

# The Founding Fathers: Constitutional Kings or Colonial Knaves?

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## Introduction

I feel that I should begin by indicating why I chose the Founders as the subject for a lecture. The Founders have always been a matter of special interest to me. To begin with, I vividly recall that, in an in-cautious moment that lasted two years, I devoted most of my time to preparing an index and a guide to the printed debates of the Founders. I have always remembered, in this connection, the comment of a colleague at the University of Melbourne Law School, who said he thought that, from an academic point of view, this was like trying to discover who wrote Shakespeare's plays by playing the recorded speeches of Billy McMahon backwards. I have no reason to think that the comparison was inapt. A second reason for lecturing on the subject of the Founders is that I am presently meant to be writing a book, of which the only chapter that I have so far managed to complete has been one concerning Australia's constitutional progenitors. The publishing company tells me that it is meant to be a popular book on the Australian Constitution; a notion which sets up one of those great contradictions, such as a Serbian cease-fire or a Queensland intellectual: but I am trying.

The third reason that I have chosen the Founders is that I am currently away from academia for two years, and am working for the Victorian Government as Crown Counsel. Crown Counsel are not meant to say anything controversial, and these days about the only thing that is not controversial about the Australian Constitution is the existence of the group of men who wrote it, and who have been dead for fifty years. It used to be that from the point of view of the public, the Australian Constitution had all the excitement of wet mud. Now it seems that constitutional discussion is about the most brutal sport since the banning of badger baiting.

Nevertheless, what I wish to attempt here is three things. First, I want briefly to explore the position of the Founders in what one might call the 'current collective Australian psyche'. Second, I would like to see whether that contemporary perception matches what I would suggest is the reality — by which I mean my own reality — of the Founders. Third, I would like to offer some form of tentative reassessment of the general place of the Founders in Australian history.

## The Position of the Founders

In terms of the present position of the Founders in the public mind, one would have to say that they are prominent only in the degree of their obscurity. There is arguably no more neglected group of people in Australian history than those who produced the Australian Constitution. It is, in fact, well worth considering why they are collectively the 'third gravediggers' in Australia's national *Hamlet*. Here, it must be remembered that most Australians would be hard pressed to name more than the smallest handful of the Founders. It is true that people can, with varying degrees of confidence, come up with names like Barton, Deakin and Isaacs. If you really push them, they will then go on to other names like Griffith (or Griffiths or even Griffin). But if you press them any further, they will simply say, 'We do not know'. The Founders, in terms of their popular legacy, very nearly do not exist.

To the extent that they do exist, to the extent that there is a 'race-memory' of the Founders, they tend to be remembered more for their political achievements after Federation than for their roles at the great conventions. Deakin is remembered because he was a prime minister; Barton is remembered because he was the first Prime Minister; and Griffith is remembered because he was the first Chief Justice. Very few of them are remembered because of what they did at the great federal conventions. This historical obscurity is particularly noticeable when you compare Barton and company to the American founders. In America, the names of people such as Madison and Jefferson still ring through that country's constitutional history, and their names are cited daily. Whether as objects of utter contempt or of complete subservience, their memories exist. They have the immortality of prominence.

This, the Australian Founders decidedly do not have. There is even a difference in terminology. I have constantly referred to the convention delegates as 'the Founders'. In America, of course, the literature is replete with references to 'the Founders' and the 'Founding Fathers', which references are completely unselfconscious. No-one is surprised when Madison is talked of as a 'Founding Father'. Yet there is always something faintly embarrassing about referring to the Australian delegates as 'Founders' or as 'Founding Fathers'. A certain Blakeian, God the Father image is evoked, and there seems to be difficulty in us imagining someone as utterly human as George Reid clothed in diaphanous cloud, engendering potency in a constitution. The Americans have no such inhibitions, and I feel that our embarrassment is symbolic of our historical contempt for the Founders. In this connection, I cannot help but recall that there was a Minister in this place who, not so long ago, said that he really thought the paintings of the Founders in Parliament House should be taken down, because they did not match the decor. There is a certain great truth in that view, in terms of the Founders' contemporary place in history.

Of course, it cannot be denied that there is some recognition of the Founders. They appear, though with diminishing frequency, in school history books, playing bit parts. In what would be to many Australians a somewhat dubious honour, there are suburbs of Canberra named after the Founders. But as to their place in contemporary Australian consciousness, it would be fairest to say of these people that they are dead, and that we are more than happy for it to be that way.

### Why the Founders Have Ceased to Exist

It is worthwhile trying to understand why the Founders are so enmeshed in their own obscurity. I believe that one of the most important reasons is based in the view that we take as to inevitably of Federation itself. We survey the fact of Australian union from the hindsight of almost a century of that very fact, and see anything other than Australian unity as utterly inconceivable. The sovereign State of Queensland, or the People's Republic of Tasmania, have essentially risible connotations to us. We therefore tend to think of the Founders as handmaidens to the inevitable: they really did not do anything: it was going to happen anyway, so they cannot be terribly important people. I will return to this issue presently, but I think that this is one of the reasons we dismiss the Founders so readily.

Another reason we dismiss them so quickly and profoundly is because of the nature of Australian Federation in 1900, when I think we suffered from the dreadful lack of a tyrant. I know that it is not terribly fashionable now to say anything nice about perfidious Albion, and I will restrain myself as someone whose surname is correctly spelt 'O'Creavan'. But Britain was a depressingly benevolent despot, at least to white middle-class male Australians of the late nineteenth century. There were no haughty imperial armies quartered around the colonies, grinding the noses of the population into the mud. There was no need for an exciting revolution from the point of view of people such as Barton and Deakin. If someone such as Barton had started prancing about the place screaming that, 'We, the people, hold these truths to be self-evident', and so forth, the general reaction would be, 'Yes, so what else is new?' If you had tried to write a constitution in terms of ringing declaration of rights and assertions of independence, you would quite rightly have been laughed at. There simply was no need for revolutionary rhetoric, because there was no need for a revolution.

The result is that, whereas the United States Founders were midwives to a revolution, the Australian Founders were notaries to a nineteenth century deed. There is a clear difference in perception of, and there is a difference in the degree of excitement aroused by, these two things. Of course, the plain truth is that nothing more was needed, and anything else would have been ridiculous. But it seems to me that we have never been able to forgive the Founders for their own good luck in not having had to foment a revolution or a rebellion.

This has had a further consequence. No one could claim that the language of the Australian Constitution is particularly exciting. The reason for this is that the Constitution is really a detailed blueprint for the next stage in a peaceful development of governmental structures. Having said this, I note that the Australian preamble is not quite as bad as some people would have one think. It begins quite resoundingly, 'Whereas the people of X, humbly relying on the blessing of Almighty God, have agreed to unite', and so on and so forth. There are such moments of attempted lyricism in the Australian Constitution, but I concede that it is not exactly *King Lear*.

The other problem for the Founders is that they are undeniably ideologically unsound. This is particularly unfortunate for them, because they are dead, and there is not much that they can do to reform. Consequently, they are not in the mainstream of attempts by those such as Manning Clark to write, or to rewrite, depending upon one's point of view, Australian history as an heroic epic. Thus, if you take

Australian history, and say that its great theme has been a glorious battle by forward-thinking Australians, led by organised and unorganised labour, to seize a united national destiny from backward thinking Anglo-Saxon imperialists, the Founders are a huge problem. They are, in short, spectacularly inconvenient. Why? Because they were Anglo-Saxon imperialists to a man. Unfortunately, wicked people that they were, they wrecked the plot of those such as Manning Clark and Fin Crisp by achieving the first step in national unity. It is not bad enough that they were evil Anglo-Saxon imperialists. They also actually managed to do something that should have been done by the scripted heroes — enter, stage left, Henry Lawson and a large band of singing shearers. Worse still, the Founders achieved Federation at a time when organised labour was, for a variety of complicated historical, social and economic reasons, steadfastly opposed to it, and fought the coalescing national epic tooth and nail, fortunately for them, unsuccessfully.

But this is disastrous for correct-line historians. One can hardly have as the heroes in the first verse of the national saga a group of social brontosauri. What do you do with them? The best thing you can probably attempt is try to write them out, pooh-pooh them, and generally exclude them from the story. If you read the relevant part of Manning Clark's history, you will see that he does a very good job of it.

The other problem that the Founders have is that they do not fit in with modern perceptions as to what a good group of Founders would be. The difficulty with the Founders is that they were, as any sane person would expect, directly reflective of the social paradigm of their time. Thus, they were (by and large) Anglo Celts. They were exclusively male. There were no ethnic minorities as such represented among them. Clearly, there were no Aborigines. In saying all of those things, one is saying nothing about the Founding Fathers except that they were living in the 1890s rather than the 1990s, but there is no doubt that they are, by present standards, ideologically lower-class.

The fact that it is quite unreasonable to judge the Founders by the standards of the 1990s has not stopped us. We are a little bit like people who criticise Leonardo da Vinci for not having applied Freudian theory when he painted the *Mona Lisa*. The fact is, as a matter of objective aesthetics, he should have. A Freudian analysis would have been a wonderful thing to bring to bear on the subject. The fact that it was not available to da Vinci does not matter. Of course, this is not to say that the Founders were the beakers of distilled wisdom that some people believe them to have been. Anyone who has read the convention debates will know the full limitations of the Founders. But, equally, anyone who reads the convention debates with any understanding should realise that it is not appropriate to dismiss the Founders simply by reference to our own, equally period-specific ideas of the 1990s.

I also believe that the Founders have suffered as a result of an endemic enmity felt towards them by constitutional academics. Constitutional academics are pretty pointless people as long as you have a constitution with which you are broadly happy. In short, if no one wants to rewrite the Constitution, it is a depressing business being a constitutional academic. I speak from experience here. It is bitterly unfair that Sir Samuel Griffith and the boys got so successfully into the act in the 1890s, and that consequently no one is ever going to come to you and say, 'Re-do the Constitution', so that you get your turn. Thus, my only chance of re-writing the Constitution is to make sure that you all think the Founders were complete fools, and that their Constitution is absolutely atrocious. Down the years, I think that there has been a real tendency for constitutional academics — Geoffrey Sawer and all the rest of us — to go to a considerable amount of trouble to stress the very real human frailties of the Founders, in the hope that our very unreal human frailties, and indeed prodigious strengths, will be brought to bear on the Constitution.

Finally, and only half flippantly, I would like to suggest that there exists a serious public relations problem in terms of the looks of the Founders. This was something suggested to me by an American constitutional colleague. He said, 'The problem with your Founding Fathers is that you have photographs of them. We have only oil paintings of our Founding Fathers and they look really impressive. Your Founding Fathers look like a group of beached walruses in a second-rate gentleman's club. They are all hopelessly overweight'. I checked this, and in fact the Founders had an average weight of thirteen stone thirteen pounds, so there is no serious doubt about the matter. If one thinks about it, in terms of Australia's national self image, and the genre of visions concerning young shearers wandering off into the sun, there is nothing terribly attractive about the Founders as physical objects. It is an odd physical truth, that matches our general intellectual perception of their work.

So I feel that in many ways what is wrong with the Founders is what is wrong generally with Australian history — from the point of view of a ten year old school boy. Nothing exciting happened until the 1850s, when you had Eureka and a few people were killed. Then there was another blank period until Gallipoli, when a lot of other people were killed, and nothing much has happened since then. The

Founders are not exciting; they are not dramatic. We really think that their one great achievement, Federation, would have happened anyway. Consequently, we pay them little attention.

## The Real Character of the Founders

However, I would suggest that there are some qualities of the Founders which we should indeed accept as laudable, and perhaps even outstanding. I begin here by observing that present day politicians are particularly inclined to dismiss the Founders of the Australian Constitution. In keeping with the general position of the Founders in Australian history, I do not think that this is a particularly vehement dismissal, largely because the Founders do not warrant that intense degree of emotion. It is more of a condescending rejection, 'Well, poor old chaps, they really didn't know terribly much. They weren't awfully bright'. What I would like to do here is to assess the quality of the Founders from three aspects: From the point of view of politics, which is indeed the same perspective from which they are themselves assessed by modern leaders; from the point of view of what I would call non-political intellectualism; and from an entirely general aspect.

I have said that modern leaders are fond of suggesting that the Founders were not exactly first-class. The common suggestion of contemporary politicians is that they were naive, did not understand the realities of government the way 'we' do, and wrote a constitution that was sadly deficient from the point of view of the practical realities of government that 'we' understand. Yet one thing that should be stressed at the outset is that the constitutional conventions which met in the 1890s were probably the most politically accomplished assemblies ever to convene in Australian history. The delegates between them comprised a collation of sheer rat cunning that would make Senator Richardson look like St Francis of Assisi. Thus, if you do a political head count of the Founding Fathers, there are some impressive statistics. There is little point counting the ministers or members of parliament — which almost all of them were or had been — because there simply are too many of them. There were, however, three future Prime Ministers, which is undeniably impressive. The statistic that struck me, however, is that there were thirty-three past, present or future Premiers. Even in contemporary politics, Premiers are serious beasts, and when one says that there were thirty-three of them among the Founders, one is saying that you could not describe such an assembly as politically naive. You would not, in short, lightly expect it to produce a constitution that did not bear some connection with the realities of government.

If you go through these politicians that were the Founders, just about every type of political skill is displayed. There were practical number-crunchers with a capital 'C', such as George Reid, who was so professionally inscrutable that ninety years later we are still not sure whether he was in favour of Federation, or just hedging his bets. There were the extraordinary, wheedling, parliamentary debaters like Henry Parkes. He would try habitually to orate his way to victory, and if that failed, he was prepared to sulk his colleagues into submission. There were the classic systematic planners such as Andrew Inglis Clark; hugely imaginative policy makers such as Henry Higgins and Isaac Isaacs; brilliant political orators, such as Alfred Deakin, who could convince everybody but himself that he was right; and altruistic visionaries such as John Quick. As a gamut of political talent, these people are difficult to dismiss.

In terms of intellect, it would not be unfair to say that the quality of the Founders was such as to be potentially embarrassing to modern-day Australians. Griffith was a brilliant lawyer; a brilliant legislator, which is not the same thing; a brilliant judge, which is a third and different thing; and finally, a brilliant administrator. In the case of Deakin, it was only a question of whether he was a better lawyer, orator, politician or journalist. The story is well known that, as Prime Minister, Deakin anonymously wrote a column for the London *Morning Post* on Australian politics, and no one could ever work out from where the unknown journalist was getting his information. It gives an entirely new dimension to the word 'leak'.

Isaac Isaacs had one of the most penetrating legal minds in Australian history. If he had been any cleverer, he would have been almost as clever as he thought he was. In 1901, John Quick produced what is probably still, embarrassingly, the best book on the Australian Constitution. John Forrest was an explorer of real renown. Even relatively obscure Founders, such as John Hackett, had talents as quite exceptional journalists and newspaper proprietors. The essential point to grasp about the Founders is that these people were, in general terms, outstanding — and they were outstanding long before they ever got into the conventions. Our Constitution, for better or for worse, was not written by a dowdy group of dead politicians, but by people who could not, in any age in which they lived, ever have failed to be anything other than exceptional and impressive.

That brings me to the general intellectual quality of the Founders. Possibly the most surprising thing about the Founders is that they were really very interesting people, and not the sorts of chaps that one would chew one's arm off rather than be seated next to at a dinner party. People usually react to the Founders by saying, 'Oh, yeah, I suppose they wrote the Constitution. That is fair enough, but, gosh, they look dull'. But they were not, by and large, even remotely dull.

Take a man such as Henry Parkes, who came to Australia as an ivory turner, which is reasonably unusual to start with. Yet apart from being a politician, he was a baroque poet of the most outstanding awfulness. I recommend Sir Henry Parkes' poetry to anyone with a taste for the appalling; it is unspeakable. He had an ego like a bull elephant; a sex life that was more ornate than his poetry; was married yet again at seventy-three years of age, to universal concern in the Sydney newspapers that his health would not be up to it; and lived for another eight years. He was a truly extraordinary man. Equally remarkable was John Quick, who came from Cornwall, and whose first job was as a miner's boy. He rose to be the country's pre-eminent constitutional lawyer, and did more to reactivate the federal movement between 1891 and 1897 than any other person. If ever there was an Australian Dick Wittington whose life is waiting to be made either into a nursery rhyme or a novel, it would be Sir John Quick. Consider also someone like Charles Kingston, who raised the dynamics of political abuse to an art form when, after being horse-whipped by an opponent, he grabbed the whip and turned it back on his tormentor.

Yet to be popularly appreciated are virtually unremembered Founders such as Sir George Grey — who was born in the baggage train of Wellington's Peninsular Army in 1812 — and who became the Governor of the infant colony of South Australia in 1841, coming back to Australia in 1891 as the most radical delegate to the convention for, of all places, New Zealand. He was a world-recognised bore, and to read Sir George Grey's contribution one hundred years later is to find oneself becoming irritated, and saying, 'For God's sake, get to the point'. Yet Sir George Grey is a potential constitutional hero, because he is the only Founder I have discerned to have been more or less definitely a republican at the conventions. It could be that his big chance has come around at last.

Perhaps the most depressing thing of all is that even the really dour, straight-laced Founders had an appealing side. Thus, Sir Samuel Griffith, who was what would today be called a high achiever — first Chief Justice of Australia, a terribly good lawyer and so forth — had a hobby, the nature of which surpasses all belief. That hobby was, of all things, translating the poetry of Dante into prose. Griffith would sit by the light of the lamp translating it and, as one person observed, rendering the divine poetry of Dante into the language of a parliamentary enactment. I also recall seeing recently in the press the story of how he offered a copy of the fruits of his labours to a friend. The friend accepted his offer on the condition that Griffith inscribed it, to the effect that it had been given voluntarily, because the friend did not want anyone to think that he had actually bought a copy or, even worse, that he had asked for one. Another great story about Griffith, which I have always liked, is that when Barton was thinking of drafting a particular constitutional provision about voting in elections — whether there should be penalties if the wrong thing were done, what the penalty should be and whether it should be included in the Constitution as such — Griffith, in a terribly polite manner, wrote back that the great constituent document of a new continental federation seemed an odd location for an addition to the statutory criminal law. This would have to be one of the great legal put-downs of Australian history.

Another thing about the Founders is that, while no one would suggest that they collectively comprised Smith Street, Collingwood, they were a far more diverse body than is commonly accepted. It is true that absolutely all of them were male, and that they were not particularly varied ethnically. It is true also that a lot of them were lawyers, and many were professional politicians, though it should be noted in relation to most of those Founders who were lawyers, that they were lawyers who were at the peak of their powers when they sat at the convention, rather than people who were lawyers, and who also happened to become successful politicians.

The point is that there was a real diversity among the Founders, which reflected the general diversity of what in Victorian times properly could have been called the 'successful class'. Within that class, as represented by the Founders, was a wide variety of backgrounds. There were doctors, lawyers, miners, soldiers, engineers, bootmakers, market gardeners, artesian well diggers, civil servants and shopkeepers. There was only one member of organised labour, William Trenwith, about whom almost nothing is remembered, but who was — in his own way — an extremely impressive man. As I said before, the reason that labour was not in the conventions was because labour largely had chosen, either tactically or substantively, to keep itself out. Thus, the Founders were not culturally diverse, but nor were they socially monolithic.

## The Achievement of the Founders

It is far from trite to say that the great achievement of the Founders was Federation itself. This is something that I believe is downplayed, on the basis that Federation was inevitable, and that there is no credit due to those such as the Founders, who are perceived to have floated jellyfish-like upon the inevitable tide of history. Yet this perception of the flow of events surrounding Federation is absolutely inaccurate. Federation, although it did happen, was not inevitable, and it is in reality ninety years of continuing and successful unity that gives that false impression. It is a little like when a team wins a football premiership, and every journalist in every paper in the country can tell you how it was always inevitable that this was going to happen even though they had consistently presented an alternative 'premier' throughout the year.

In fact, of course, Federation was far from inevitable. It is quite conceivable that Australia could have broken into separate national units, and in one sense it did: the Australian colony of New Zealand is still out there masquerading as a sovereign state, and there is no reason why you could not have had such similar sovereign entities as Western Australia, Queensland, or Victoria. Western Australia was intensely hostile to Federation, and it was only brought in by a series of political confidence tricks that were grubby even by the undemanding standards of the Colonial Office in the 1890s.

There were a number of very real factors conspiring against Federation. There was, firstly, the powerful force of inertia. It is always easier (and always has been easier) in terms of constitutional politics to stay with that to which one is accustomed. There was inter-colonial rivalry, with the only real question being whether Victoria hated New South Wales more than the collective small States hated Victoria and New South Wales together. Ready proof of this state of affairs is to be found in the convention debates, where a hopeful New South Wales regularly would raise the question of Sydney as the prospective capital of Australia. Everyone would look forward to the occasion immensely, and while some poor New South Welshman would try to argue for Sydney, other members of the convention would be screaming out, 'St Kilda — no, Mudgee — no, Warracknabeal', frantically advocating the most obscure place that they could imagine. One must also take account of the vested interest of politicians, who had happy colonial political careers which they were reluctant to place in jeopardy. Most importantly, the Founders faced a huge number of profoundly complex issues, all of which would have to be resolved if Federation was to occur. The balance of power between the Commonwealth and the States had to be arrived at, as did the basis of representation in both Houses of the Federal Parliament. A decision was required on the question of whether there was to be responsible government, or some modification thereof. There was the appallingly vexed question of freedom of interstate trade, and the equally daunting prospect of attempting to create a financial settlement between the States and the Commonwealth. It is worth noting that every one of those issues is more complicated in its own right than any constitutional issue that has ever been solved by any group of Australians since 1900. Collectively, they dwarf such current issues of profound importance as Mabo and the republic. Yet to all of these issues, the Founders gave some sort of answer, and that answer was accepted by the Australian people.

It is well worth remembering how close the Federal cause came to disaster. In 1891, we saw the first draft of the Constitution. It was laid over for six years before any further progress was made, and the Paul Lynehams of 1891 were predicting that it was never going to come back onto the agenda. In Adelaide, in 1897, there emerged the key issue of States rights — the issue that was always to be at the heart of the conventions — and it emerged in its most acute form: how the Senate was to be composed. Was it to be composed on the basis of population — the large States obviously wanted that — or was it to be composed on the basis of equality of representation among the States, which was the dream of the smaller colonies? In 1891, the Senate question had been resolved by a compromise, under which the basis of representation in the Senate would be equal numbers for the colonies, but with the Senate's powers with regard to money being severely constrained. The small States were happy to get equal representation; the larger States were prepared to concede that, so long as the Senate had limited money powers.

However, on 13 April 1897, that compromise began to unravel, when the representatives of the small States, in an unusually acute display of arithmetic, realised that there were three of them at the convention, and only two sets of representatives of the large States. The mathematically gifted among them worked out that South Australia, Tasmania and Western Australia — even in the absence of Queensland, which had not bothered to turn up — could outnumber New South Wales and Victoria, and they proposed to go back on the compromise of 1891.

If you read the debates of 13 April, you can almost smell the sour hopelessness. You can almost see these people thinking that it was 1891 all over again. There then occurred — and it is brilliantly described in

La Nauze's book, 'The Making of the Australian Constitution' — what I have always referred to as 'the night of the long drinks'. This was a typically Australian version of how you would solve a massive constitutional impasse, with coaches lumbering around the streets of Adelaide and the sounds of corks popping, as the arms of South Australian and other delegates were wrenched from their sockets. On the following day, when the vote was taken, the compromise of 1891 was affirmed because two South Australians and three Tasmanians voted with the large colonies, resulting in a majority of two votes for the compromise. There is little doubt that, had the vote gone the other way, Federation would have been put off for as long as it had been in 1891; and it might not have occurred at all, at least with the States that we have today. So when one talks of inevitability in the context of Federation, one is talking of the votes of two South Australians and three Tasmanians.

The achievement of the Founders in this context is one not to be underestimated. Obviously there were many profound factors impelling us towards Federation: defence, economics, nationalism — all of those wonderful, inevitable things that produce solutions so readily in places like Bosnia and Serbia. Certainly, Federation was a thing that clearly should have happened, but — in the infinity of possibility — conceivably may not have occurred. It was the achievement of the Founders to ensure that it did.

For the purpose of this lecture, I tried to think of what qualities the Founders had that enabled them to achieve Federation. There are obviously a lot of factors that played their part here: political, intellectual, and just plain good luck. But it struck me that there was one thing in particular that allowed the Founders to achieve something the like of which has not been achieved since, and this was the fact that and I would describe the Founders as 'pragmatists of vision'. They were, in the Victorian phrase, 'highly practical men of affairs' — people with the capacity to understand political reality, and to wheel and deal in the gutter with the best of them, and win. But, in addition, they were not blinded by this practicality to the value of ideals and ideas, or to the value of aiming high to achieve distant objectives. Again, I think Parkes is not a bad personification of that quality: an incredibly grubby politician, with a genuine, if schizophrenic, belief in the idea of Federation as a concept. It was that combination of pragmatism and vision, of an acceptance of the two things as being of equal worth, that stood best to the Founders' credit in achieving Federation. In this sense, I think they are very different from many modern leaders, who try to draw a clear distinction between those who are practical and those who are idealists. The practical despise those with ideals as unrealistic and pathetic, while those idealists among us despise those who can actually work out how to catch a tram as morally bankrupt. The difference between the Founders and their political descendants, at least in this context, was that they were able to achieve some sort of creative tension between those two genuine values.

Aside from Federation, the other great achievement of the Founders is the Constitution itself. The adequacy of the Constitution at the moment is very much a political issue, so I am determined not to go into that in any detail, but I will make a few comparatively uncontroversial points. The first is that the Constitution was drafted, as I have said before, by excellent lawyers and superb politicians; whatever one thinks of the Constitution in today's circumstances, that is worth remembering. The second is that it is an objective fact that very few constitutions last one hundred years without collapse. This is an undemanding test, in one sense, but a real one. There are not many constitutions around the world that have lasted that long, but the Australian Constitution undeniably is one.

Another thing that is important to grasp is that the Founders were not mindless followers of British precedent. There is an idea about that they were a group of imperial hijackers who somehow managed to gain the constitutional ascendancy briefly in the 1890s, and attempted to follow a guide marked 'Imperial Constitutions: for the making of'. That is not true. If you look at the Australian Constitution, there are many international influences. Obviously, the imperial English precedent but — equally obviously — the United States example, with the added and extraordinary difficulty of combining the two: not to mention our quite amazing section 128, with its referendum requirement imported directly from Switzerland for the occasion.

All of those things suggest, I think, a wider grasp of constitutional and political reality and thought than that with which the Founders are generally credited. Moreover, I believe that there is a tremendous misconception about some things that the Founders did. For example, one of the ideas that most amuses me is that federalism is a colonial relic. This is often put forward by those who wish to abolish the States, and to wipe out federalism itself. The true colonial relic is, of course, an absolute hatred for federalism derived directly from Dicey, and the one central proposition of British constitutional politics, which is that at all times you must crush the Scots, the Irish and the Welsh, and make sure you have an omni-competent parliament in Westminster. It is this centralism gone mad that is the true constitutional descendent of the British imperial colonial legacy in Australia.

The other thing I would say about the Constitution is this: one of the criticisms that had not been raised until quite recently, but is being cited frequently in a number of contexts today, is that the Constitution is a bad constitution because it does not spell out the true system of government, and does not mention the holy words 'Prime Minister', for example. All I would say about that is that there is no constitution in the world — bar none — which is fully explicit. There is no such thing as a fully written constitution, as indeed the French and the Americans will tell you. Of course, in England you have a constitution which is largely unwritten, so that this sort of criticism does nothing less than betray a misunderstanding of constitutionalism as such.

## Conclusion

The final thing I would say for the Founders is that they have a real constitutional authority in Australia. This is a concept that is more familiar, I would have thought, to an American audience than to an Australian one. But we must remember that the Founders were not, as I have said, imperial terrorists who invaded the colonial parliaments and held a Gatling gun at people's heads until they let them write a constitution. The Founders from all States, except Western Australia, were directly elected in popular elections, with massive voting in favour of the selected candidates. Their Constitution was put to a referendum on two separate occasions, and passed with massive majorities. If you take that Anglo-Celtic democratic club of Australia, Canada, the United States and New Zealand, the Australian Constitution is, in fact, the only one that has ever been put to direct popular vote. That occurred in the 1890s. So when one looks at the old fogies sitting in their colonial armchairs writing a constitution, one must recall that, in the absence of a referendum carried in a majority of States by a majority of Australians, one is looking at the authors of the last authentic expression of the will of the Australian people upon their constitutional depositions. Here, it matters not how good the Founders were, whether they were perfect, or whether they represented an absolute democratic ideal. The real question is whether they are better on these scores than any of the available or putatively available alternatives. I think the answer is that, in the absence of a referendum, one must have a very considerable respect for the achievement of the Founders as embodied in the Constitution.

So what I would say by way of conclusion on this subject is this: the Founders decidedly were not heroes; they were ordinary people. But they do not need to be heroes for their true position in history to be secure. I prefer to think of them as what I said before: pragmatic men of vision, practical enough to achieve something, and idealistic enough to achieve something worth having. In terms of the title of this lecture, I would say this: if the Founders were not constitutional kings, they very certainly were not colonial knaves.

**Questioner** — I would point out that an original copy of the document we have been listening to you talking about, and which of course is the foundation of the magnificent building that we are in, resides at this moment — although practically no-one who enters this building is ever aware of it — in a very drab nondescript box which you can see on the right hand side as you exit this committee room. That is totally out of keeping, one would think, with the importance of a document which is the total foundation of our country.

That state of affairs does not exist in the United States of America. When you were analysing at the start of your speech why Australians are so unaware of their Constitution and their founding fathers, I thought you missed the vital point. In the United States of America, the constitutional history of the country is a core part of the educational curriculum. That is the reason why all Americans know about John Hancock and all the rest of the founding fathers.

In this country I went to what I think was quite a good school and was never told, at any stage, that this country even had a constitution, let alone the process by which it had been drafted. As far as I am aware, basic constitutional history is still not a core part, that is a compulsory part, of the school curriculum anywhere in Australia. So huge numbers of people are still leaving school in this country unaware that this country has a constitution. That seems to me to be the real reason. That is not something for which the broad mass of Australians can be blamed; they do not set the school curriculum.

So I think all the points about the photographs of the founding fathers not revealing terribly handsome visages or ethnic minorities not being represented or all the things about despots being lacking are really beside the point. Australians do not even know that there are founding fathers. How could they therefore know what their photographs look like? We must change the educational system. Part of that process



could be that when children come to this House in very large numbers we could make sure that they are aware that they are walking right past one of the original copies of the Constitution of their country.

**Dr Craven** — I quite agree with you that there is a really lamentable lack of teaching about our Founders and indeed the whole process of Federation in schools. I completely agree with that. I think that perhaps there is not quite the dichotomy between the two things that you are suggesting. To some extent one of the reasons it is not talked about, and certainly why it will not be taught from now on, is some of the factors I mentioned. If one is to judge the history one is going to teach, one brings to it certain presuppositions and judgments.

Some of the things I have talked about reinforce what you are saying. That is why it is not taught. I would much rather people be taught the history of the Constitution. There is a much sadder story than that of people walking past that box. I remember a colleague of mine who worked in the Premier's Department in Victoria for a time. Because she was doing intergovernmental agreements, she eventually asked whether they could bring the file up. They did so, and she rifled through it in my presence. She looked under C for Constitution. She found the original copy of the Constitution as agreed to in 1898 in Melbourne, signed by the president and the other members of the convention.

People talk about bringing back the Constitution from the United Kingdom. However, I think that is not the real Constitution — it is just the Constitution with the elephant stamp on it. But the real Constitution is, as far as I know, still in a manilla folder under C for Constitution. I know the Victorian Government of the time did not want to display it. We tried to have it displayed in Queen's Hall. I think that document did not even get as far as the box.

**Questioner** — Could we not make constitutional education a compulsory part of the Victorian curriculum?

**Dr Craven** — That sounds like a great idea to me.

**Questioner** — I was most impressed when you mentioned the democratic experience of the founding fathers. You also mentioned that section 128 came from Switzerland. It seems to me to be the essential section of the Constitution — a quite remarkable one. It means that the Constitution cannot be changed except by the will of the people. The Clerk of the Senate, Mr Harry Evans, recently said that he takes this to indicate that the people of Australia are sovereign because they are the only people who can change their own rules about democracy.

Another point I wish to touch on is the fact that in the 1890s and early 1900s, particularly in the 1880s and 1890s, Tasmania, Victoria and South Australia were pioneers in voting systems — particularly, our quite extraordinary and, in my view, perfect single member electorate system with the full preferential vote. This is the only system I know of in which it is possible to put a member out of parliament by having half the voters plus one put him last.

I have only read a few of the convention debates. I wonder what the reaction of the founding fathers would have been to the proposal that, where the governing party had a majority of more than five seats in the lower House, there should be no by-elections for casual vacancies.

**Dr Craven** — I honestly do not know. I appreciate that is a proposal in Victoria at the moment. Without a crystal ball or a ouija board, I would not try to answer it.

**Questioner** — I was wondering whether you would elaborate on a part of your discussion. It seems to me that in the 1890s one of the ambivalences about the continent was that it was governed by colonies. But fifty years earlier, as a result of a long campaign, they were granted the status of independent sovereign beings. So you had this entity called a colony, but it won independence in the 1850s. Why was it that the founding fathers fifty years later chose to perpetuate the colony part of their inheritance rather than the sovereign independent state? It is one of the documents being circulated by the Turnbull committee — a lot of us have read it again after all these years. But it reads so much like a colonial document.

This is the Keating problem, is it not: if it was not a colonial document, you would not have to change about one hundred things to get rid of the Queen? In other words, why did the founding fathers perpetuate the colonial part of their inheritance and forget the independent sovereign state part?

Dr Craven — There are a number of reasons. One reason is, like all good lawyers, they were working from precedents. A lot of what they had came from the original colonial constitutions. Some of it did not, obviously. It makes no sense to argue about the colonial bits that are direct lifts from the United States Constitution. There are quite a few of those. British governments, and therefore the Australian Government derivatively, have always been somewhat euphemistic. I know that Malcolm Turnbull gets terribly upset about this. Things are never quite as they seem. I think to a large extent the founding fathers would have said, 'Well, as long as everyone knows things are not the way they seem, it really doesn't matter'. A lot of the colonial part of the Constitution that you are referring to is in simple form. It is a bit like the white part in the French flag which stands for the Bourbon monarchy. No-one seriously believes that it represents a commitment to monarchism. I think the central part of what you are saying is correct, of course. The colonies were, subject to very limited exceptions, fully independent at least by the 1870-80s and certainly by 1900.

It is true that the founding fathers — and this is probably the ultimate answer — saw everything as a gradual development. In a sense, the year of 1900 was the creation of a bigger colony, not full independence, though many of them would have seen independence as coming. I think the fundamental answer is that the founding fathers were great gradualists and great realists. They cared much more about the substance of something than they cared about its form.

Questioner — I would really like to know if there is such a breed as founding mothers. I feel that behind every good man there must be a good woman. You might be able to enlighten us. In regard to the influences of other constitutions, you touched briefly on the constitution of Switzerland. I wonder whether, in the debate, the American model had been looked at seriously. I am also wondering whether constitutional discussion is a *fin-de-siecle* issue and whether it is always inevitably going to be linked to economic depression.

Dr Craven — There were no founding mothers in the sense that there were no women delegates to the convention. I think in five of the six colonies, the vote was still a manhood suffrage. It did not apply to women. That was not true in South Australia where women voted in the convention, and, I think, one woman stood for election to the convention. There were no women delegates. In that sense, the Founders were very much the creatures of their social paradigm.

In regard to the United States document, the answer is yes. Much consideration was given to the United States document. In 1891, Sir Samuel Griffith railroaded a form of words through parliament which would not have left Australia necessarily tied to responsible government. Sir Samuel Griffith firmly believed that Australia should be left in a position where it could develop either into a responsible government type situation or into a United States model — not a presidential model — but where there was a strict separation between the executive and the legislature. Some would say that as a result it has developed into neither. It sits stranded somewhere in the middle. It was very seriously considered in that sense.

I do not know if it is a *fin-de-siecle* issue. I suppose the French Revolution is running for you in the century before. I think that good constitutions always go through periods of renewal. I do not think that a change of a constitution or a reaffirmation of a substantially intact document is a bad thing. I think you have to hope that the quality of the debate is sufficient to isolate the issues and to allow good, sound intellectual judgments to be made.

Questioner — Mr Craven, you have represented to us that the delegates at the convention were people of perspicacity, vigour and energy, but nowadays we are used to all of policy coming rather more from departments and from advisers and from staff and things such as that. In your reading of the constitutional debates, is there any evidence that there was a second line of people advanced in policy, ideas and, in fact, they were what we would nowadays see as public servants?

Dr Craven — Yes, there were some very prominent type people like that. The answer is yes and no. Yes, there were some very prominent people behind the Founders. To mention two — the most obvious is probably the person who became Sir Robert Garran who was the secretary to the drafting committee. He was the man with the bottle of glue and the scissors who did the drafts — which would have been the most appalling job. He would have been the classic. The other one was Blackmore who was the Clerk to the South Australian Parliament and also the Clerk to the whole of the second convention. He was very, very influential.

The striking difference between the Founders and modern day politicians — and it is probably no more than a difference of the way governments are organised — is that the Founders, at least the best of them and the central ones of them, were utterly capable of drafting a constitution themselves. There was never any question of who was doing the drafting out of people such as Griffith and O'Connor. It was them and while they were supported they were the people in charge.