

Looking for Heroes: History, Framers and the Australian Constitution*

Good Iron Mac: The Life of Australian Federation Father Sir William McMillan, K.C.M.G.**

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1. Introduction

True or false:¹ installation into the sanctum sanctorum of the Australian Constitution's² framers³ pantheon⁴ depends upon a pre-

* Compare the dedication to Chief Justice Warren in Ely, J.H. 1980, *Democracy and Distrust: A Theory of Judicial Review*, Harvard University Press, Cambridge, v ('You don't need many heroes if you choose carefully'). For a discussion see Koh, H.H., 'War and Responsibility in the Dole-Gingrich Congress' (1995) 50 *U Miami LR* 1.

** Gunnar, P.M. 1995, *Good Iron Mac: The Life of Australian Federation Father Sir William McMillan, K.C.M.G.*, Federation Press, Sydney.

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1 Of course, these concepts may be epistemologically untenable. 'Traditional epistemology, with its belief in the existence of transcendent, objective truth has been replaced . . . by a "new epistemology", which rejects a belief in objective truth and claims of certainty that traditionally follow.' Williams, J., 'Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells' (1987) 62 *New York ULR* 429 at 430-31 (footnotes omitted). For the suggestion that 'truth is merely a language game that people play', see Eskridge, W., 'Gaylegal Narratives' (1994) 46 *Stanford LR* 607 at 623. See also Sherry, S., 'The Sleep of Reason' (1996) 84 *Georgetown LJ* 453 at 457-65 (social constructivism's theory of knowledge and reality).

2 *Commonwealth of Australia Constitution Act 1900* (UK). At least for historical purposes, it may be necessary to recognise that the Australian Constitution contains pre-1901 and post-1901 provisions. The latter (but not the former) flow from the s. 128 amendment process. That is, there are post-1901 framers of the Australian Constitution. For examples see Thomson, J., 'Altering

the Constitution: Some Aspects of Section 128' (1983) 13 *FL Rev* 323 at 325 n. 7 (bibliography of post-1901 referendums); Thomson, J., 'Casual Senate Vacancies: Section 15's Continuing Conundrums' (1992) 3 *PLR* 149; Powell, G., 'Bruce, Latham and the 1926 Industrial Powers Referendum' (1979) 14 *Aust National University Hist J* 20; Wildavsky, A., 'The 1926 Referendum', in Wildavsky, A., & Carboch, D. 1958, *Studies in Australian Politics*, F. W. Cheshire, Melbourne, 3-118; Kirby, M., 'H. V. Evatt, The Anti-Communist Referendum and Liberty in Australia' (1991) 7 *Aust Bar Rev* 93; Buckley, K., Dale, B. & Reynolds, W. 1994, *Doc Evatt: Patriot, Internationalist, Fighter and Scholar*, Longman Cheshire, Melbourne, 355-95; Bander, F. 1989, *Turning the Tide*, Aboriginal Studies Press, Canberra, 79-129. For the suggestion that s. 15 of the *Australia Act 1986* (UK) may have amended s. 128 of the Australian Constitution see Zines, L. 1997, *The High Court and the Constitution*, 4th edn Butterworths, Sydney, 306-08; Thomson, J., 'The Australia Acts: A State Constitutional Law Perspective' (1990) 20 *UWALR* 409 at 415 n. 19.

3 Who were the framers? Several possibilities emerge.

(i) Delegates to the 1890 Conference and 1891, 1897-1898 Conventions. For biographical details see La Nauze, J. A. 1972, *The Making of the Australian Constitution*, Melbourne University Press, Carlton, 328-33; Norris, R. 1975, *The Emergent Commonwealth: Australian Federation: Expectations and Fulfilment 1889-1910*, Melbourne University Press, Carlton, 211-30; McDonald, G. W., 'The Eighty Founding Fathers' (1968) 1 *Queensland Hist R* 38; La Nauze, J., 'Who are the Fathers?' (1968) 13 *Historical Studies* 333.

(ii) Individuals assisting delegates, for example, Walter O. Wise who drafted Clark's influential 1891 Constitution Bill (see Thomson, J., 'Andrew Inglis Clark and Australian Constitutional Law', in Haward, M. & Warden, J. (eds), 1995, *An Australian Democrat: The Life, Work, and Consequences of Andrew Inglis Clark*, Centre for Tasmanian Historical Studies, Hobart, 59, 66, 239 n. 12); Robert R. Garran as secretary to the 1897 Drafting Committee (see La Nauze, at 135 and see fn. 33) and Premier George Reid's 'advisers' consulted during the 29 January - 3 February 1899 Melbourne Premiers' Conference (see La Nauze at 244).

(iii) Members of colonial Parliaments discussing and proposing amendments to Constitution Bills (see *id* at 356 (records of colonial Parliaments)).

(iv) Members of the United Kingdom Parliament in 1900 (see *id* at 356 (records of UK Parliament)).

(v) UK Colonial Office officials (see La Nauze, at 183-86, 249-60; de Garis, B. K., 'The Colonial Office and the Commonwealth Constitution Bill', in Martin, A. W. (ed), 1969, *Essays in*

Australian Federation, Melbourne University Press, Carlton, 94; de Garis, B. K. 1965, *British Influence on the Federation of the Australian Colonies*, D. Phil. thesis, (Oxford)).

(vi) Should 'framers' include ratifiers (that is, those who voted in referendums to approve the Constitution or its post-1901 changes)? On pre-1900 'ratification' referendums see, for example, La Nauze, at 239-40, 247; Quick, J. & Garran, R. 1901, *The Annotated Constitution of the Australian Commonwealth*, Angus & Robertson, Sydney, 206-13, 222-28; Rhodes, G. 1988, *The Australian Federation Referenda 1898-1900: A Spatial Analysis of Voting Behaviour*, PhD thesis, London School of Economics and Political Science. See also fn. 15. On post-1901 referendums see fn. 2.

Except for some, all of the pre-1900 ratifiers were men. However, it may be incorrect to refer to Federation Fathers (see, for example, Crisp, L. F. 1990, *Federation Fathers*, Melbourne University Press, Carlton). First, women voted in South Australia at the 1897 Convention delegates' election and 1898 and 1899 referendums and in Western Australia in the 1900 referendum on the Constitution Bill. See Rhodes, G., 'The Hobart Understanding: A Plan of Prearranged Coincidences' (Dec. 1993) 2 n. 5 *Constitutional Centenary* 6, 7; Cass, D. & Rubenstein, K., 'Representations of Women in the Australian Constitutional System' (1995) 17 *Adel LR* 4 at 29-30; Twomey, A., 'The Constitution: 19th Century Colonial Office Document or a People's Constitution?' Dept of the Cwth Parliamentary Library, Background Papers 15/1994 (25 Aug. 1994) 22-24 ('who voted in the referendum?'). Secondly, women may have had an important role and effect on the Constitution's drafting, formation and promulgation. See, for example, Irving, H. (ed), 1996, *A Woman's Constitution? Gender & History in the Australian Commonwealth*, Hale & Iremonger, Sydney; Irving, H., 'Who are the Founding Mothers? The Role of Women in Australian Federation' (June 1995) 25 *Papers on Parliament* 65. Cf Law, S., 'Women and the Framers' in Ollman, B. & Birnbaum, J. (eds), 1990, *The United States Constitution*, New York University Press, New York, 106; Hoff, J., 'Women and the Constitution' in id at 231; Nichol, G., 'Commentary on Law: Wallowing in Intention' (1987) 39 *U Florida LR* 613; Amar, A., 'Women and the Constitution' (1995) 18 *Harv JL & Pub Pol'y* 465; Brown, 'The Nineteenth Amendment and Women's Equality' (1993) 102 *Yale LJ* 2175.

- 4 Compare the historical, cultural and legal significance accorded to framers of the United States Constitution. See, for example, Bradford, M. E. 1994, *Founding Fathers: Brief Lives of the Framers of the United States Constitution*, 2nd edn revised, University Press of Kansas, Lawrence; Miller, W. L. 1992, *The Business of May*

1900 American sojourn? Some—Henry Parkes,⁵ Samuel Griffith,⁶ Andrew Inglis Clark,⁷ William McMillan⁸—could satisfy such an

Next: James Madison and the Founding, University Press of Virginia, Charlottesville; Banning, L. 1995, *The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic*, Cornell University Press, Ithica.

- 5 See, for example, Martin, A. W. 1980, *Henry Parkes: A Biography*, Melbourne University Press, Carlton, 321-23 (Parkes' 1882 visit to the USA including meeting President Arthur and dinner with US Supreme Court Justice Field). On Field and his laissez faire constitutionalism see, for example, Kens, P. 1997, *Justice Stephen Field: Shaping Liberty From the Gold Rush to the Gilded Age*, University Press of Kansas, Lawrence; Swisher C. B. 1930, *Stephen J. Field: Craftsman of the Law*, Archon Books, Connecticut (reprinted, with a new Introduction by McCloskey R. G., 1960, University of Chicago Press, Chicago); Siegal, S., 'Lochner Era Jurisprudence and the American Constitutional Tradition' (1991) 70 *North Carolina LR* 1, 90-99. See generally Benedict, M., 'Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origin of Laissez-Faire Constitutionalism' (1985) 3 *Law & Hist R* 293. For linkage between Parkes' 1891 Resolutions, the text of s. 92 of the *Australian Constitution* and laissez faire constitutionalism see La Nauze, fn. 3 at 35-38; Sawyer, G. 1967, *Australian Federalism in the Courts*, Melbourne University Press, Carlton, 175, 187; Hanks, P. 1994, *Australian Constitutional Law: Materials and Commentary*, 5th edn, Butterworths, Sydney, 682; Thomson, J., 'An Australian Bill of Rights: Glorious Promises, Concealed Dangers' (1994) 19 *MULR* 1020 at 1054. Given s. 92's importance (see, for example, Thomson, 1054 nn. 220-21), what was said at the Parkes-Field dinner?
- 6 See, for example, Joyce, R. B. 1984, *Samuel Walker Griffith*, University of Queensland Press, St. Lucia, 142 (May-June 1887 visit to the USA including 'lunch [] with [Justice Stephen] Field's brother, David Dudley [Field] a constitutional lawyer'). Griffith 'was acquainted with . . . Stephen Field' and Griffith's 'American experience . . . was . . . applied . . . in his contribution to the framing of the Australian constitution.' Id at 142.
- 7 See, for example, Thomson, fn. 3 at 59, 237 n. 5 (Clark visited America in 1890, 1897-1898 and 1902-1903).
- 8 See, for example, Gunnar, P. M. 1995, *Good Iron Mac: The Life of Australian Federation Father Sir William McMillan*, K. C. M. G., Federation Press, Sydney, 7, 221 (McMillan's 1876 and 1922 visits to America). See also Waterson, D.B., 'Thomas McIlwraith: A Colonial Entrepreneur' in Murphy, D.J & Joyce, R.B. (ed), 1978, *Queensland Political Portraits 1859-1952*, U Qld Press, St Lucia,

entrance requirement.⁹ Of course, debates might ensue on the influence or relevance, if any, of that American experience on the Australian Constitution's text.¹⁰ However, *Good Iron Mac: The Life of Australian Federation Father: Sir William McMillan, K. C. M. G.*¹¹

119-141, 468-471 (indicating that McIlwraith 'visited North America three times').

9 No framers of the 1787 US Constitution or 1791 Bill of Rights visited Australia. Did framers of subsequent amendments visit Australia prior to 1900? If so, did they meet and discuss constitutional law with Australian framers?

10 Compare the post-1901 American influence on the Australian Constitution and constitutional law. See for example Thomson, J., 'Comparative Constitutional Law: Entering the Quagmire' (1989) 6 *Arizona J Int'l & Comp. L* 22, 46-49 (bibliography of comparative Australian-United States scholarship); Thomson, J., 'American and Australian Constitutions: Continuing Adventures in Comparative Constitutional Law' (1997) 30 *John Marshall LR* 627, 683-685 (same); Kenny, S., 'Constitutional Fact Ascertainment' (1990) 1 *PLR* 134; Eichhorst, J. & McCallum, R., 'Garcia and Judicially-Imposed Constitutional Protections of State Sovereignty: The Australian Experience' (1989) 4 *Florida Int'l LJ* 465; MacChesney, B., 'Full Faith and Credit: A Comparative Study' (1949) 44 *Illinois LR* 298; Gummow, W., 'Full Faith and Credit in Three Federations' (1995) 46 *South Carolina LR* 979; Fletcher, C. & Walsh, C., 'Comparative Fiscal Constitutionalism in Australia and the US—The Power of State Politics,' in De Villiers, B. (ed), 1994, *Evaluating Federal Systems*, Martinus Nijhoff, Dordrecht, 345; Barendt, E., 'Importing United States Free Speech Jurisprudence?,' in Campbell, T. & Sadurski, W. (eds), 1994, *Freedom of Communication*, Dartmouth, Aldershot. See also fn. 6.

11 Gunnar, fn. 8. 'The Original Manuscript of this [book is] 618 . . . pages of text and eighty-four . . . pages of source notes Id at 237. Initial reviews of Gunnar, fn. 8 include Schoff, P., 'Book Review' (1995) 1 *Aust. J Legal History* 317; Wilson, R., 'Lively account of a nation coming of age,' *Canberra Times*, December 30, 1995, p. m8; Cridland, C., 'An honest politician?' (February 1996) 70 n. 2 *Law Institute J* 80; McMillan, W. T., 'Book Review' (December 1995) 75 *The Law Letter: Newsletter of the Law Society of Tasmania* 32; Taylor, H., 'Book Review' (January-February 1996) 16 n. 1 *Proctor: Queensland Law Society Magazine* 19. See also McMillan, H., *Brief Record of William McMillan, K. C. M. G.* (privately printed, Mitchell Library); Martin, A. W. 'McMillan, Sir William,' in Nairn, B. & Serle, G. (eds), 1986, *Australian Dictionary of Biography: Volume 10: 1891-1939*, Melbourne University Press, Carlton, 342; Martin, A. W., 'William McMillan—A Merchant in Politics' (1954) 40 *J Royal Aust. Hist.*

stimulates a larger controversy: has Australian or, at least, federation history been skewed? Indeed, *Good Iron Mac*¹² partially derives¹³ from an affirmative response:

[T]wo eminent Australian historians, Professor Bede Nairn and Dr Allan W Martin . . . pointed out to [Peter M Gunnar] (1) that Australian historiography was, at [least in 1980], so weighted toward Labor and Labor politicians that [William] McMillan's life story had yet to be written, (2) that [McMillan's] story warranted being examined and preserved as an important part of Australian history, and (3) that the coming [2001] centenary of the Australian Constitution and the Commonwealth of Australia made [a biography of McMillan] timely. The present omission of McMillan, an eminent, committed conservative (he preferred 'Old Liberal' or 'Conservative-Liberal') from Australian historical literature recalls the metaphor . . . that history demands the view from Corinth as well as Athens, lest it degenerate into Athenian mythology.¹⁴

Inevitably, other debates and consequences flow from or are infused by this historiographical struggle. Examples include: linkages between economic factors, motivations and influences and the Australian Constitution's formation;¹⁵ and, whether Australia's

Society 197; Nairn, B., 'A Note on the Colonial Treasurer's Resignation' (1967) 13 *Historical Studies* 539. McMillan's papers are in the Mitchell Library, Sydney.

12 For a discussion of McMillan's sobriquets—'Good Iron Mac' and 'Patriotic McMillion'— see Schoff, fn. 11 at 318.

13 For the much larger 'Original Manuscript' see fn. 11.

14 Gunnar, fn. 8 at x.

15 See, for example, Clark, M., 'Foreword,' in Crisp, fn. 3 at v ('radical view that the federal constitution was a conspiracy by the conservatives for the preservation of privilege in Australia'); La Nauze, fn. 3 at 282-86; Parker, R. S., 'Australian Federation: The Influence of Economic Interests and Political Pressures' (1949) 4 *Historical Studies* 1; Blainey, G., 'The Role of Economic Interests in Australian Federation: A Reply to Professor R. S. Parker' (1950) 4 *Historical Studies* 224; Parker, R. S., 'Some Comments on the Role of Economic Interests in Australian Federation' (1950) 4 *Historical Studies* 238; Bastin, J., 'Federation in Western Australia: A Contribution to the Parker-Blainey Discussion' (1951) 5 *Historical Studies* 47; Martin, A. W., 'Economic Influences in the "New Federation Movement"' (1953) 6 *Historical Studies* 64; Hewett, P., 'Aspects of Campaigns in South-Eastern New South Wales at the Federation Referenda of 1898 and 1899' in Martin (ed), fn. 3 at 167; Norris, R., 'Economic Influences on the 1898 South

Constitution is a beneficent living document requiring little or no amendment or an obsolete relic needing extensive renovation, perhaps, eradication and replacement.¹⁶ Jostling with such polemics are related conundrums: what and where are the Constitution's antecedent documents;¹⁷ what were the framers' intentions (on

Australian Federation Referendum,' in Martin (ed), fn. 3 at 137; Norris, R. 1966, *Aspects of the 1898 South Australian Referendum and the Parker-Blainey Controversy*, BA thesis, Adelaide University; de Garis, B. K., '1890-1900,' in Crowley, F. (ed), 1974, *A New History of Australia*, William Heinemann, Melbourne, 216, 252-53; Loveday, P., 'The Federal Convention: An Analysis of the Voting' (1972) 18 *Aust J Politics & History* 169; Fredman, L. E., 'Economic Interpretation of the Constitution: Australian Style' (1968) 1 *U New South Wales Hist. J* 17. For the American debate see Beard, C. A. 1913, *An Economic Interpretation of the Constitution of the United States*, MacMillan, New York; Brown, R. E. 1956, *Charles Beard and the Constitution*, Princeton University Press, New Jersey; McDonald, F. 1958, *We The People: The Economic Origins of the Constitution*, University of Chicago Press, Chicago; McCorkle, P., 'The Historian as Intellectual: Charles Beard and the Constitution Reconsidered' (1984) 28 *American J Legal Hist* 314; McGuire, R. & Olsfeldt, R., 'Economic Interests and the American Constitution: A Quantitative Rehabilitation of Charles A. Beard' (1984) 44 *J Economic Hist* 509; Slonim, S., 'Beard's Historiography and the Constitutional Convention' (1987) 3 *Perspectives in American Hist (New Series)* 173; Hutson, J., 'The Constitution: An Economic Document?,' in Levy, L. & Mahoney, D. (eds), 1987, *The Framing and Ratification of the Constitution*, MacMillan, New York, 259; Symposium, 'The Constitution as an Economic Document' (1987) 56 *George Washington L Rev* 1.

- 16 See, for example, Thomson, J., 'Australia's Constitution: Ancient Relic or Living Icon?' (1995) 25 *UWALR* 355; Davis R., 'Re-writing the Constitution: An Irrelevant Debate,' (Autumn 1983) 37 *Institute of Public Affairs Review* 20; Saunders, C., 'Is the Constitution Out of Date?' in Lovell, D., Maley, W. & Kukathas, C. (eds), 1995, *The Australian Political System*, Longman, Sydney, 32.
- 17 See, for example, La Nauze, fn. 3 at 289-304, 355-59 (successive versions of the Constitution and other documents); Hunt, E. 1930, *American Precedents in Australian Federation*, Columbia University Press, New York, 270-78; Crisp, fn. 3 at 369-454; Thomson, J., 'Drafting the Australian Constitution: The Neglected Documents' (1986) 15 *MULR* 533; Waugh, J., 'George Higinbotham on the Constitution Bill 1891' (1991) 2 *PLR* 156.

specific substantive issues¹⁸ and general themes¹⁹); and, what relevance are those intentions and broader historical contexts or panoramas in which the Constitution evolved²⁰ to the processes and

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- 18 For example, on specific provisions in the Constitution, see Thomson, J., 'Constitutional Interpretation: History and the High Court: A Bibliographical Survey' (1982) 5 *UNSWLJ* 309, 324-26 (bibliography); Galligan, B., & Chesterman, J., 'Aborigines, Citizenship and the Australian Constitution: Did the Constitution Exclude Aboriginal People from Citizenship?' (1997) 8 *PLR* 45; McDermott, P., 'External Affairs and Treaties—The Founding Fathers' Perspective' (1990) 16 *UQLJ* 123; Leeming, M., "'Something That Will Appeal to the People at the Hustings": Paragraph 3 of Section 53 of the Constitution' (1995) 6 *PLR* 131; Opeskin, B., 'Section 90 of the Constitution and the Problem of Precedent' (1986) 16 *FLR* 170; Hall, R. & Iremonger, J. 1976, *The Makers and the Breakers*, Wellington Lane Press, Sydney; Craven, G. 1986, *Secession: The Ultimate States Right*, Melbourne University Press, Carlton, 13-30; O'Collins, G. 1965, *Patrick McMahon Glynn: A Founder of Australian Federation*, Melbourne University Press, Carlton, 137-43; Stretton, P. & Firnimore, C., 'Black Fellow Citizens: Aborigines and the Commonwealth Franchise,' (1993) 25 *Historical Studies* 521.
- 19 For example, responsible government (see Galligan, B. J., 'The Founders' Design and Intentions regarding Responsible Government' (1980) 15 *Politics* 247; Winterton, G. 1983, *Parliament, the Executive and the Governor-General: A Constitutional Analysis*, Melbourne University Press, Carlton, 3-7, 13-14); Senate and Supply (see Winterton at 6-7; Howard, C. & Saunders, C., 'The Blocking of the Budget and Dismissal of the Government,' in Evans, G. (ed), 1977, *Labor and the Constitution 1972-1975*, Heineman, Melbourne, 251, 252-60; Galligan, B. & Warden, J., 'The Design of the Senate,' in Craven, G. (ed), 1986, *The Convention Debates 1891-1898: Commentaries, Indices and Guide*, vol. 6, Legal Books, Sydney, 89); Judicial Review (see Thomson, J., 'Constitutional Authority for Judicial Review: A Contribution from the Framers of the Australian Constitution,' in id at 173); financial matters (see Saunders, C., 'The Hardest Nut to Crack: The Financial Settlement in the Commonwealth Constitution' in id at 149; Saunders, C., 'Fiscal Federalism—A General and Unholy Scramble,' in Craven, G. (ed), 1992, *Australian Federation: Towards the Second Century*, Melbourne University Press, Carlton, 101-08); Bill of Rights (see Thomson, fn. 3 at 69-72, 253-57; *Australian Capital Television Pty Ltd v. Commonwealth* (1992) 177 CLR 106).
- 20 An example concerning s. 92 of the Constitution is *Cole v. Whitfield* (1988) 165 CLR 360.

principles of constitutional decision-making?²¹ *Good Iron Mac*, by engendering such questions and, at least obliquely, postulating answers, demonstrates in this domain of constitutional law, history and theory the need for and benefits which can flow from a continuing dialogue.

2. William McMillan: Founding Father

Encapsulated between chronological extremities—born 14 November 1850, County Derry, Ireland; died 21 December 1926, Woollahra, New South Wales—are biographical details tethering William McMillan and the Australian Constitution. *Good Iron Mac* contains the requisite information. Examples include: delegate to the 1890 Australasian Federation Conference and 1891 and 1897-1898 Constitutional Conventions;²² member of the New South Wales Legislative Assembly which discussed the 1891, 1897, 1898 and 1899 Constitution Bills; participation in 1898 and 1899 New South Wales referendum campaigns to approve the Constitution; member

21 See, for example, Goldsworthy, J., 'Originalism in Constitutional Interpretation' (1997) 25 *FLR* 1; Craven, G., 'Original Intent and the Australian Constitution—Coming Soon to a Court Near You?' (1990) 1 *PLR* 166; Schoff, P., 'The High Court and History: It Still Hasn't Found(ed) What It's Looking For' (1994) 5 *PLR* 253; Dawson, D., 'Intention and the Constitution—Whose Intent?' (1990) 6 *Aust Bar R* 93. For the American debate see generally Kay, R., 'Adherence to Original Intentions in Constitutional Adjudication: Three Objections and Responses' (1988) 82 *Northwestern ULR* 226; Farber, D., 'The Originalism Debate: A Guide for the Perplexed' (1989) 49 *Ohio State LJ* 1085; 'Symposium: Originalism, Democracy and the Constitution' (1996) 19 *Harv JL & Pub Pol'y* 237.

22 Indeed, only Alfred Deakin and William McMillan had been delegates to the Conference and Conventions. However, neither attended the 1899 Premiers Conference. La Nauze, fn. 3 at 241-46. Then they were members of the first Commonwealth Parliament. Fourteen years (1890-1903) were involved. Gunnar, fn. 8 at 70, 202. For Conference and Convention debates and documentation see fn. 17. See also Craven, fn. 19 at 307-09 (index to McMillan's remarks at Conventions). See also Pringle, R. 1969, *The Workings of the Federation Movement in New South Wales 1891-1899: The Role of Parliament and Public Opinion*, M.A. Thesis, Macquarie University.

(1901-1903) of the first Commonwealth Parliament; and, the McArthur litigation.²³

Four biographical features displayed in *Good Iron Mac* establish a contextual panorama for those direct connections with the Constitution. First, McMillan's intense involvement in colonial politics, including the formation and leadership of political factions and parties²⁴ and election to legislative and executive offices.²⁵ This, for example, provided experience in parliamentary conflicts over Appropriation and Taxation Bills, tactics concerning parliamentary prorogation and dissolution and the relationship of Governors and ministers in the exercise of executive power.²⁶ Secondly, McMillan's continuing participation, especially through his employment by and management of the McArthur company,²⁷ in private enterprise. Within this politics-business amalgam may inhere an explanation for

23 *W & A McArthur Ltd v. Queensland* (1920) 28 CLR 530. McMillan was associated with this company (which his uncles William and Alexander McArthur had formed in Sydney in 1842) from 1870 to 1925 when it ceased business. See, for example, Gunnar, fn. 8 at 3-8, 96, 164-65, 167-69, 206-09, 211, 213-15, 220-21, 223; Coper, M. 1983, *Freedom of Interstate Trade Under the Australian Constitution*, Butterworths, Sydney, 18-20.

24 Gunnar, fn. 8 at 24 (leadership of free trade members in 1887 NSW Legislative Assembly), 27 ('ideological leader of the new free traders'), 36 ('led the free trade party into the 1889 [NSW] election'), 41 ('led his free traders to organize into a broader, more permanent party [forming] the "Liberal Political Association of New South Wales"'), 42-3 (1889 formation of Free Trade and Liberal Party, including 'McMillan's period of intense party leadership'), 117-18 (1893 creation of Australasian Federal League), 119 ('task of bringing the divided free traders together under Reid's leadership'), 170 ('leading part in organizing the free traders for the [1901] federal [election] campaign'), 175 ('opposed efforts . . . to form a radical, dual-level State and Federal free trade party dominated by [George] Reid'), 182 ('McMillan's free trade party . . . the largest of the three parties in [the 1901 Commonwealth] Parliament' and 'McMillan was the Deputy Leader . . . of the Opposition'). See also fn. 59 (Convention delegates' failure to perceive the emergence of political parties).

25 McMillan was a member of the NSW Legislative Assembly (1887-1898) and NSW Treasurer (February 1889-21 July 1891). Gunnar, fn. 8 at 22, 40, 94, 163.

26 See, for example, Gunnar, fn. 8 at 34-35, 66-68, 128-33.

27 See fn. 23.

McMillan's conservative-liberal philosophy²⁸ and, consequential, free-trade views.²⁹ Thirdly, McMillan's intellectual perspectives which were influenced by wide-ranging and voracious reading.³⁰ Of particular importance to McMillan and immediate relevance to the Constitution's formation were books on the American Constitution, Senate and politics.³¹ Fourthly, McMillan's personal and political

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- 28 See, for example, Gunnar, fn. 8 at x ('McMillan, an eminent, committed conservative [who] preferred "Old Liberal" or "Conservative-Liberal"'); 107-13 ('abhorrence of radical change,' tradition, experience and reasoned judgment to facilitate change and the maintenance of individual freedom and liberty). For the characterisation of '[t]he "merchant in politics"' see id at 105 n. 9.
- 29 Id at 13-17, 20-27, 36-44, 96, 100-01, 120, 164 (NSW's 'leading free trade federalist'), 187-94, 203-04. See also *Cole v. Whitfield* (1988) 165 CLR 360 at 391 ('Free trade was understood to give "equality of trade," which Mr McMillan . . . asserted [at the 1898 Melbourne Convention] to be [the] "one grand principle involved in the whole of [Australia's] federation"').
- 30 'To grapple with . . . political issues concerning him, McMillan relied heavily, . . . throughout his life, on . . . intensive continuous reading [which] was a key to understanding his thinking and . . . motivations for his actions.' Gunnar, fn. 8 at 103. McMillan's reading included Edmund Burke's and Daniel Webster's speeches and books, for example, by Plutarch, Sir Henry Maine and Adam Smith. Id at 102-04 (including McMillan's library) 222.
- 31 Id at 71, 102 (referring to Story, J, 1833, 3 vols, *Commentaries on the Constitution of the United States*, [4th edn published in 1873 and 5th edn published in 1891], Hillard, Gray & Co., Boston, and Bryce, J., 1888, 3 vols, *The American Commonwealth*, MacMillan, London), 80 ('respect for [US] Senate . . . about which [McMillan] had read extensively'), 103 n. 7 ('Men and Measures of Half a Century [1888], by Hugh McCulloch, President Lincoln's third Secretary of the Treasury [who] McMillan described . . . as . . . "a man who . . . was a thorough master of finance in [America]"'). On Story's Commentaries which McMillan 'preferred' (Gunnar, fn. 8 at 71) see Powell, J., 'Joseph Story's Commentaries on the Constitution: A Belated Review' (1985) 94 *Yale LJ* 1285. For similar reading by other framers see, for example, La Nauze, fn. 3 at 13, 18-19, 104-05, 272-75; Cowen, Z. 1967, *Isaac Isaacs*, Oxford University Press, Melbourne, 56-8 ('Isaacs . . . read . . . the five volumes of Elliot's Debates on the General State Conventions on the Adoption of the Federation Constitution'). Compare the US framers' reading. See, for example, Greene, J. P., 1986, *The Intellectual Heritage of the Constitutional Era: The Delegates' Library*, The Library Company of Philadelphia, Philadelphia; Meyers, M. (ed), 1981 (revised edn), *The Mind of the Founder*:

relationships with other framers. Politicians from other colonies who, with McMillan, were delegates at the 1890's Conferences and Conventions worked and socialized together in public and private forums.³² However, McMillan also knew, for example, Robert Garran,³³ Joseph Carruthers,³⁴ Bernhard Wise,³⁵ Richard O'Connor³⁶

Sources of the Political Thought of James Madison, University Press of New England, Hanover; Wills, G., 1981, *Explaining America: The Federalist*, Doubleday, New York.

- 32 See, for example, Gunnar, fn. 8 at 52 (Parkes, McMillan, Duncan Gillies and Alfred Deakin on 5 February 1890 in Gillies' office discuss and draft a resolution for federation presented on 9 February to the 1890 Conference), 58 (1890 Conference McMillan's 'first opportunity to interact on quite an intimate basis with the [other colonies'] principal political leaders [and] he became acquainted with their motivations, . . . foibles and . . . prejudices'), 71 (23-24 February and 1 March 1891 NSW delegation discussions including Parkes' draft Convention resolutions), 73 (1891 banquet), 136 (March 21, 1897 luncheon and informal meeting in SA Parliament's library discussing whether to commence the 1897 Convention debates from 'the 1891 Constitution or with resolutions for a new [Constitution]'), 137 (1897 banquet and dinner), 141 (1897 Drafting Subcommittee was 'hidden away in [William John] Downer's home'); 143 (proposed amendment to decrease Senate's power to amend taxation Bills discussed 'in the delegates' hotels'). See also *id* at 143 n. 2 (suggesting an unfortunate 'conspiracy of silence' about delegates 'nocturnal activities [because] problem[s] and compromise[s] may have been worked out . . . without any record left to aid historical understanding'); La Nauze, fn. 3 at 135-36 ('Downer's house'), 140-41 ('lobbying and sufficient agreement outside the Chamber' to delete from the Constitution 'States Assembly' and substitute 'Senate'); Thomson, fn. 18 at 321 n. 56 (Deakin and La Nauze views).
- 33 Gunnar, fn. 8 at 42 (August 1889 Free Trade and Liberal Association Convention). See also Garran, R. R. 1958, *Prosper the Commonwealth*, Angus and Robertson, Sydney; Parker, R., 'Garran, Sir Robert Randolph,' in Nairn, B. & Serle G. (eds), 1981, *Australian Dictionary of Biography*, vol. 8, Melbourne University Press, Carlton, 622. See also fn. 3.
- 34 Gunnar, fn. 8 at 42 (August 1889 Convention). Delegate to 1897-1898 Convention. Ward, J., 'Carruthers, Sir Joseph Hector McNeil,' in Nairn & Serle, fn. 33 at 574, vol. 7 (1979).
- 35 Gunnar, fn. 8 at 32, 42 (August 1889 Convention). Delegate to 1897-1898 Convention. See also Wise, B. R. 1913, *The Making of the Australian Commonwealth, 1889-1900*, Longmans, Green, & Co., London; Ryan, J., 'Wise, Bernhard Ringrose' in Ritchie, J.

and George Dibbs³⁷ and was embroiled in New South Wales politics with Henry Parkes,³⁸ George Reid³⁹ and Edmund Barton.⁴⁰ Thus, *Good Iron Mac's* juxtaposition of McMillan, Parkes, Reid and Barton vividly conveys two and, given the chaotic nature of 1880's and 1890's New South Wales politics, often intertwined spectrums: conservative, liberal and labor—free trade and protectionist—political philosophies and actions.⁴¹ In this august company, McMillan appears to be the most consistent and exemplary conservative freetrader. Of course, such a biographical exposé merely starts, not answers, a conundrum: To what extent is this history reflected in the 1900 text of the Australian Constitution?

Chronologically, *Good Iron Mac* reveals some of the details.⁴² Not surprisingly, concentration on McMillan highlights events otherwise submerged or neglected in more general narratives tracing

(ed), 1990, *Australian Dictionary of Biography*, vol. 12, Melbourne University Press, Carlton, 546.

- 36 Gunnar, fn. 8 at 134 (February 3, 1897 McMillan campaign speech for election as NSW delegate to Convention). See also Rutledge, M., 'O'Connor, Richard Edward,' in Serle, G. (ed), 1988, *Australian Dictionary of Biography*, vol. 11, Melbourne University Press, Carlton, 56.
- 37 Gunnar, fn. 8 at 134 (February 3, 1897 McMillan campaign speech). See also Crisp, fn. 3 at 49-120; Quick & Garran, fn. 3 at 155-57 ('Dibb's Unification Scheme').
- 38 See generally Martin, fn. 5.
- 39 See generally McMinn, W. G. 1989, *George Reid*, Melbourne University Press, Carlton; McMinn, W., 'Reid, Sir George Houstoun,' in Serle, fn. 36 at 347; Crisp, fn. 3 at 1-48.
- 40 See generally Reynolds, J. 1948, *Edmund Barton*, Angus & Robertson, Sydney; Rutledge, M., 'Barton, Sir Edmund,' in Nairn & Serle, fn. 33 at 194, vol. 7 (1979).
- 41 See generally fns. 28-29.
- 42 *Good Iron Mac* does not mention draft Constitutions prepared by Clark (and Wise) and Charles Kingston. See, for example, La Nauze, fn. 3 at 24-27; Thomson, fn. 3 at 239-40 n. 12, 242 n. 19. This is important. The 1891 Constitution Bill, which was based on Clark's Constitution, 'is the Constitution of 1900, not its father or grandfather.' La Nauze, fn. 3 at 78; Thomson, fn. 3 at 241 n. 18; Neasey, J., 'Andrew Inglis Clark Senior and Australian Federation' (August 1969) 15 *Aust J Politics & History* 1, 21-4 (comparison of Clark's Bill, 1891 Bill and 1900 Constitution). Given this textual pedigree (and that Clark was the Tasmanian Attorney-General), is the response to the conundrum (in the text following footnote 40) 'very little'?

the 1889-1901 evolution of Australia's federation and Constitution.⁴³ Merely 'days before' Parkes' 24 October 1889 'Tenterfield Speech,' McMillan advocated the future federation of Australia's colonies.⁴⁴ Parkes and McMillan, as New South Wales representatives, attended the 5-14 February 1890 Australasian Federation Conference in Melbourne where McMillan extolled 'intercolonial freetrade.'⁴⁵ McMillan's 'three-quarters of an hour' speech, on 28 August 1890 in the NSW Legislative Assembly on Parkes' resolution to select NSW parliamentary delegates to the 1891 Sydney Constitution Convention eschewed political and local bias and illustrated that federation issues could be approached and dealt with candidly and carefully.⁴⁶ Also, there were private NSW delegation discussions on 23-24 February and 1 March 1891 at the NSW Parliament and Parkes' residence on 'their advisable course of action' and Parkes' draft Convention resolutions.⁴⁷ At the 1891 Convention, McMillan's motions established the procedural rules and his 12 March 1891 speech advocated 'intercolonial freetrade;' extolled the virtues for Australia's freedom of a strong Senate which, except for 'the initiation of money bills,' ought to possess 'co-equal powers' with the House of Representatives; agreed, with Samuel Griffith,⁴⁸ that responsible government 'need not' be constitutionally mandated; and rejected 'the election of a Governor-General' because that would transform an 'impartial office' into a partisan political position.⁴⁹ McMillan was a

43 See, for example, La Nauze, fn. 3; Quick & Garran, fn. 3.

44 Gunnar, fn. 8 at 47. See also La Nauze, fn. 3 at 9 (Tenterfield); McMinn, W.G. 1994, *Nationalism and Federalism in Australia*, Oxford University Press, Melbourne, 132-33; Fredman, L., 'The Tenterfield Oration: Legend and Reality' (Sept. 1963) 35 *Aust Quarterly* 59; Clark, C. M., (ed), 1955, *Select Documents in Australian History 1851-1900*, Angus and Robertson, Sydney, 467-70 (Parkes' Tenterfield Oration).

45 Gunnar, fn. 8 at 52-8.

46 Id at 61-2. For example, see id at 79-80 (McMillan abandons the Parkes—NSW 'liberal, democratic position' on Senate powers), 143-44 (McMillan abandons his views to achieve federation).

47 Id at 71. For subsequent 'private' meetings and correspondence concerning these resolutions see La Nauze, fn. 3 at 35-38; Thomson, fn. 3 at 60, 79-81, 240 n. 13.

48 See, for example, La Nauze, fn. 3 at 36, 39-40, 54, 70; Joyce, fn. 6 at 189, 193; Gunnar, fn. 8 at 74, 146. See also La Nauze, fn. 3 at 127 (subsequent drafting history).

49 Gunnar, fn. 8 at 73, 74-5, 82. See also id at 139 ('If you have responsible government at all').

member of the Convention's Finance Committee⁵⁰ and participated in Convention debates, including proposing amendments,⁵¹ on Commonwealth taxation power and control of interstate rivers and railways, Senate power to amend money—taxation and ordinary annual appropriation—Bills, distribution of Commonwealth revenues, and Commonwealth assumption of colonies' debts.⁵²

However, proposals to debate in the NSW Parliament the resulting 1891 Constitution Bill, to put suggested amendments to a second Convention and to submit, by referendum, the Constitution to the people, were suffocated by NSW politics.⁵³ Only in June-July 1893 did 'McMillan [affiliate with] Barton in reviving Australian federation as a patriotic movement outside the partisan arena' through the creation of the 'Australasian Federal League.'⁵⁴ Following the January 1895 Hobart Premiers' Conference,⁵⁵ McMillan assisted in securing NSW legislation to enable NSW to be represented at a Convention to draft an Australian Constitution.⁵⁶ On 27 January

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- 50 Id at 76-7. See also La Nauze, fn. 3 at 45, 54-5. Also established were the Judiciary and Constitutional Committees. Id.
- 51 Gunnar, fn. 8 at 79-80 ('Senate be granted . . . the right to amend all bills other than the ordinary annual appropriation bill [and] the House of Representatives could accept or reject, in whole or part, the Senate amendments [and an amended Bill imposing taxation] would go back to the Senate to be accepted or rejected (but not further amended)'), 82 (amendments concerning distribution of Commonwealth revenues). See also Craven, fn. 19 at 459, 460 (text of McMillan's amendment).
- 52 Gunnar, fn. 8 at 78-82.
- 53 Id at 83-84. Generally on NSW politics during this era see Martin, fn. 5 at 403-24; McMinn, fn. 39 at 64-70.
- 54 Gunnar, fn. 8 at 117-18 ('broad-based vehicle to promote Federation'). See also id at 167. On this League see Quick & Garran, fn. 3 at 152-53 ('Australian Federation League'); McMinn, fn. 44 at 153-56; Morey, G., 'The Australian Federation League in the Federal Movement in NSW, 1893-99' (unpublished paper cited in Crisp, fn. 3 at 448); Wright, D.I., 'The Australasian Federation League in New South Wales, 1893-1899' (March 1971) 57 Pt 1 *J Royal Hist Soc* 58; Macintyre, S., 'Corowa and the voice of the people' (March 1994) 33 *Canberra Hist J (new series)* 2, 5-8.
- 55 See, for example, La Nauze, fn. 3 at 90; Thomson, fn. 3 at 242 n. 20; Macintyre, S., 'After Corowa' (Oct 1994) 65 *Vic Hist J* 98.
- 56 Gunnar, fn. 8 at 134. See also Quick & Garran, fn. 3 at 160-61 (unsuccessfully 'McMillan opposed the principle of a Convention elected by the people' and advocated that the NSW Parliament select Convention delegates); Clark, fn. 44 at 503-04 (NSW Act). Assented to on 23 December 1895. Not until 4 January 1897 was

1897 McMillan's 'Manifesto' was released. Again, freetrade was stressed. Hidden was McMillan's 'conviction that the Senate should be a conservative bulwark against popular legislative experimentation.'⁵⁷ Unfortunately, *Good Iron Mac* does not disclose whether, during McMillan's campaign speeches 'all over' NSW, voters became aware of that view before electing him on 4 March 1897 as one of the ten NSW delegates.⁵⁸ If not, it was revealed in McMillan's speech on Monday, 29 March 1897 to the Convention's Adelaide session. Rather than 'entirely [being] a States House,' Senators, acting according to 'political philosophy and party affiliation,'⁵⁹ should exercise 'judgment,' 'wisdom,' 'moderation' and 'temper the extremes of democracy in the [House] of Representatives.'⁶⁰ As chairman of the Convention's Finance Committee, McMillan, in addition to the Committee's Report,

this Act proclaimed to come into operation. McMinn, fn. 39 at 118, 130.

57 Gunnar, fn. 8 at 134.

58 Id at 134-35. Similarly, there is no disclosure in La Nauze, fn. 3 at 91; Quick & Garran, fn. 3 at 163-64. See generally Pringle, R., 'The Convention Elections in New South Wales: A Milestone?' (1972) 58 *J Royal Aust Hist Society* 3.

59 Gunnar, fn. 8 at 138, 139. See also id at 77 (John Macrossan's 1891 Convention comment: 'instead of [Senators] voting . . . as states, they will vote as members of [political] parties'); La Nauze, fn. 3 at 119 ('Only a few, a very few, [delegates, for example, Isaacs and Deakin] foretold' the rise of political parties), 141 ('rigid party discipline was [in 1897] unknown' in colonial parliaments), 148. See also fn. 24 (emergence of political parties). See generally Loveday, P. & Parker, R. (eds), 1977, *The Emergence of the Australian Party System*, Hale & Ironmonger, Sydney; Eddy, J., 'Politics in New South Wales: The Federation Issue and the Move Away from Faction and Parochialism,' in Hodgins, B., Wright, D. & Heick, W. (eds), 1978, *Federalism in Canada and Australia: The Early Years*, Australian National University Press, Canberra, 195. But contrast *Western Australia v. Commonwealth* (1975) 134 CLR 201 at 228: 'To that federal nature, the maintenance . . . of the Senate as the States' House is indispensable') (Barwick, CJ, dissenting).

60 Gunnar, fn. 8 at 138, 139. McMillan's assumption that the Senate would 'be conservative even when acting upon political philosophy and party' was without foundation 'in 1891;' has subsequently (for example, in 1996) been incorrect and 'appears' to have been based on McMillan's 'experience with the New South Wales appointed Legislative Council' and knowledge of the House of Lords and US Senate. Id at 80 n. 6.

drafted 'memoranda, proposals, and restructured language'⁶¹ and, seeking clarification of s. 92's⁶² effect, noted in a 9 April 1897 memorandum, that s. 92's phrase 'absolutely free' was 'considered possibly misleading.'⁶³

(i) Senate and Money Bills: The Great Crisis?

Good Iron Mac asserts: 'On [14 April 1897], McMillan alone literally held in his hands the fate of the Australian federation.'⁶⁴ As a drafting problem, the issue was clear.⁶⁵ The 1891 Constitution Bill provided:

The Senate shall have equal power with the House of Representatives in respect of all proposed laws, except laws imposing taxation and laws appropriating the necessary supplies for the ordinary annual services of the Government, which the Senate may affirm or reject, but may not amend....

In the case of a proposed law which the Senate may not amend, the Senate may at any stage return it to the House of Representatives with a message requesting the omission or amendment of any items or provisions therein. And the House of Representatives may, if it thinks fit, make such omissions or amendments, or any of them, with or without modifications.⁶⁶

61 *Id* at 141.

62 See fn. 5.

63 Gunnar, fn. 8 at 141; La Nauze, fn. 3 at 133 (quoting 'Notes for the Drafting Committee from the Finance Committee'). On the Finance Committee see Gunnar, fn. 8 at 140-41, 144-45; La Nauze, fn. 3 at 132-34.

64 Gunnar, fn. 8 at 142.

65 For the chronological textual evolution of section 53 of the Constitution see Craven, fn. 19 at 458-64. For the 1891 and 1897-1898 Convention Debates see La Nauze, fn. 3 at 43-4, 71, 126, 140-49, 188-91, 217-18, 241; Crisp, fn. 39 at 15, 302-04, 325-26; Winterton, fn. 19 at 6-7, 200-04; McMinn, fn. 44 at 144-45, 169-71; Pearce, D., 'The Legislative Power of the Senate,' in Zines, L. (ed), 1977, *Commentaries on the Australian Constitution*, Butterworths, Sydney, 119; Hall & Iremonger, fn. 18 at 15, 91-104, 110, 119-82; Howard & Saunders, fn. 19 at 252-60. See also New South Wales Parliamentary Debates, 1898 (vol. 94), 1660-64 (NSW Legislative Assembly Resolution concerning 'money bills').

66 *Official Report of the National Australasian Convention Debates*, 1891, NSW Government Printer, Sydney, 953-54 (cl. 55(1) & (5)). For background 1891 debates see La Nauze, fn. 3 at 43-4, 71; Joyce, fn. 6 at 198-99, 205; Galligan & Warden, fn. 19 at 89-105; Gunnar,

The 12 April 1897 Constitution Bill,⁶⁷ prepared by the Drafting Committee⁶⁸ following the Constitutional Committee's⁶⁹ 6 April 1897 decision to omit the words 'laws imposing taxation and,'⁷⁰ provided:

The States Assembly shall have equal power with the House of Representatives in respect of all proposed laws, except laws appropriating the necessary supplies for the ordinary annual services of the Government, which the

fn. 8 at 78-80. For earlier draft provisions see Bills numbered 1-9 listed in La Nauze, fn. 3 at 289-90. See also fn. 84 ('veto-in-detail').

- 67 This 12 April 1897 Bill is Bill number 11 in La Nauze, fn. 3, at 290. For its development and location see *id* at 137-38, 343 n. 27. Clause 53(1) and (5) is at p. 14 of the Bill and reproduced in Craven, fn. 19 at 460-61.
- 68 For details of this 1897-1898 Committee (comprised of Edmund Barton, John Downer, Richard O'Connor and, its secretary, Robert Garran) see La Nauze, fn. 3 at 128-30, 135-36, 179-80. Compare the 1891 Drafting Committee (comprised of Samuel Griffith, Charles Kingston, Andrew Clark and Edmund Barton). *Id* at 46, 48, 64-5.
- 69 For details of this Committee (composed of 20 delegates plus 5 Premiers as *ex officio* members) see *id* at 121-28, 136. McMillan was not a member of this Committee.
- 70 *Id* at 126. All small (in population size) states' (Tasmania, South Australia and Western Australia) committee members (except SA Premier Charles Kingston) voted in favour of Richard Baker's 6 April 1897 proposal to omit those words. Barton, as committee chairman, did not vote. All large states' (New South Wales and Victoria) committee members (including NSW Premier George Reid) voted against Baker's proposal. Therefore, the proposal was approved 14 to 10 and the words omitted. It has been suggested that this vote 'eliminated' the 1891 compromise. *Id* at 142. Baker was chairman of the Committee of the Whole when the 14 April 1897 vote (fn. 73) was taken. Gunnar, fn. 8 at 143. For Baker's wider 1891 Convention amendment to equate Senate powers with those of the House of Representatives over appropriation and taxation Bills see Gunnar, fn. 8 at 78-80; Craven, fn. 19 at 459, 460. See also La Nauze, fn. 3 at 23 (Baker's 1891 Manual of Reference); Van der Hoorn, R., 'Richard Chaffrey Baker: A South Australian Conservative and the Federal Conventions of 1891 and 1897-98' (1980) 7 *J Historical Society of South Australia* 24; Playford, J., 'Baker, Richard Chaffrey,' in Nairn & Serle, fn. 33 at 152. For Kingston's same 1891 position see La Nauze, fn. 3 at 71; Crisp, fn. 3 at 302-04.

States Assembly may affirm or reject, but may not amend.

. . . .
 In the case of a proposed law which the States Assembly may not amend, the States Assembly may at any stage return it to the House of Representatives with a message requesting the omission or amendment of any items or provisions therein. And the House of Representatives may, if it thinks fit, make such omissions or amendments, or any of them, with or without modifications.⁷¹

On 14 April 1897, Premier Reid's amendment to re-insert the words 'laws imposing taxation and' was adopted⁷² 'by 25 votes to 23.'⁷³

71 See fn. 67 (cl. 53(1) & (5)).

72 Gunnar, fn. 8 at 142-44; La Nauze, fn. 3 at 140-46; McMinn, fn. 39 at 130-34. Reid 'did not believe New South Wales and Victoria [were] likely to combine against the smaller colonies, [however,] he was prepared to allow [the smaller colonies], as a defence against such a contingency, the right to reject financial measures *in toto*, but the right to amend, even when disguised as a right to suggest amendments, was a different matter; it implied a right to influence the normal day-to-day financial administration, and so involved a derogation in practice from the principle of responsible government, of a Government responsible to the Lower House, which had been accepted in theory.' *Id* at 133 (footnote omitted). Reid 'remained unhappy about the "compromise of 1891" which allowed the Senate to reject a money bill *in toto* or to "suggest" amendments [because] the difference between "amendment" and "suggestion of amendment" was a very fine one. [Reid] was willing to accept the [1891] compromise only on condition that there be a deadlock provision allowing a simple majority at a joint sitting to carry the day on financial questions. [That is], in the final instance the large colonies should be able to outvote the smaller.' *Id* at 130-31 (footnote omitted). Therefore, Reid 'favoured the Senate's simple acceptance or rejection of money bills' (La Nauze, fn. 3 at 141) but 'only' with a deadlock resolving procedure. He rejected Senate amendments and suggested amendments, but may have accepted the latter to obtain the former. For development of section 57's deadlock mechanism and its intended relationship to Senate 'rejection' and 'suggestion' powers see McMinn, fn. 39 at 132 ('Reid insisted that the deadlock clause had to be seen not in isolation but in context of the whole question of state and popular rights'); La Nauze, fn. 3 at 128, 188-91 ('the support of the large States [to equal state Senate representation] had not been given without implied conditions. To defend [the Senate compromises] in the [1898, 1899 and 1900 referendum] campaigns without some

ultimate safeguard against an indefinite blocking of the popular will would have been difficult in New South Wales and impossible in Victoria'). See also *id* at 241, 242, 244-45; McMinn, fn. 39 at 165 (at the Jan.-Feb. 1899 Melbourne Premiers Conference, '[o]n the critical question of Senate powers [Reid] got enough to satisfy him: no alteration was made in the money-bills compromise, but the three-fifths majority provision [in section 57's deadlock resolving procedure] was replaced by one requiring only an absolute majority at a joint sitting, so ultimate [House of Representatives] supremacy [over the Senate] was guaranteed'). See generally Richardson, J., 1973, *Patterns of Australian Federalism*, Australian National University, Canberra, 11-13; Richardson, J., 'Federal Deadlocks: Origin and Operation of Section 57' (1962) 1 *Tas Univ LR* 706; Curtis, W., 'The Origin and Genesis of the Deadlock Clause of the Australian Constitution' (1945) 60 *Political Science Quarterly* 412; Galligan & Warden, fn. 19 at 105-09; Gunnar, fn. 8 at 150.

- 73 La Nauze, fn. 3 at 146. See also Gunnar, fn. 8 at 144 (25 to 23). There were 50 delegates. Baker, as Chairman of the Committee of the Whole, could only vote—a casting vote—on an equal division. Baker's vote would have been to reject the Reid amendment because of 'parliamentary convention . . . or . . . personal convictions.' La Nauze, fn. 3 at 146. See also fn. 70. John Hackett (a Western Australian delegate left Adelaide on 7 April 1897 to return to WA) did not vote. La Nauze, fn. 3 at 140, 343 n. 4. How would Hackett have voted on Reid's amendment? At the 1891 Convention he (but no other WA delegate) had supported inclusion of those words. *Id* at 147. However, on 6 April 1897, in the Constitutional Committee he had supported their omission. *Id* at 126. See also fn. 70. At the 1897 Sydney Convention, he supported their inclusion. La Nauze, fn. 3 at 147. See generally *id* at 41-2 (Hackett's 1891 Convention 'epigram' that 'either responsible government will kill federation or federation, in the form in which we shall, I hope, be prepared to accept it, will kill responsible government'); Battye, O., 'Sir J Winthrop Hackett, the editor,' in Hunt, L. (ed), 1979, *Western Australian Portraits*, University of Western Australia Press, Crawley, 92; Crowley, F., 1971, *Forrest: 1847-1918*, University of Qld Press, St Lucia, 288-302. On 14 April 1897, if Hackett had supported Reid's amendment to include those words, the amendment would have been carried (without the need for Baker to vote and even if McMillan had voted against Reid) 25 to 24. If Hackett had voted against Reid's amendment, 25 to 24 the amendment would have been rejected. In either situation, McMillan's vote would not have been crucial. Here, Hackett's position is the most important. However if Baker's view is taken into account (so that there would have been 25 votes—and 26 votes with a Hackett rejection vote—to reject Reid's amendment), then only Hackett's vote to support

Therefore,⁷⁴ the second and fourth paragraphs of s. 53 of the Constitution state:

The Senate may not amend proposed laws imposing taxation, or proposed laws appropriating revenue or moneys for the ordinary annual services of the Government.

The Senate may at any stage return to the House of Representatives any proposed law which the Senate may not amend, requesting, by message, the omission or amendment of any items or provisions therein. And the House of Representatives may, if it thinks fit, make any of such omissions or amendments, with or without modifications.

Behind this textual facade smouldered a momentous issue: What was to be the constitutional power of the Senate (composed of the same number of senators from each State⁷⁵) vis a vis the House of

Reid would have been important by producing a 25 to 25 tied vote. Of course, as Hackett exemplifies, delegates had and were prone to change their minds (and votes) on this issue. See, for example, Crisp, fn. 3 at 303-04 (Kingston); La Nauze, fn. 3 at 71 (Kingston), 142-43 (Walter James), 187-88. And, of course, for purposes of the actual vote on 14 April 1897, it was McMillan (not Hackett) who was present (and voted for) Reid's amendment.

- 74 For subsequent 1897 Sydney Convention debates see La Nauze, fn. 3 at 187-88.
- 75 For Convention debates see id at 35, 37 (Parkes' 1891 Resolution that the 'Senate [shall consist] of an equal number of members from each Province'); Howard & Saunders, fn. 19 at 252-53 n. 5. Note also Henry Higgins' proposal 'that Senate seats, like House [of Representatives] seats be allocated to States according to population.' Crisp, fn. 3 at 325; La Nauze, fn. 3 at 187. For the transition from senators appointed by State Parliaments (1891 Convention) to elected senators (1897 Convention) see id at 53, 72, 124. Because of s. 15 of the Constitution (State Parliament or Governor appointment of senators to fill a casual senate vacancy) that transition is not complete. See, for example, Thomson, J., 'Causal Senate Vacancies: Section 15's Continuing Conundrums' (1992) 3 *PLR* 149. Note also McMillan's 1897 Sydney proposal to permit the Commonwealth Parliament to change senate electorates from being single state electorates into divisions was adopted. Gunnar, fn. 8 at 150. See para. 2 of s. 7 of the Constitution; Lumb, R. & Moens, G. (eds), 1995, *The Constitution of the Commonwealth of Australia: Annotated*, 5th edn, Butterworths, Sydney, 57. Now, there are territorial senators. See, for example, *W.A. v. Commonwealth* (1975) 134 CLR 201; *Queensland v.*

Representatives (composed of members in proportion to the State's population)⁷⁶ and, in particular, Senate power to reject or amend money Bills? One extreme advocated equality of power over all Bills.⁷⁷ Opposite were proposals to give the House of Representatives final or ultimate power.⁷⁸ The 1891 compromise⁷⁹ encompassed express denial of Senate power to amend appropriation and taxation Bills and express affirmation of Senate power to request amendments to or affirm or reject those Bills.⁸⁰

McMillan was thrust into this quagmire of attempts to resuscitate,⁸¹ repeal⁸² or modify by amendment⁸³ that compromise.

Commonwealth (1977) 139 CLR 585; Coper, M., 'The Agony of Judicial Choice: Representation of the Territories in the Federal Parliament' (Jan. 1978) *Aust Current L Digest* DT1-DT4.

- 76 See, for example, s. 24 of the Constitution; *Attorney-General (Clith) (ex rel McKinlay) v. Commonwealth* (1975) 135 CLR 1 (s. 24 does not mandate equal number of electors in House of Representatives electorates); *McGinty v. Western Australia* (1996) 186 CLR 140; Lumb & Moens, fn. 75 at 78-81.
- 77 For example, Baker's 1891 Convention proposal. See fn. 70. See also La Nauze, fn. 3 at 71 (John Cockburn).
- 78 For example, Parkes' declaration that 'he would have to submit an amendment that would deny the Senate any voice on money bills.' Gunnar, fn. 8 at 80 (summarising Official Report, fn. 66 at 721); Crisp, fn. 3 at 303 (Playford).
- 79 See, for example, Crisp, fn. 3 at 303, 325 La Nauze, fn. 3 at 71 ('The "compromise", providing for "requests" but not [Senate] "amendments" [of money bills], was approved by 22 votes to 16'). See also fn. 66.
- 80 See text accompanying fn. 66. See also fn. 84 (proposed 'veto-in-detail').
- 81 'At Adelaide in 1897 the New South Wales and Victorian delegations, with unhappy memories of their own inter-House battles, were insistent on the revival and insertion of "the 1891 Compromise" in the new [1897 Constitution Bill].' Crisp, fn. 3 at 325. For those 'inter-House battles' see Gunnar, fn. 8 at 126-33 (NSW disputes, 1894-1896, over taxation Bills, proposals to reform Legislative Council and a Bill to facilitate referenda to determine such disputes); McMinn, fn. 39 at 104-26 (taxation Bill, reform of Legislative Council), 130 (Reid's 'bitter and recent experience of Upper House power').
- 82 Did Richard Baker attempt to revive his 1891 amendment (see fn. 70 ('equal powers')) or merely concentrate on taxation (not appropriation) Bills (see fn. 70 (6 April 1897 amendment))? There appears to be some ambivalence or doubt. Compare La Nauze, fn. 3 at 126 ('taxation') and *id* at 142 ('eliminated' compromise).

Textually, an easy question emerged. Should the Constitution prohibit the Senate amending taxation Bills?⁸⁴ Baker's 6 April 1897

Apparently, near the beginning of the 1897 Adelaide Convention 'the balance of opinion amongst the delegations of the three small colonies [WA, SA and Tas.] was strongly for greater equality [than the 1891 Compromise] between the [Senate and House of Representatives] in financial matters.' Crisp, fn. 3 at 325-26. See also McMinn, fn. 39 at 133 ('it gradually became clear that most small-state delegates wanted even greater [than the 1891 Compromise] powers for the Senate'). But, how much 'greater'? Was it (virtual) equality?

83 For example, Richard Baker's 6 April 1897 amendment. See fn. 70.

84 These amendments only dealt with taxation Bills. Proponents of Senate power appear (but note fn. 82) to have accepted that the Senate could not amend (but it could reject or request amendments to) appropriation Bills (see, for example, fn. 83). Opponents of Senate power appear to have conceded that the Senate could suggest amendments to, and reject *in toto* (but insisted it could not amend), appropriation Bills (see, for example, fn. 72 (Reid)). Why were these two concessions made? First, as to Senate requests to amend Appropriation Bills see Pearce, fn. 65 at 125-30. Secondly, 'the "compromise of 1891" left the Senate with the power to reject Bills appropriating money for the ordinary annual services of government, so [the Senate] had the [constitutional] power to deprive the government of supply. As the ultimate sanction of ministerial responsibility is the denial of supply to government, the Senate clearly had the capacity to make government responsible to it if it wished. [S]ome of the framers may not have thought this through . . . [However,] others were well aware that, if the Senate took its financial powers to the limit, the government could not survive . . . But they did not regard this theoretical eventuality as a practical possibility. [For example, in Adelaide on 29 March 1897] . . . McMillan suggested that a Senate veto of supply would be "inviting a revolution in the country," and that only a "lunatic" would dare to do so. . . . It was expected that . . . in any event, even deadlocks over supply could be resolved by the mechanism of s. 57 [of the Constitution]. . . . Accordingly, the time-bomb ticking away in s. 53 was largely forgotten for the first seventy years of federation. . .': Winterton, fn. 19 at 6-7 (footnotes omitted). For elaboration of the 1891, 1897-1898 Convention debates and Senate power vis-a-vis appropriation Bills see Howard & Saunders, fn. 19 at 256-57 (general acceptance of Senate power to reject *in toto* appropriation and taxation Bills and circumstances when this might occur); Hall & Iremonger, fn. 18 at 15, 91-104, 119-82. In addition to rejection *in toto*, amendment and requests for amendments, Senate power to 'veto-in-detail' individual items of

proposal was to remove that prohibition and, therefore, the Senate would possess that power.⁸⁵ Reid's 13 April 1897 amendment re-inserted⁸⁶ this prohibition and, consequently, curtailed Senate power.⁸⁷ However, at least two perspectives suggest much more was or, at least, perceived to be at stake. First, was the perceived divergence of interests between small (less populous) and larger (more populated) states. In this context, stakes were high: creating and bringing into existence the Constitution and federation. Would small states (Western Australia, South Australia, Tasmania and Queensland) enter into the federation and accept the Constitution without protection and the means of protecting themselves from the larger states (New South Wales and Victoria)? Even if such divergent interests existed, some delegates questioned whether anticipated clashes or confrontations would, in practice, occur.⁸⁸ However, assume this eventuated and a Senate, functioning as a States' House, was, as a prerequisite to federation, required to protect small states' interests against a House of Representatives advancing larger states' interests. Were broad (almost or, perhaps, equal) Senate powers over appropriation and taxation Bills required to effectively perform that task?⁸⁹ How could Senate interference with those Bills protect small

expenditure in appropriation Bills was proposed, but not adopted, in the 1891 Convention. Galligan & Warden, fn. 19 at 96-8. For comparisons see Fisher, L. & Devins, N., 'How Successfully Can the States' Item Veto be Transferred to the President?' (1986) 75 *Georgetown LJ* 159; Rappaport, M., 'The President's Veto and the Constitution' (1993) 87 *Northwestern ULR* 735; *Raines v. Byrd* (1997) 117 S. Ct 2312.

85 See fn. 83.

86 For its previous 6 April 1897 removal see *id.*

87 For Reid's amendment see fn. 72 and accompanying text.

88 See, for example, fn. 72 (Reid did 'not believe'). Of course, some delegates (for example, Macrossan, McMillan, Isaacs and Deakin) 'foresaw the development of national political parties and the inevitable defeat of the Senate's expected role as protector of State interests.' Howard & Saunders, fn. 19 at 254. See also fn. 59.

89 Would States' interests have been better protected and maintained by State Parliaments appointing senators as the 1891 Constitution Bill proposed? If an appointment (not election) system applied to all senators, would constitutional conventions (similar to those regarding appointment of s. 15 senators) have developed and lessened that protection? See fn. 75 (transition from appointment to election of senators).

states' interests? Examples, in both directions, were proffered.⁹⁰ By 14 April 1897 five small state delegates⁹¹ moved from their states' position of seeking more Senate power than provided by the 1891 compromise to support Reid's amendment limiting (but not abolishing) that power. Two reasons were apparent: crystallization of a preference for federation over increased Senate power, when large state delegates suggested that achieving the latter might render the former unattainable,⁹² and democracy, which required less, not more, power in a state, not population, based Senate.⁹³

Where did McMillan stand? Apparently, behind the second perspective surrounding the Baker-Reid imbroglio: a conservative vision of the Senate. Political philosophy, not state population size, controlled construction of Senate powers and functions. Therefore, some conservative delegates, from large states,⁹⁴ supported the creation of a powerful Senate to counter majoritarian will and interests which might prevail in the House of Representatives. For example, at the 1891 Convention:

McMillan espoused a powerful, co-equal Senate of the most distinguished and experienced Australians elected indirectly by State parliaments for longer terms than [House of] Representatives' members. Concluding . . . that political cleavage in the Commonwealth Parliament would in practice fall along philosophical and party lines,

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- 90 Howard & Saunders, fn. 19 at 256 (arguments and examples). See also La Nauze, fn. 3 at 148 (Senate rejected a Bill 'to compensate the States for loss of revenue').
- 91 South Australians Charles Kingston and Patrick Glynn and Tasmanians John Henry, Nicholas Brown and Neil Lewis. La Nauze, fn. 3 at 146; McMinn, fn. 44 at 170.
- 92 La Nauze, fn. 3 at 143-45 (Glynn, Henry, Lewis and Brown).
- 93 Crisp, fn. 3 at 304 (Kingston, 1891 Convention). See also id at 326 (Kingston, 1897 Convention). 'Between the Adelaide and Sydney [1897] Sessions,' the South Australian, Tasmanian and Western Australian Parliaments 'repudiated' these 5 votes 'making clear that their majorities were in favour of a Senate power to amend Money Bills.' Id at 326. At the 1891 Convention, Kingston and Thomas Playford 'contrary to [their South Australian] State's interest, declared [their] intent[ion] to vote against any provision that did not give substantially complete control to the popularly elected House [of Representatives].' Gunnar, fn. 8 at 80.
- 94 For example, McMillan (NSW) and Victorian Legislative Councillors Henry Cuthbert and Nicholas Fitzgerald at the 1891 Convention. See Official Report, fn. 66 at 172, 291.

[McMillan] saw such [a] Senate as a conservative bulwark against popular excesses of the moment.⁹⁵

On 13 April 1897, McMillan reiterated these views and indicated that, in his view, Reid's amendment would permit the House of Representatives 'not merely to dominate but to override the Senate.'⁹⁶ Indeed, that ought not to have been the position even if lower Houses were 'a deliberative assembly . . . [where] so called mandate[s] from the people' did not reduce their obligation to consider 'great momentous question[s] in all [their] surroundings' to avoid 'suicidal' struggles with upper Chambers.⁹⁷ Thus, from two perspectives—Senate power and House of Representatives acquiescence—the former ought to prevail. So on 13 April 1897 there was a clear indication that McMillan would 'vote against Reid's amendment, against the position of his large [NSW] colony and again, for his conservative philosophy.'⁹⁸ But, '[i]n the division taken [on 14 April 1897],

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- 95 Gunnar, fn. 8 at 79 (summarizing Official Report, fn. 66 at 718-21). For the suggestion that by espousing these views and proposing an amendment to the 1891 Compromise (see fn. 51) 'McMillan had placed his own political philosophy ahead of his representation of his large [NSW] colony' see Gunnar, fn. 8 at 80. See also fns. 59, 60 and accompanying text. On McMillan's proposal 'that the Senate be granted . . . the right to amend all money bills other than the ordinary appropriation bill' the NSW Premier 'Parkes was furious at McMillan's desertion from the liberal, democratic, large-State position.' Gunnar, fn. 8 at 79-80. See also fn. 78. For removal (except for s. 15) of State Parliaments appointing senators see fn. 75. See also fn. 56 (McMillan's support for appointment, not election, of NSW Convention delegates).
- 96 Gunnar, fn. 8 at 142. Indeed, that is what more liberal, democratic delegates, such as Kingston, sought to achieve. See, for example, Crisp, fn. 3 at 304. Earlier, on 29 March 1897, McMillan had also spoken of the Senate as 'a firm and moderating . . . check' on the 'popular house' and, therefore, as requiring 'co-equal power . . . to amend or reject all Bills, excepting only annual supply Bills.' Gunnar, fn. 8 at 138.
- 97 Id at 128 (quoting McMillan's 11 September 1895 NSW Legislative Assembly Speech NSW Parliamentary Debates (vol. 79) 733). Compare McMillan's view of 'deliberative' politics with, for example, Sunstein, C., 'Beyond the Republican Revival' (1988) 97 *Yale LJ* 1539, 1548-52 ('politics as above all deliberative').
- 98 Gunnar, fn. 8 at 142. For the origins and content of this conservative philosophy and McMillan's incorrect assumption see fns. 28, 60.

McMillan's affirmative vote carried the Reid amendment 25 to 23.⁹⁹ Why did McMillan change from 'no' to 'yes'? Albeit momentarily on 14 April 1897, did he 'alone literally [hold] in his hands the fate of Australian federation'?¹⁰⁰ Even at the Convention's September 1897 Sydney session McMillan 'press[ed] to preserve a strong, independent Senate. . . . [H]e was becoming more confident in his public espousal of [the Senate] as the "conservative" element in government and more comfortable with himself as an openly "conservative" voice in the Convention.'¹⁰¹ However, given McMillan's parliamentary and convention experience, explanation of his 14 April 1897 reversal cannot rest upon diffidence. Rather, like at least four of the five small state delegates who switched sides,¹⁰² the motivation was federation.¹⁰³ Indeed, McMillan had apparently previously and privately disclosed his priorities: 'I am a Federalist above all things.'¹⁰⁴ Even so, did McMillan save Australian federation? Unhesitatingly, *Good Iron Mac* proclaims an affirmative answer. Equally decisive has been that response's rejection.¹⁰⁵ Of

99 Gunnar, fn. 8 at 144. See fn. 73 (postulating possibilities). For the 14 April 1897 vote there were 49 delegates (29 small and 20 large state delegates). Hackett was absent (fn. 73) and Baker only had a casting vote (fn. 73). Five small state delegates (fn. 91) changed to vote with the 19 large state delegates which meant 24 votes for Reid's amendment and 24 small state votes against. McMillan's vote (placing him back with the large states) made 25 votes for Reid's amendment. Therefore, Baker did not vote and Reid's amendment was approved.

100 Gunnar, fn. 8 at 142 (affirmative answer). See also *id* at v (Professor Martin's conclusion that 'McMillan virtually saved the federation by deciding—after a deep crisis of conscience—to make in 1897 a crucial compromise on Senate powers').

101 *Id* at 149. See also *id* at 196-98 (McMillan's 1902 position on Senate requests for amendments).

102 See fn. 92.

103 See Gunnar, fn. 8 at 144 ('for the sake of compromise, and for the sake of Australian union, which [McMillan] put above every other subject [on 14 April 1897, McMillan gave his] vote in favour of [Reid's] amendment'). See also *id* at 105 ('federation as the principal cause of [McMillan's] life').

104 Gunnar, fn. 8 at 105 (quoting McMillan's letter to Parkes). The reference provided by *id* at 244 for the location of McMillan's letter is Parkes Papers, Mitchell Library, Sydney, MSS number 894, vol. 24, p. 154. However, the 'I am a federalist' remark does not appear in the McMillan letter with that reference in the Parkes' papers.

105 For example, Schoff, fn. 11 at 322 (McMillan's 14 April 1897 'resolution of contrapuntal ideals'—'federation' and 'conservative

course, in such a crisis,¹⁰⁶ other 14 April 1897 heroes may emerge. In fact, prior to *Good Iron Mac*, Reid¹⁰⁷ and Kingston¹⁰⁸ had been nominated.

(ii) A London Meeting

Despite any such diminution of McMillan's 14 April 1897 lustre, his subsequent contributions—within and outside the 1897-1898 Convention¹⁰⁹ and during the 1898 and 1899 NSW referenda on the Constitution Bill¹¹⁰ ought to be recognized. However, one mystery remains: What, if anything, did McMillan say to Chamberlain on 28 June 1900 in England about Australian federation and the Constitution Bill? *Good Iron Mac*, other than revealing that a meeting occurred, provides no clue.

On 21 June [1899], McMillan in London learned by cable that, in the [20 June 1899] referendum, New South Wales adopted the Constitution . . . This result appeared to assure federation. The last hurdle was approval by the Imperial Parliament, for which the support of Joseph Chamberlain, the Secretary of State for the Colonies was critical. On 28 June, at 12:30 p.m., scarcely a week after the New South Wales referendum, McMillan met with Chamberlain to press for his backing. Following this conference, Chamberlain invited to London one representative from each colony . . .¹¹¹

philosophy'—was merely 'a crisis of conscience . . . [T]o take the incident further . . . [would be] ahistorical').

- 106 See, for example, Gunnar, fn. 8 at 143, 144 ('crisis'); La Nauze, fn. 3 at 140 ('fate of the federation'), 147 ('crisis of the Convention' and 'the most contentious issue').
- 107 Hall & Iremonger, fn. 18 at 15 ('Reid's presence was crucial to the success of the [Adelaide] 1897 Convention').
- 108 Crisp, fn. 3 at 326 ('Kingston . . . made the break in [the] apparent deadlock [between the Colonies], announcing that he would join in voting with delegates of New South Wales and Victoria for "the 1891 Compromise"').
- 109 Gunnar, fn. 8 at 145-60.
- 110 Id at 161-62, 167. See generally La Nauze, fn. 3 at 239-47; McMinn, fn. 39 at 148-68.
- 111 Gunnar, fn. 8 at 167. Two sources are cited (id at 250) for this meeting. First, the diary of Helen McMillan which indicates that McMillan met with 'Chamberlain about federation matters.' Second, the McMillan Papers (fn. 11 at manuscript 1885/4 p. 175) (Letter of 21 June 1899 to McMillan only indicating that Chamberlain had been informed that McMillan wanted to 'see

Substantially similar is the longer original *Good Iron Mac* manuscript.

The last hurdle for federation was the approval of the Imperial Parliament, for which the support of Joseph Chamberlain was critical. As the Secretary of State for the Colonies, he would present the Australian Commonwealth Bill to the Imperial Parliament. On 28 June at 12.30 p.m., scarcely a week after the approval of the Constitution in New South Wales, McMillan met with Chamberlain. He was the first Australian, political figure and Commonwealth Convention delegate to press the cause of Australian federation on the Colonial Secretary after the New South Wales referendum made colonial agreement on federation substantially a certainty.¹¹²

Again, at least inferentially, *Good Iron Mac* seems to over-emphasize McMillan's importance. First, unknown to McMillan, Chamberlain had been, since the Convention's 1897 Adelaide Session, closely acquainted with and involved in the development of the Constitution Bill.¹¹³ Second, it may well not have been until 21 December 1899, following correspondence in October and December with Samuel Griffith and discussions with Colonial Office officials, that Chamberlain decided Australian delegates should be invited to London to discuss the Constitution Bill.¹¹⁴

**(iii) Constitutional Law without the High Court:
1901-1903**

On 29 March 1901, McMillan was elected to the House of Representatives and remained a member until its 23 November 1903 dissolution.¹¹⁵ From at least two perspectives, this first Commonwealth Parliament was a continuation of the 1890, 1891 and 1897-1898 Conventions.¹¹⁶ First, the 'immense volume of

[Chamberlain] on the subject of Federation' and suggesting Wednesday 28 June 1899 at 12.30 pm).

112 Page 494 volume 2 of the 'Original Manuscript.' See fn. 11.

113 See, for example, La Nauze, fn. 3 at 173-76, 183-86; de Garis, 'The Colonial Office' fn. 3; de Garis, 'British Influence' fn. 3 at 267-88, 290-301.

114 Id at 330-32.

115 Gunnar, fn. 8 at 175, 201-02.

116 Compare the First United States Congress (4 March 1789 - 3 March 1791) which 'has been regarded almost as an adjourned session of the [1787] Convention.' Berger, R. 1969, *Congress v. The Supreme Court*, Harvard University Press, Cambridge, 106 (footnote omitted). See also Kutler, S., 'A Sword for a Scabbard:

legislation'¹¹⁷ it debated and enacted to establish, under the Constitution, operative structures and details of a Commonwealth government.¹¹⁸ Second, these parliamentarians raised and discussed constitutional law issues.¹¹⁹ For example, on several occasions McMillan asserted that proposed Commonwealth legislation was unconstitutional. *Good Iron Mac* provides illustrations: 'the Postal and Telegraph Bill;' '[t]he cane sugar rebate;' the 'bonus bill;' and the 'Conciliation and Arbitration Bill.'¹²⁰

Given that the High Court did not commence until 6 October 1903¹²¹ and a number of parliamentarians (including McMillan, Barton, O'Connor, Deakin, Reid and Kingston) had been framers and drafters of the Constitution, *Good Iron Mac* opens up, but unfortunately does not pursue, Commonwealth parliamentary interpretation of and decision-making under the Constitution. At least three aspects might emerge from such an analysis. First, what specific principles or processes of constitutional interpretation and

Reflections on the Making of the Judiciary Act of 1789' (1989) 14 *Nova L R* 97 ('First Congress represented an ongoing constitutional convention').

- 117 Gunnar, fn. 8 at 201 (referring to public service, electoral, tariff, defence, High Court, immigration and postal legislation).
- 118 See *id* at 180-201. See generally Sawyer, G. 1956, *Australian Federal Politics and Law 1901-1929*, Melbourne University Press, Carlton, 14-31; Souter, G. 1988, *Act of Parliament: A Narrative History of the Senate and House of Representatives: Commonwealth of Australia*, Melbourne University Press, Carlton, 46-82; Souter, G. 1992, *Lion and Kangaroo: The initiation of Australia*, Pan MacMillan, Sydney, 72-91; Galligan, B. 1987, *Politics of the High Court*, University of Queensland Press, St. Lucia, 72-77.
- 119 See generally Sawyer, fn. 118 at 14-31. Compare, for example, Currie, D., 'The Constitution in Congress: The First Congress and the Structure of Government, 1789-1791' (1995) 2 *University Chicago Law School Roundtable* 161; Currie, D., 'The Constitution in Congress: Substantive Issues in the First Congress, 1789-1791' (1994) 61 *U Chicago LR* 775; Currie, D., 'The Constitution in Congress: The Second Congress, 1791-1793' (1996) 90 *Northwestern ULR* 606; Currie, D., 'The Constitution in Congress: The Third Congress, 1793-1795' (1996) 63 *U Chicago LR* 1; Currie, D. 1997, *The Constitution in Congress: The Federalist Period: 1789-1801*, University of Chicago Press, Chicago.
- 120 Gunnar, fn. 8 at 193-201.
- 121 Bennett, J. 1980, *Keystone of the Federal Arch: A Historical Memoir of the High Court of Australia to 1980*, Aust Govt Publishing Service, Canberra, 23.

decision-making were perceived or utilised in the Parliament?¹²² Second, how did the first parliamentarians view the Constitution? Was it revered as a foundational document which created and would maintain a nation and, therefore, was to be carefully observed and respected? Alternatively, did reality intrude so that the Constitution, with its myriad of compromises, was dealt with and treated as merely being an English statute?¹²³ Third, what role, if any, should the Commonwealth Parliament have in justiciable and non-justiciable matters¹²⁴ involving constitutional law?¹²⁵ Within these contexts, historians and biographers can facilitate an understanding of law and legal theory. Of course, recourse to parliamentary debates, rather than law reports, for this purpose may be somewhat novel.¹²⁶ However, that should motivate, not deter, scholarly quests into these realms of Australian constitutional law and history.

122 For more contemporary analyses see Thomson, J., 'Principles and Theories of Constitutional Interpretation and Adjudication: Some Preliminary Notes' (1982) 13 *MULR* 597 at 599-600. Examples include House of Representatives Standing Committee on Legal and Constitutional Affairs, Nov. 1995, *The Third Paragraph of Section 53 of the Constitution*, Australian Govt Publishing Service, Canberra; Senate Legal and Constitutional References Committee, Nov. 1995, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, Senate Printing Unit, Canberra.

123 See generally Thomson, J., 'The Australian Constitution: Statute, Fundamental Document or Compact' (1985) 59 *LIIJ* 1199.

124 See, for example, Lindell, G., 'The Justiciability of Political Questions: Recent Developments,' in Lee, H. & Winterton, G. (ed), 1992, *Australian Constitutional Perspectives*, Law Book Company, Sydney, 180; Thomson, J., 'Non-justiciability and the Australian Constitution' in Coper, M. & Williams, G. (ed), *Power, Parliament and the People*, Federation Press, Annandale, 56.

125 Compare analyses in Tushnet, M., 'The Constitution Outside the Courts: A Preliminary Inquiry' (1992) 26 *Valparaiso ULR* 437; Tushnet, M., 'Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty' (1995) 94 *Michigan LR* 245; 'Symposium on Law and Public Policy' (1988) 73 *Cornell LR* 281, 371-400 ('The Role of the Legislative and Executive Branches in Interpreting the Constitution'); Fisher, L., 'Constitutional Interpretation by Members of Congress' (1985) 63 *North Carolina LR* 707; Neuman, G., 'Variations for Mixed Voices' (1989) 137 *University Pennsylvania LR* 1851. See also fn. 119.

126 For some scholarship see fn. 118.

3. Conclusion

Good Iron Mac overtly endeavours to redress the balance in Australian federation historiography. It concentrates on a conservative founding father: Sir William McMillan. From this perspective—

'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.¹²⁷

Good Iron Mac may initiate a conservative counter revolution.¹²⁸ Whether it succeeds ought not to be of prime importance. Rather, provoking debate and engendering scholarly analyses should suffice. If that occurs, Good Iron Mac will have made a significant contribution. Subsequently, obsolescence can obviate one Australian federation quest: looking for heroes.

127 Gunnar, fn. 8 at 70 (referring to biographies of Parkes (Martin, fn. 5), Reid (McMinn, fn. 39), Deakin (La Nauze, J. 1965, *Alfred Deakin: A Biography*, Melbourne University Press, Carlton), Griffith (Joyce, fn. 6)). See also Gunnar, fn. 8 at 109, 163 (Labor Party's opposition to federation).

128 From the opposite direction compare Horwitz, M., 'The Conservative Tradition in the Writing of American Legal History' (1973) 17 *American J. Legal History* 275. See also Ernst, D., 'The Critical Tradition in the Writing of American Legal History' (1993) 102 *Yale LJ* 1019; Moglen, E., 'The Transformation of Morton Horwitz' (1993) 93 *Columbia LR* 1042, 1043-45 (historiographic shifts).

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