Great Constitutional Swindle*, is the view that:

[i]t is . . . highly implausible to suppose that the [1897-1898] delegates conceived themselves to be constructing a federation as an abstract conservative device. [T]he interests they were consciously concerned to defend were those of their own States, including their general commercial and trading interests . . .

Equally, the political leaders of the new Labour parties, though they might have their dreams of a society purged of the injustices of capitalism, were also practical men with practical aims. They had already secured . . . some tangible benefits for the workers within economic systems which in debate they would denounce as capitalist . . .

If the [Australian] Constitution was designed as a defence of the 'interests' of its framers, the design must be sought in its specific provisions, and in the identification of groups who supported or opposed them, not in the mere fact that [the Constitution] was federal. A brief consideration of one aspect of [the Constitution's] division of legislative powers [; namely, the Commonwealth was assigned powers concerning such matters as banking, bills of exchange, promissory notes, bankruptcy; while the States were left with their existing powers to legislate directly on matters such as wages, hours and conditions of work, and indeed on most subjects with which policies of social and industrial reform were likely to be concerned] may suggest that there are difficulties in interpreting the evidence for such designs.

...

122 L Fredman, note 88 *supra* at 17, 20-3. On Crisp see note 106 *supra*. For Professor Botsman's use of Cardinal Moran's remarks see P Botsman, note 5 *supra*, p 33. On Trenwith see note 115 *supra*. See also J A La Nauze, note 70 *supra*, p 282 (indicating that "Crisp's discussion is altogether more careful and more subtle than seems to be appreciated by L E Fredman" note 88 *supra*). Professor Crisp describes Bruce Smith as "conservative" and characterises Smith's remarks as "convey[ing] something of the fine Burbon reaction of his class" to the emergence "of the vigorous Labour Party" after the 1890-1891 strikes. Crisp, note 79 *supra*, pp 16-17. See also A E Cahill, "Moran, Patrick Francis" in B Nairn & G Serle (gen ed), *Australian Dictionary of Biography*, Melbourne University Press (1986), vol 10, pp 577-81; M Rutledge, "Smith, Arthur Bruce" in G Serle (gen ed), *Australian Dictionary of Biography*, Melbourne University Press (1988), vol 11, pp 637-9.

The distinction between these groups of powers illustrates . . . the complexities involved in reading into the provisions of the Constitution the self-interested intentions of any particular groups among the delegates, beyond the specific provisions which reflect the outcome of bargaining in the interests of the various States.¹²³

Resolving or, perhaps, blending such disparate views requires more historical excavation, analysis and evaluation. Obvious candidates include: the 1891 and 1897-1898 Convention debates; numerous draft Constitution Bills;¹²⁴ 1898, 1899 and 1899 referenda campaigns and votes,¹²⁵ discussions on and amendments proposed to the Constitution Bill in colonial Parliaments;¹²⁶ public debates outside these forums;¹²⁷ and biographies of the framers¹²⁸ and other major participants.¹²⁹ Simultaneously, those particular aspects ought to be placed within a wider panorama comprising not merely the 1890s¹³⁰ but also earlier and broader Australian history.¹³¹ Hopefully, a more balanced, nuanced perspective than emerges from *The Great Constitutional Swindle* might evolve.

4. "FROZEN CONSTITUTION"?

123 J A La Nauze, note 70 *supra*, pp 281-283. Compared to democratic reforms, such as electoral matters, including Senate elections (see note 91 *supra*), "liberal and radical" 1897-1898 Convention delegates did not pursue Commonwealth powers over social and industrial issues. Were "powers to regulate wages and working conditions or in other ways to intervene directly between owners and workers in a private-enterprise economy . . . deliberately withheld from the Commonwealth [Parliament] in the interests of employers and owners of property"? "Labour men, at least in New South Wales and Victoria . . . believed with conservative men of property that social and industrial legislation should be left to the States." Indeed, for the framers "[t]he applications of the arbitration power [in s 51(35) of the Constitution were] conceived to be relevant in only a limited context" despite subsequent judicial elaborations. J A La Nauze, note 70 *supra*, pp 283-4. On the framers' intent and subsequent use of s 51(35) see J Macken, *Australian Industrial Laws: The Constitutional Basis*, Law Book Company (2nd ed, 1980); W B Creighton, W J Ford, and R J Mitchell, *Labour Law: Text and Materials*, Law Book Company (2nd ed, 1993); W Ford, "Reconstructing Australian Labour Law: A Constitutional Perspective" (1997) 10 *Australian Journal of Labour Law* 1; S Macintyre and R Mitchell (eds), *Foundations of Arbitration*, Oxford University Press (1989); *Re Pacific Coal Pty Ltd ex parte Construction, Forestry, Mining and Energy Union* (2000) 74 ALJR 1034. Of course, the *Engineers* case (note 148 *supra*) involved s 51(35).

124 See J A La Nauze, note 70 *supra*, pp 289-91 ("Successive Printed Versions" of Constitution Bill).

125 See notes 83, 120 *supra*.

126 See, for example, J A La Nauze, note 70 *supra*, pp 161-6, 284.

127 See, for example, *ibid*, pp 166-7; D Drinkwater, note 83 *supra*.

128 See J Thomson, note 8 *supra* at 121-2 (bibliography). See also WG McMinn, George Houston Reid and the Federation Movement (MA thesis, University of New South Wales 1961); DP Armstrong, George Reid and Federation (Bachelor of Literature thesis, University of New England 1963); H Bryan, *John Murtagh Macrossan: His Life and Career*, University of Queensland Press (1958); R Van den Hoorn, Richard Chaffey Baker: A Colonial Conservative and Federation (BA (hons) thesis, University of Adelaide 1979); C Campbell, Charles Cameron Kingston: Radical Liberal Democrat (BA (hons) thesis, University of Adelaide 1970); J Grundy, Josiah Symon and the Federation Conventions 1897-98 (Diploma of Social Science thesis, Flinders University 1982); F Crowley, *Big John Forrest 1847-1918: A Founding Father of the Commonwealth of Australia*, University of Western Australia Press (vol 2, 2000).

129 For example, Cardinal Moran (note 122 *supra*); Robert Garran (note 42 *supra*); Rose Scott (note 20 *supra*); Catherine Helen Spence Scott (note 27 *supra*); and United Kingdom colonial office officials (note 75 *supra*).

130 P Botsman, note 5 *supra*, pp 4, 15-18 ("The Heat of the 1890s").

Echoing in and connected to the conservative conspiracy thesis are two additional propositions: First, the “ultra-federationist” framers intended, as part of their strategy to design a Constitution which protected property and economic interests, to erect a rigid, unamenable Australian Constitution.¹³² Secondly, that intention became a reality: “for 100 years”¹³³ Australia’s Constitution has been and remains “frozen”.¹³⁴ For example, *The Great Constitutional Swindle* suggests:

The great constitutional swindle . . . [began] in 1899 . . . [when] a small minority (11 per cent) . . . enshrined a constitution that was designed never to be changed . . .

...

[That], ironically, with the ‘frozen’ constitution [Australia] already [has], popular election of a . . . president would create a new form of absolutism . . .

...

[P]ostponing the wider debate [about constitutional amendments than merely changing Australia from a constitutional monarchy to a republic] risks losing a once-in-a-century opportunity to ‘defrost’ essential parts of [Australia’s] ‘frozen’ constitution.

...

[T]he rigidity of the constitution closed off the possibility of the people changing the form and rules of government.

...

[I]t was the destiny of the 1891 [Constitution] Bill to become frozen in time as the unamenable law of Australia . . .

...

[O]ne of the pressing questions for Australia is: What will unfreeze the frozen constitution.¹³⁵

131 See, for example, J Browning, note 90 *supra*; J A La Nauze, note 70 *supra*, pp 1-5 (“The Federal Idea, 1847-1889”); H Irving, note 85 *supra*.

132 See generally J A La Nauze, note 70 *supra*, pp 286-7 (framers’ intentions regarding s 128); J Thomson, note 22 *supra* at 328 n 19; G Craven (ed), note 77 *supra*, pp 585-7 (s 128’s drafting and textual evolution).

133 P Botsman, note 5 *supra*, p 58. See also note 77 *supra* (second error).

134 P Botsman, note 5 *supra*, p 58. See also *ibid*, pp 8, 10, 38, 40, 49, 57, 64, 87, 116, 123 (similar).

135 *Ibid*, pp xii, 8, 9-10, 36, 40, 64. See B Galligan, note 70, *supra*, p 117 (labelling this perspective the “progressive reformist view”). See *ibid*, pp 116-17 (summarising “progressive reformist view”). See also text accompanying note 144 *infra*. One consequence of this view is a seemingly inevitable (but not a necessary) result: Australia has a “horse and buggy constitution”. P Botsman, note 5 *supra*, pp xii, 83, caption on page facing p 91. For a completely different view of the Constitution see text accompanying note 144 *infra*. Progressive reformists wanted to amend the Australian Constitution to confer more power on the Commonwealth Parliament to implement “national economic management and social welfare reform”. B Galligan, *supra*, p 117. Protecting minorities or human rights was not a major objective. Are there similarities with the progressive era (1890-1920) in the United States? See L Glickman, “Still in Search of Progressivism?” (1998) 26 *Reviews in American History* 731.

Of course, both propositions have previously been denied. However, *The Great Constitutional Swindle* does not reveal or confront that fact. As to the framers' intent proposition several suggestions have been advanced:¹³⁶

The framers provided that the Constitution should be less easily amended than an act of Parliament . . . But did they, deliberately or short-sightedly, make it so difficult to amend that on them lies the blame, if it is blame, for the *apparent* fact that 'constitutionally speaking, Australia is the frozen continent'?

If, in fact, their intentions were deliberately conservative their dealings with the amendment provision raise difficulties of explanation, for its changing forms were successively more democratic . . . [T]he Australian framers certainly believed that [Australia's] Constitution was more easily alterable than that of the United States, and by more direct and democratic means.

It was, however, assumed by the framers and by their critics that the small States were, and would continue to be, comparatively conservative in their political attitudes. The requirement that amendments [to the Constitution] should be approved by a majority of States as well as by a majority of all electors voting could therefore be seen as a serious obstacle, perhaps deliberately imposed, to the realisation of the will of the Australian people, though critics admitted that the position had been improved by the [Premiers' Conference] revision of 1899 [that a proposed constitutional amendment, after Senate or House of Representatives rejection or failure to pass, could be put, by the Governor-General, to electors at a referendum, so that] . . . at least the Senate, with its majority elected by the small States, could not indefinitely block the reference of a proposed amendment to the people [and there may have been in 1899 an assumption that, in the circumstances of Senate or House of Representatives obstruction, the Governor-General's discretion (perhaps to be exercised on prime ministerial advice) would invariably uphold the position of the House of Representatives].¹³⁷

Assume that, at least as a relative matter, the framers' intent behind and procedural aspects of s 128 have some democratic credentials. Confrontation with the second proposition ought then to occur. Has the Australian Constitution been "frozen"? Is it still frozen? Initially, glimmers of a negative response might be garnered from the Commonwealth Parliament's power to displace or obviate elements of the Constitution's text.¹³⁸ More easily negation can be

¹³⁶ See note 132 *supra* (framers' intentions and drafting of s 128).

¹³⁷ J A La Nauze, note 70 *supra*, pp 286 (emphasis added and footnote omitted). See also *ibid*, p 287 (Higgins' and William Harrison Moore's views). For comparisons of Australian and United States amendment procedures and results see P Botsman, note 5 *supra*, pp 38, 57, 185 n 20 (Higgins' views); J Thomson, "American and Australian" note 13 *supra* at 676-81; B Galligan, note 135 *supra*, pp 120-2 (several countries: Switzerland; Canada; United States; France). On the 29 January-3 February 1899 Premiers' Conference see J A La Nauze, note 70 *supra*, pp 242-4; J Thomson, note 14 *supra* at 389; J Bannon, "Introduction to the Minutes of the Conference of Premiers in the Commonwealth Bill" (December 1999) 4 *The New Federalist: The Journal of Australian Federation History* 104. Does the s 128 phrase "the Governor-General may submit the proposed law" contain or confer a reserve power on the Governor-General to act (in this s 128 context) without or contrary to prime ministerial advice, at least as to amendments the Senate proposes to protect itself or the States? See J Thomson, "Reserve Powers of the Crown" (1990) 13 *University of New South Wales Law Journal* 420 at 424 n 24 (bibliography containing opposing views); *Final Report*, note 59 *supra*, p 884 (paragraph 13.177).

¹³⁸ Some of the Constitution's provisions are now not operative because "the [Commonwealth] Parliament [has] otherwise provide[d]" by legislating pursuant to s 51(36) of the Constitution. See J Thomson, note 22 *supra* at 323 n 4(1); J Thomson, note 70 *supra* at 304 n 92; PH Lane, note 59 *supra*, pp 358-9.

obtained from several constitutional amendments electors have approved.¹³⁹ However, traditionally, voters' referenda rejections of numerous proposed amendments has been used to justify the "progressive reformist view"¹⁴⁰ which labels the Constitution with the epithet "frozen". Professor Botsman, without reference to opposing views,¹⁴¹ endorses that position.¹⁴² Two reasons might suggest that this view of s 128 is, at least empirically, incorrect: First, assessments ought not be solely quantitative.¹⁴³ Scope and effect – a qualitative dimension – of approved amendments ought also to be considered.¹⁴⁴ Secondly, there is a different perspective of s 128 and its utilisation:

Given the strength and persistence of this progressive reformist view that Australia is constitutionally a frozen continent, it is appropriate to examine the record. Just how bad is Australia's record on constitutional change? To answer that question some criteria are needed according to which the extent and significance of successful changes may be assessed. [T]hree different sorts of criteria are . . . expectations; . . . comparison with other countries; and . . . demonstrable need for change [to the Australian Constitution].

139 For lists of referenda and results see B Galligan, note 70 *supra*, p 119; T Blackshield and G Williams, note 70 *supra*, pp 1183-8. See also note 61 *supra* (unsuccessful 6 November 1999 republic and preamble referendum proposals). For quantitative and qualitative assessments see notes 143, 144 *infra*.

140 See note 135 *supra*.

141 See text accompanying notes 143-5 *infra*. See generally J Crawford, note 59 *supra*, pp 191-2 (rejecting "the general wail that the Constitution is 'practically unamenable' . . . [because] the provisions of section 128 were adopted out of [democratic] principle rather than expediency, and in the knowledge that they might make [constitutional] amendment more difficult"); J Thomson, "Australia's Constitution: Ancient Relic or Living Icon?" (1995) 25 *University of Western Australia Law Review* 355.

142 See text accompanying note 135 *supra*.

143 Electors have approved 8 out of 44 referendum proposals. See note 139 *supra*.

144 Examples might include the impact and significance of s 105A (inserted in 1929); s 51(23A) (inserted in 1946); ss 51(26) and 127 (amended and repealed, respectively, in 1967). See, for example, R D Lumb and G A Moens, *The Constitution of the Commonwealth of Australia: Annotated*, Butterworths (5th ed, 1995), pp 207-10; 216-19, 495-8; D Mendelson, "Devaluation of a Constitutional Guarantee: The History of Section 51(xxiiiA) of the Commonwealth Constitution" (1999) 23 *Melbourne University Law Review* 309; I Birch, *Constitutional Responsibility for Education in Australia*, Australian National University Press (1975); J Malbon, "The Race Power under the Australian Constitution: Altered Meanings" (1999) 21 *Sydney Law Review* 80; A Reilly, "Reading the Race Power: A Hermeneutic Analysis" (1999) *Melbourne University Law Review* 476; P Johnston and J Edelman, "Beyond Kartinyeri: Drawing the flame close to Wik" (November 1998) 1(3) *Constitutional Law and Policy Review* 41; G Williams, S Gageler and G Lindell, "October Symposium – The Races Power" (1998) 9 *Public Law Review* 265; M Detmold, "Original Intentions and the Race Power" (1997) 8 *Public Law Review* 244; J Williams and J Bradsen, "The Perils of Inclusion: The Constitution and the Race Power" (1997) 9 *Adelaide Law Review* 95. See also P Botsman, note 5 *supra*, pp 129-31 (referring to ss 51(26), 127 and 1967 referendums).

Clearly, Australia's modest record of formal constitutional change falls far short of the expectation of progressive reformists who persist in advocacy and agitation for such change. From a comparative perspective, however, Australia's record is unexceptional since comparable countries with established democratic constitutions do not change their constitutions frequently. There is little need for change in Australia's constitutional system since [Commonwealth, State and Territory] governments [and parliaments] can do just about all they want to do under existing constitutional arrangements. In any case, the Australian Constitution is a relatively flexible instrument of government that is reinterpreted periodically by judicial review and adjusted by the push and pull of intergovernmental relations.¹⁴⁵

Predictably, taking the opposite position – “[w]ith no prospect of democratic change to the [Australian] constitution by referendum”¹⁴⁶ – Professor Botsman turns to appointed and tenured High Court justices,¹⁴⁷ as “judicial statesmen and women [, to] fill the void.”¹⁴⁸ For *The Great Constitutional Swindle*, the *Engineers* case¹⁴⁹ is the classic example. Of course, this confronts the counter-majoritarian dilemma¹⁵⁰ and seems to¹⁵¹ dilute or weaken strong versions of

145 B Galligan, note 70 *supra*, pp 117-118. See also *ibid*, pp 118-32 (discussing each criterion). The “progressive reformists” are Professors Sawyer; Crisp; Aitkin; Howard; and Jaensch. *Ibid*, p 116-17. Professor Botsman must also be included. See text accompanying note 135 *supra*. Similarly see B Galligan, “The 1988 Referendums in Perspective” in B Galligan and J Nethercote, *The Constitutional Commission and the 1988 Referendums*, Centre for Research on Federal Financial Relations (1989) p 118; B Galligan, “The 1988 Referendums and Australia’s Record on Constitutional Change” (1990) 43 *Parliamentary Affairs* 497. See also P Botsman, note 5 *supra* pp 65, 192 n 6 (citing and utilising, but not alluding to, the different “not frozen” s 128 perspective in B Galligan, “The 1988 Referendums” *supra*).

146 P Botsman, note 5 *supra*, p 73.

147 See note 67 *supra*; J Thomson, “Appointing Australian High Court Justices: Some Constitutional Conundrums” in H P Lee and G Winterton (eds), *Australian Constitutional Perspectives*, Law Book Company (1992) p 251; J Thomson, note 68 *supra* at 224-5, 238-40.

148 P Botsman, note 5 *supra*, p 75.

149 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129. See Winterton et al, note 7 *supra*, pp 743-59 (discussing prior developments and various aspects and criticism of *Engineers* case). See also note 58 *supra*.

150 For elaboration and discussions, in the American constitutional law context, of whether and, if so, to what extent judicial review (that is, invalidation) of legislation by appointed and tenured justices (see note 147 *supra*) can be reconciled or is compatible with representative democratic majoritarianism, see, for example, B Friedman, “The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy” (1998) 73 *New York University Law Review* 333 (suggesting that “[t]he ‘countermajoritarian difficulty’ has been the central obsession of modern [American] constitutional scholarship”); B Friedman, “The History of the Countermajoritarian Difficulty, Part Four: Law’s Politics” (2000) 148 *University of Pennsylvania Law Review* 971; M Graber, “The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary” (1993) 7 *Studies in American Political Development* 35; K Yingling, “Justifying the Judiciary: A Majoritarian Response to the Countermajoritarian Problem” (1999) 15 *Journal of Law and Politics* 81.

151 For an attempt “to dis-solve [rather than solving the countermajoritarian difficulty] by undermining the vision of American democracy and history [as pure representative majoritarianism democracy, developed during the progressive era (see note 135 *supra*) and replacing it with] a neo-Federalist theory of democracy [which was the United States Constitution’s framers’ theory of democracy upon which that Federalist Constitution was based]”; see B Ackerman, “The Storrs Lectures: Discovering the Constitution” (1984) 93 *Yale Law Journal* 1013 at 1014. See also note 99 *supra* (Ackerman’s critics).

representative majoritarian democracy.¹⁵² In this context, this is exacerbated, not alleviated, given the assumption that the High Court, currently by a four to three majority,¹⁵³ can invalidate, on procedural¹⁵⁴ or substantive¹⁵⁵ grounds, a constitutional amendment approved by electors at a referendum.¹⁵⁶

At the other extremity is *The Great Constitutional Swindle*'s endorsement of Higgins:¹⁵⁷

[A]lmost alone among his federalist colleagues was [Higgins' concern] for greater capacity to amend and change the [Australian] constitution. Between 1897 and 1899 he argued for a change to section 128. [H]e foresaw a situation where a small minority [of voters] in the states could vote down any [proposed constitutional] amendment. Higgins thought that a simple national majority [of voters] should be the key requirement and was even prepared to give [the Commonwealth] parliament the power to change the [Commonwealth] Constitution. Higgins wanted a living, breathing constitution and a vibrant Australian democracy that would adapt and change the rules of the nation in accordance with its values and needs, so . . . he was the most far-seeing of the bearded men . . . Higgins' suggestions were lost, to Australia's great detriment.¹⁵⁸

Adoption of Higgins' concession that the Commonwealth Parliament might be given power to amend Australia's Constitution could have led to Dibbs' "alternative vision": a unified Australia with "one governor, one Government and

152 For explanations and analyses of democracy see R Dahl, *A Preface to Democratic Theory*, Chicago University Press (1956); D Held, *Models of Democracy*, Stanford University Press (1987). See also A Birch, *Representation*, Pall Mall Press (1971). To compare and contrast constitutionalism see J Pennock and J Chapman (eds), *Constitutionalism*, New York University Press (20 Nomos, 1979); L Alexander (ed), *Constitutionalism: Philosophical Foundations*, Cambridge University Press (1998); J Elster and R Slagstad, *Constitutionalism and Democracy*, Cambridge University Press (1988); M Dorf and C Sabel, "A Constitution of Democratic Experimentalism" (1998) 98 *Columbia Law Review* 267. See also note 176 *infra*.

153 Currently, by virtue of s 71 of the Constitution and s 5 of the *High Court Act* 1979 (Cth), the High Court of Australia comprises a Chief Justice and six Justices.

154 For example, because a proposed law to alter the Australian Constitution did not satisfy a s 128 – "absolute majority" or "rejects or fails to pass" – requirement. Compare the failure of a Bill to satisfy a s 57 requirement. See, for example, T Blackshield and G Williams, note 70 *supra*, pp 408-23.

155 See J Thomson, note 22 *supra* at 331-40 (noting suggested limitations on scope or reach of s 128).

156 See J Thomson, "American and Australian" note 13 *supra* at 679-80 (noting various issues, including justiciability, concerning judicial review of constitutional amendments in Australia, the United States, India and Canada).

157 See note 14 *supra*.

158 P Botsman, note 5 *supra*, p 38 (footnotes omitted). See also L F Crisp, note 16 *supra*, p 165 (quoting Higgins' interview reported in *Daily Telegraph*, Sydney 25 May 1899: "I think the proper way of amending the Constitution is to let the proposed amendment pass both Houses of Parliament and then to submit it to the national referendum . . . Failing that I should like to see a power for the [Commonwealth] Parliament by absolute majority of both Houses to make any alteration in the Constitution"). Compare P Weiser, "Ackerman's Proposal for Popular Lawmaking: Can it Realize His Aspirations for Dualist Democracy?" (1993) 63 *New York University Law Review* 907 (discussing proposal to enable the United States Constitution to be amended by a national referendum); B Ackerman, *We the People: Transformations*, Harvard University Press (vol 2, 1998), pp 128-9, 410-14, 492-3 n 22 (describing referendum proposal).

one Parliament" proposed at Tamworth on 21 May 1894.¹⁵⁹ Such an untrammelled parliamentary power starkly raises a basic issue:

Whether 'time must bring alterations' [to the Constitution] or whether rigidity is a 'fortunate safeguard' of a constitution. Higgins remained critical of . . . the assumption that encasing 'fundamental law within a wall of concrete somehow safeguarded democracy'.¹⁶⁰

Piddington,¹⁶¹ "another forgotten father of federation", similarly "believed":¹⁶²

No constitution ought to be proposed, or ought to be accepted by the people of Australia, which is not based on majority rule. [I]t will be our fault if we permit a Constitution to be set up in Australia which, when the last resort is reached . . . permits, not that the majority should rule the minority, but the minority should dictate to the majority . . .¹⁶³

Pure majoritarianism, even when enshrined within democratic rhetoric, may not, however, always be benign. Despite advocating "an active democracy" where "[t]he highest duty of a citizen is to fight for his convictions when he is in a minority" and extolling "Evatt [for understanding] the significance of standing firm [in 1951] even in the face of a popular majority",¹⁶⁴ *The Great Constitutional Swindle* does not recognise either the danger to minorities of majoritarian tyranny¹⁶⁵ or the Constitution's protection against such an eventuality. First, in this context, *The Great Constitutional Swindle* might have recognised the importance of s 128 in producing a rejection of the 1951 anti-communist referendum.¹⁶⁶ Not only did a rigid, difficult to amend Australian Constitution prevent the Constitution being amended to the detriment of an ideological minority and forestall the installation in the Constitution of a precedent curtailing political freedom. It also, given the passage through the House of Representatives and Senate of the proposed amendment,¹⁶⁷ vividly

159 P Botsman, note 5 *supra*, pp 39-40 (quoting Dibbs' 21 May 1894 Tamworth speech). See L F Crisp, note 14 *supra*, pp 77-80 (reproducing speech). See also *ibid*, pp 83-99 (Dibbs' unification proposal). See note 21 *supra*.

160 P Botsman, note 5 *supra*, p 38 (quoting H Higgins, "The Rigid Constitution" (1905) 20 *Political Science Quarterly* 203).

161 See note 16 *supra*.

162 P Botsman, note 5 *supra*, p 41.

163 *Ibid*, p 41 (quoting Piddington's speech on 27 May 1897 in New South Wales Legislative Assembly on the 1897 Constitution Bill). See L F Crisp, note 14 *supra*, pp 132-3 (partially reproducing speech). Compare notes 99 *supra* and 177 *infra* (Amar's and Ackerman's theses of people amending the United States Constitution, without complying with Article V requirements). Similarly, can the Higgins-Piddington views be utilised to sustain a people's amendment power outside of s 128? See note 177 *infra* (initial attempts to replicate Amar's and Ackerman's theses in Australia).

164 P Botsman, note 5 *supra*, p 68 (quoting James Bryce), 113 (footnote omitted). On Bryce see J Thomson, "Quick and Garran's" note 13 *supra* at 76 n 4 (bibliography). On Evatt see Winterton et al note 7 *supra*, p 921 (bibliography); J Thomson, note 137 *supra* at 422 n 5 (bibliography).

165 However, "the leading bourgeois politicians of Australia . . . wanted a constitution which would protect them from the tyranny of the majority". See text accompanying note 107 *supra*. Did federation critics (including Higgins) want majoritarian tyranny to crush or injure a conservative (property owning) minority? Did those critics intend or not foresee conservative majoritarian destruction or infringement of non-property rights? See note 135 *supra* (suggesting an affirmative response to the former question and indifference to the latter).

166 See note 60 *supra*.

167 See, for example, M Kirby, note 60 *supra* at 106-10.

illustrates the undesirability of accepting proposals¹⁶⁸ to vest the Commonwealth Parliament with power to amend the Commonwealth Constitution. Under the Higgins' concession, Prime Minister Menzies would have succeeded in rendering communism unlawful and communists' activities illegal. Subsequently, of course, the Commonwealth Parliament might have repealed any such legislation.¹⁶⁹

Secondly, despite *The Great Constitutional Swindle's* recognition of Andrew Inglis "Clark's ideal of governmental checks and balances" and "[t]he important principle of judicial review and constitutional integrity" displayed by and illustrated in the *Communist Party* case,¹⁷⁰ Professor Botsman does not draw out the vital, perhaps necessary, connection between this and a rigid, difficult to amend Constitution. That is, embedding within the Constitution fundamental doctrines, such as "checks and balances"; federalism limitations on and division and separation of legislative, executive and judicial powers; and "judicial review",¹⁷¹ creates a structural Bill of Rights.¹⁷² In a Constitution which may only contain few and limited express or implied rights,¹⁷³ this architectural

168 See notes 29 (1930 proposal), 23 (Higgins' proposal), 158 (same) *supra*.

169 Could a situation equivalent to United Kingdom parliamentary sovereignty (see note 99 *supra*) have been created?

170 P Botsman, note 5 *supra*, p 114. See note 58 *supra* (*Communist Party* case).

171 See J Thomson, "Constitutional Authority for Judicial Review: A Contribution from the Framers of the Australian Constitution" in G Craven (ed), note 77 *supra*, pp 173-202.

172 "[D]ebates over the structure of government implicate the protection of fundamental rights. The persons responsible for the [United States] Constitution of 1787 [before the Bill of Rights was appended in 1791] were not unconcerned with individual liberties. Rather, they maintained that such freedoms were best protected by well-designed political institutions rather than by parchment declarations. '[A]ll observations founded upon the danger of usurpation . . . ought to be referred to the composition and structure of the government, not to the nature or extent of its powers.'" M Graber, "The Constitution as a Whole: A Partial Political Science Perspective" (1999) 33 *University of Richmond Law Review* 343 at 362 (quoting Alexander Hamilton). For elaborations on this linkage between constitutional structure and liberty or freedom see J Best, "Fundamental Rights and the Structure of the Government" in R Licht (ed), *Framers and Fundamental Rights*, AEI Press (1991) p 37; T McAfee, "The Federal System as Bill of Rights: Original Understandings, Modern Misreadings" (1998) 43 *Villanova Law Review* 17; R Brown, "Separated Powers and Ordered Liberty" (1991) 139 *University of Pennsylvania Law Review* 1513.

173 See J Thomson, "An Australian Bill of Rights: Glorious Promises, Concealed Dangers" (1994) 19 *Melbourne University Law Review* 1020; G Williams, *Human Rights Under the Australian Constitution*, Oxford University Press (1998); A Twomey, note 79 *supra*; A Stone, "The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication" (1999) 23 *Melbourne University Law Review* 668; J Kirk, 'Implied Rights' in *Constitutional Adjudication by the High Court of Australia since 1983* (D Phil thesis, Oxford University 1998); Winterton et al, note 7 *supra*, pp 939-46 (bibliography).

edifice¹⁷⁴ challenges, blunts and might prevent at least some majoritarian infringements of minorities' rights, interests and values.¹⁷⁵ Of course, democrats seeking legitimacy and implementation of their preferences, through simple majority rule, may not be enamoured of such constitutionalism.¹⁷⁶ However, for the Australian Constitution, the latter, not the former prevails.¹⁷⁷

5. CONCLUSION

Inevitably, two questions arise: Were the Australian people swindled? If so, does that great constitutional swindle continue, perhaps to be perpetuated into the future? Yes – without a hint of hesitation, proclaims *The Great Constitutional Swindle*. For their acquiescence and obedience, the Australian people received a flawed and frozen Constitution. Obtained by ignoring divergent or opposing views and critiques and achieving electoral majorities, not mandates, from an unrepresentative minority of the population, that Constitution continues an unbroken tradition: shutting out the people. Of course, that was achieved by very small electoral majorities and ignoring differing, dissenting and opposition views. Contesting such an unequivocal 'yes' response, by challenging its normative and empirical premises, can be done without undue difficulty. However, dialogues, rather than confrontations, about constitutions requires more. Consequently, for Australian constitutional law and history the challenges remain: to produce better research, analysis and discussions of viable and different positions, including options for retention of the status quo and reform. Engendering the people's participation, their reflections on and debates about the

174 Examples of structural analysis and interpretation of the United States Constitution include C Black, *Structure and Relationship in Constitutional Law*, Louisiana State University Press (1969); A R Amar, *The Bill of Rights: Creation and Reconstruction*, Yale University Press (1998); "Symposium: Book Reviews [of Amar, *The Bill of Rights*]" (1999) 87 *Georgetown Law Journal* 2273 at 2273-362; "Commentaries [on Amar, *The Bill of Rights*]" (1999) 33 *Richmond Law Review* 289 at 289-600; A Amar, "Intra Textualism" (1999) 112 *Harvard Law Review* 748; L Tribe, "Taking Text and Structure Seriously: Reflections on Free Form Method in Constitutional Interpretation" (1995) 108 *Harvard Law Review* 1221; G Taylor, "Structural Textualism" (1995) 75 *Boston University Law Review* 321; D Golove, "Against Free-Form Formalism" (1998) 73 *New York University Law Review* 1791. For structural analysis of the Australian Constitution see A Stone, note 173 *supra*; P Allister, *Structure and Architecture: Explorations in Constitutional Design* (LLB (Hons) thesis, University of Western Australia Law School, October 1998).

175 This occurs not only via judicial decisions (see note 173 *supra*) but also through the political process. See L Kramer, "Putting the Politics back into the Political Safeguards of Federalism" (2000) 100 *Columbia Law Review* 215; J Thomson, note 173 *supra*, at 1063 n 279 (discussing whether "democratically based constitutionalism [is] too partial or thin to adequately protect individual rights").

176 See J Thomson, note 13 *supra* at 1063 n 278 (discussing different visions of democratic constitutionalism, including interest groups, pluralistic and deliberative, and their relation to and impact on individual rights).

177 Can American constitutional amendment theories – Amar's popular sovereignty and majoritarian amendments and Ackerman's constitutional moments (see note 99 *supra*) – be incorporated within or applied under the Australian Constitution? For discussion of those theories within an Australian context see B Galligan, note 135 *supra*, pp 111-12, 114; J Thomson, "American and Australian" note 13 *supra* at 677-8.

Australian Constitution, ought to be *The Great Constitutional Swindle's* only legacy. Presumably, if that occurs, the people should be pleased.