

Papers on Parliament

‘The Truest Patriotism’: Andrew Inglis Clark and the Building of an Australian Nation

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Contents

Opening Remarks

Andrew Inglis Clark, Moby Dick and the Australian Constitution <i>The Hon. Rev. Prof. Michael Tate AO</i>	1
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Political Thought and Practice

Andrew Inglis Clark: A Dim View of Parliament? <i>Dr Rosemary Laing</i>	5
Shadow or Illumination? Kingston's Rival Constitution <i>The Hon. Dr John Bannon AO</i>	15
Andrew Inglis Clark: From Colonial Patriot to Radical Nationalist <i>Professor Henry Reynolds</i>	21

Intellectual Life and Capital Connections

Four Degrees of Separation: Conway, the Clarks and Canberra <i>Dr David Headon</i>	29
Oh, to Be in Boston Now That Federation's Here <i>Professor Marilyn Lake</i>	41
Andrew Inglis Clark Deserves to Be Remembered Across the Great Divide <i>Dr James Warden</i>	49

A Few of Clark's Hidden Stories

<i>Professor Henry Reynolds, Professor John Williams, Dr David Headon, Dr Rosemary Laing, Professor Paul Pickering</i>	61
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The Law and the Constitution

The Over-rated Mr Clark?: Putting Andrew Inglis Clark's Contribution to the Constitution into Perspective <i>Professor Helen Irving</i>	73
Andrew Inglis Clark: Our Constitution and His Influence <i>Professor John Williams</i>	81
Panel Discussion.....	95
Inglis Clark: A Living Force <i>The Hon. Robert French AC</i>	107

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Andrew Inglis Clark, *Moby Dick* and the Australian Constitution

Michael Tate

In 1865, in my home city of Hobart, a young apprentice of 17 raced through his father's workshop, a foundry and sawmill, yelling out that Robert E. Lee had surrendered, signalling the end of the Civil War in the United States of America.

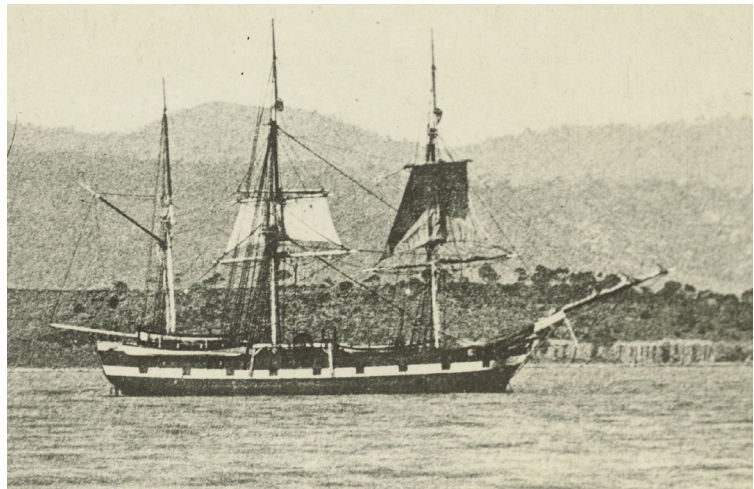
In 1891, the Attorney-General of the colony of Tasmania submitted a draft federal constitution to the Convention meeting outside Sydney.

The Attorney-General had been that 17-year-old boy. As a teenager, Andrew Inglis Clark heard tales of the Civil War from the whalers out of Nantucket, Massachusetts, who took shelter in the Derwent River from the Confederate *Shenandoah* which was preying on the fleet of Union whaleships as it followed whales in the Southern Ocean.¹

Of course, Nantucket was the port out of which Henry Melville has Captain Ahab setting out in pursuit of *Moby Dick*, the great whale which had bitten off his leg.

This is my somewhat feeble justification for the title of these opening remarks. When I saw the titles of the presentations to be delivered today (some with a hint of revisionism!), I thought I had to be just as ingenious.

The title also gives me the opportunity to show a picture of one of those whalers, later named the *Derwent Hunter*. There is a nice connection with an item in the display case in the foyer. It is a reproduction of an original water colour of Inglis Clark being rowed out to join the drafting committee on the *Lucinda* in Sydney Harbour on Easter Day 1891.



Derwent Hunter on Derwent River, c. 1880. Image courtesy of W.L. Crowther Library, Tasmanian Archive and Heritage Office, AUTAS001126070309

One might say that the Australian Constitution was both water-born (in 1865) and water-borne (in 1891).

Inglis Clark was fascinated by the United States of America. As a young lawyer, he presided at a dinner celebrating the Declaration of Independence (1876), visited his idol Oliver Wendell Holmes in Boston (and named one of his sons after him), and became totally entranced by the US Constitution.

1 I am indebted to a wonderful article by John Reynolds for this story: 'A.I. Clark's American sympathies and his influence on Australian federation', *Australian Law Journal*, vol. 32, July 1958, p. 62.

Despite the very different geneses of the US and Australian federations, the one forged in revolution and bloody warfare, the other sluggishly evolving with no great wave of popular enthusiasm, it was in the mind of this not very prepossessing Tasmanian lawyer that the US Constitution provided a working model adaptable into the colonial tradition of responsible government.

I am not going to teach grandmothers to suck eggs. This audience knows far more than I do of the exploits of Andrew Inglis Clark. But I am sure that individually each one of us will learn something new and for that possibility we are indebted to Dr Rosemary Laing, Clerk of the Senate, and Dr David Headon, History and Heritage Adviser for the Centenary of Canberra.

Rosemary and David must have a sixth sense, refined by their years in Canberra. In a moment of prophetic inspiration, they chose the Friday before the convening of the 44th Parliament to host this symposium. This 44th Parliament owes so much of its structure to the genius of Andrew Inglis Clark.

They are of such stature that an eminent group of speakers and panellists has responded to their invitation to focus on a sometimes obscured progenitor of the Constitution of the Commonwealth of Australia.

It is probably fair to say that most Australians are only vaguely aware of our Constitution, though the Australian Electoral Commission is doing its best to stimulate some interest in it!²

I felt this neglect very acutely yesterday when I visited ‘Constitution Place’ at the eastern end of the Old Parliament House. It is a rather sad little plot. Perhaps we might hope that this symposium may be a catalyst for doing something more to embellish that area with some tribute to the founders of our Constitution. There must be some happy medium between the Liberty Bell in Philadelphia and the rather pathetic little plaque at Constitution Place.

Inglis Clark was a man with a touch of the obsessive, one part focused on the US, the other on matters of religion.

He had forsaken his Baptist allegiance, I think in his early twenties, and became a Unitarian ‘freethinker’ very opposed to any favouring of any denomination of the Christian religion.

Inglis Clark’s draft Constitution reflected his Tasmanian battle against state aid to Catholic schools. It proposed to forbid the Commonwealth Parliament’s making of any law ‘for the establishment *or support of any religion ...*’ (emphasis added).

I need not go through the purely pragmatic political manoeuvring which ended up with section 116 constraining the Commonwealth Parliament, rhetorically balanced by the clause appearing in the Preamble: ‘... humbly relying on the blessing of Almighty God’.

As is well known, that clause was put in to secure the support of (male) churchgoers for the referendum needed to adopt the Constitution.

Talking of referenda, section 116 does not apply to the states. (Only Tasmania has a similar provision in its constitutional structure, but by way of an ordinary, repealable provision in an Act of Parliament.)

2 This was a reference to the Australian Electoral Commission’s loss of ballot papers marked by voters in the 2013 Senate election in Western Australia.

What could be more fitting as a tribute to Andrew Inglis Clark than to extend section 116's entrenched constraint so as to limit the capacity of the states in this regard?

In 1988, the then Attorney-General of the Commonwealth promoted a referendum to do just that.

It fell to me as Minister for Justice, sitting in the Senate, to get the bill authorising the referendum through that august chamber. It was a gruelling process but this question was eventually put to the people. Yea or nay to:

116. The Commonwealth, a State or Territory, shall not establish any religion, impose any religious observance, or prohibit the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth, a State or Territory.

Never has a referendum been so comprehensively and decisively rejected!

Only 30 per cent of voters Australia-wide favoured the amendment and there was no majority in any state.

So, as a boy from the port city of Hobart, I enjoyed much less success (let's face it, no success) compared with the influence of the subject of this conference on the shape and provisions of the Australian Constitution.

Whales have long departed the Derwent River. Was this an omen?

The success and singular contribution of Andrew Inglis Clark was made possible by his friendship with the whalers out of Nantucket. In opening this conference I give you—Andrew Inglis Clark, Moby Dick and the Australian Constitution.

Andrew Inglis Clark: A Dim View of Parliament?

Rosemary Laing

The draft Constitution that Andrew Inglis Clark brought to the 1891 National Australasian Convention in Sydney was federalist in character. It brought together the existing colonies in a federation with a national government that would possess specified legislative powers after the US model, leaving all residual powers to the new states which would not be subordinate polities, but partners. Also following the US model, the states would have equal representation in a Senate that would have sufficient powers to protect their interests.

It had republican features, consistent with Clark's lifelong interest in such matters, ranging from a clear separation of powers providing checks and balances on the exercise of power, to a provision for state legislatures to elect state governors. The question of whether ministers should sit in parliament and, therefore, the degree to which the Constitution should entrench a system of responsible government, was left open and not prescribed. While not suggesting an alternative to responsible government, Clark wanted the Constitution to be flexible enough to allow one to emerge in future.

The draft Constitution was broadly democratic, providing for the representation of each 20,000 head of population by a member of the popular assembly or House of Representatives. The Senate was to be elected by the state legislatures but there were few at this time, except perhaps for Alfred Deakin,¹ who advocated direct popular election of what looked like being a very powerful second chamber. Clark was still defending indirect election as late as 1897, citing the quality of US senators in the early years as evidence of the success of that method (although he conceded that the US Senate had gone downhill recently with too many millionaires).²

Clark's big idea was for a federal supreme court entrenched in the Constitution. As a delegate to the 1890 Australasian Federation Conference in Melbourne, he had led the drive towards the ultimate preference of delegates for a US-style federation, where states retained plenary legislative powers, over the Canadian model that was more of an amalgamation under a central government, leaving only specified powers to the provinces. It was thought that the US model was likely to produce more successful results for those striving to achieve federation in Australia.³

Notwithstanding its incorporation of features of the US Constitution, Clark's draft reflected the reality that federation in Australia could only be achieved by an Act of the British Parliament. It would be a federation under the imperial Crown and, as Clark pointed out in his introduction to the 1891 draft, the Colonial Laws Validity Act made colonial law-making subject to the imperial parliament. This was the basis of the final, rather esoteric, argument in his introduction that the parliament should consist of the two Houses and the Governor-General, not the Queen, because it would derogate from the dignity of the Crown to have the Crown as part of the colonial law-making process which was subordinate to imperial power. That might leave the Crown party to an invalid Act or even to two contradictory laws.⁴ Such fine points about the nature of imperial and executive power did not, however, excite the delegates to the 1891 Convention.

1 See, for example, J.A. La Nauze, *The Making of the Australian Constitution*, Melbourne University Press, Carlton, Vic., 1972, p. 47.

2 *The Mercury* (Hobart), 29 July 1897, supplement, p. 2.

3 See Clark's introduction to his 1891 draft Constitution, reproduced in John M. Williams, *The Australian Constitution: A Documentary History*, Melbourne University Press, Carlton, Vic., 2005, p. 66.

4 *ibid.*, pp. 73–4, 76.



National Australasian Convention delegates, Sydney, 1891, photographed by Laura Praeger, Empire Galleries, Sydney. Image courtesy of National Library of Australia, an14293711

While Clark had succeeded in putting down on paper a scheme that reflected the thoughts of the 1890 Conference, he did so using the language and framework of the *British North America Act 1867*, particularly ‘in providing for such matters as the location, nature and the exercise of the Executive power under the Federal Constitution’.⁵ Perhaps he thought such an approach would least frighten the horses, but it also reflects his habitual approach to drafting, which was to find an appropriate model and adapt it to his purposes.⁶ It did the job without setting the world on fire.

Clark thought deeply about the nature and exercise of executive power and about the role of a supreme court under the Constitution. He had a creditable stab at enumerating the various heads of legislative power that would be appropriate for the national legislature to exercise. These and other aspects of the draft Constitution, including the electoral provisions, the financial powers of the Senate⁷ and the financial arrangements for the new Commonwealth have received much scholarly attention.

For a parliamentary officer, there are interesting questions that have not received much attention.⁸ Clark was a member of the Tasmanian House of Assembly from 1878 to 1882 and again from 1887 to 1898. During the period in the 1880s when he was not a member of parliament, he made three attempts to get back in, unsuccessfully in 1884 and 1886.⁹ It was clearly a career he wanted to pursue. He was a

5 *ibid.*, p. 67.

6 La Nauze, *op. cit.*, p. 26 refers, not disparagingly, to the ‘scissors-and-paste’ job that Clark did on his draft Constitution, but see F.M. Neasey and L.J. Neasey, *Andrew Inglis Clark*, University of Tasmania Law Press, [Hobart], 2001, chapter 5 *passim* for numerous examples of Clark drafting by cutting and pasting.

7 In clause 52 of his draft, Clark provided for money bills to originate in the House of Representatives but for the Senate to have the power to reject or amend them, subject to a prohibition on increasing the overall amount.

8 It is interesting to note that one of Clark’s sons, Carrel, was a parliamentary officer, becoming Clerk of the Tasmanian Legislative Council in 1946.

9 Neasey and Neasey, *op. cit.*, p. 65.

backbencher from 1878 to 1882 (the first few months in opposition), in opposition from August 1892 to April 1894 and again, briefly, in 1898, but for the remainder of the time he was Attorney-General, first in the Fysh Government and then in the Braddon Government. He was therefore a key member of the executive government. During the period he was out of parliament, he was the inaugural chair of the Southern Tasmanian Political Reform Association which was established to pursue electoral reform.¹⁰ The work of the Association notwithstanding, parliament was really the only forum in which Clark could pursue the ideals that were so dear to him.

Clark's parliamentary experience and his 1891 draft Constitution

But how, if at all, did his experiences as a member of parliament shape the choices he made in the 1891 draft? Did he think as deeply about the institution of parliament as he did about the roles of the executive and the judicature? In particular, if the Senate was to be so important as the bastion of state interests, did Clark give any thought to what it might need, apart from financial powers, to carry out its functions? What might the Federal Parliament look like today if Clark's initial thoughts on the machinery provisions for the operation of parliament had survived as first proposed?

These machinery provisions became sections 49 and 50 of the Constitution. They provide:

49. The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.

50. Each House of the Parliament may make rules and orders with respect to:

- (i.) the mode in which its powers, privileges, and immunities may be exercised and upheld;
- (ii.) the order and conduct of its business and proceedings either separately or jointly with the other House.

They provide the Federal Parliament, particularly the Senate, with significant powers and immunities and with the procedural independence to function effectively, to undertake the duties it was established to carry out on behalf of the constituent parts of the federation.

Clerk's parliamentary career is chronicled in the pages of the Journals of the Tasmanian House of Assembly¹¹ and, in the absence of an official Hansard service, the Hobart daily newspaper, *The Mercury*. Clark embraced his parliamentary duties after being sworn in as the Member for Norfolk Plains on 30 July 1878¹² and was active in using the various parliamentary procedures available to him, quickly grasping the forms and some of the fundamentals. For example, he presented petitions calling for the passage of a bill regulating the Presbyterian Church, but he voted against a motion that would have allowed a representative of the church to appear at the bar and address the House in support of the petition.¹³ That would have involved the inappropriate usurpation of a representative's proper role

10 *ibid.*, p. 66

11 Minutes of the House of Assembly, individually known as Votes and Proceedings, were bound into annual volumes, collectively known as the Journals of the House of Assembly.

12 Journals of the Tasmanian House of Assembly (hereafter referenced as J), 30 July 1878, p. 15.

13 3 September 1878, J.41; 12 September 1878, J.83; the bill was passed on 12 September 1878, J.65.

which Clark would no doubt have contemplated as he sat on the Assembly's green benches. He was appointed to numerous select committees during his first period as a backbencher including on the present system of electing members of parliament,¹⁴ oyster fisheries and the preservation of forests,¹⁵ the destruction of fruit by the Codlin Moth,¹⁶ and the operation of the *Customs Duties Act 1880* (which he initiated).¹⁷ For most of his parliamentary career, he was a member of the Library Committee, allowing him to influence the purchase of works for the Tasmanian Parliamentary Library.

Clark made regular use of orders for production of documents, an exercise of the House's powers to obtain information from government. For example, in 1881 he sought, and obtained, legal advice from the government on the rates of intercolonial postage.¹⁸ Clark's orders over the years covered a wide range of matters from public policy and administration to the affairs of individuals. They were routinely complied with by the government of the day. One curious matter in 1892, when Clark was in opposition, appeared to involve a matter of private concern to the Clerk of the House, Frederick A. Packer, who had apparently been unable to register the name of his infant son. On 11 October, Clark moved an order for the tabling of all correspondence between Packer and the Registrar-General's Department and Chief Secretary's Department.¹⁹ The correspondence was tabled on 18 October²⁰ and a few days later Clark successfully moved a motion calling for Crown Law advice on whether the Governor could direct the Registrar-General to register a child's name more than seven days after the registration of the birth and, if not, calling for amendment of the relevant law. The episode not only provides a window into the occasional intimacies of parliamentary life but shows Clark using classic parliamentary tools to address a matter of concern.

As early as three months after his election, Clark can be seen using a deadly parliamentary tactic to kill off a bill. The bill was the Hobart Town Corporation Act Amendment Bill which put rate collection in Hobart on the same footing as in Launceston, including by making landlords liable for the rates of small tenancies of less than 20 pounds per year. Clark found the provision objectionable and moved a second reading amendment for the bill to be read a second time 'this day 6 months'.

When parliamentary sessions lasted for six months or less, as was the case in Tasmania, and bearing in mind that all business lapses at the end of a session, such an amendment, if successful, effectively cast a bill into oblivion, assigning it to be considered on a date on which the parliament would have been long prorogued. It was fatal to a bill and prevented its revival, other than by reintroduction in a new session.²¹ By employing such a device, Clark can be seen as eager to apply the tactics at his disposal to achieve his goals but it was nonetheless an unusual tactic, perhaps designed to demonstrate Clerk's alacrity in embracing his new role. He was only 31.

Clark witnessed his first no-confidence motion on 17 December 1878 and a new ministry formed under Premier William Crowther on 20 December.²² He was later to denounce this method of changing

14 12 September 1878, J.66.

15 2 May 1879, J.215.

16 8 May 1879, J.215.

17 18 August 1881, J.56.

18 21 July 1881, J.11–12.

19 J.78.

20 J.97.

21 The same tactic remains in the Senate's standing orders and is regarded as finally disposing of a bill. It is seldom used, perhaps because it requires majority support and there are other, easier ways of defeating a bill on an equally divided vote. However, a bill defeated by this method is not necessarily dead, although it is usually considered to be so. It may be revived, for example, by motion on notice, if a majority wishes to proceed with it.

22 J.164; J.168.

government and it appeared to lie at the heart of his dislike of the system of responsible government. In his speech on the resolutions at the 1891 Convention in Sydney, Clark quoted Victoria's Chief Justice George Higinbotham's disparaging assessment of the state of affairs in Victoria at a particular time, and the 'feelings of distrust and disapproval ... almost entirely occasioned and generated by the accursed system under which the party on this side of the House are always striving to murder the reputations of the party on the other side, in order to leap over the dead bodies of their reputations on to the seats in the Treasury bench'.²³ When challenged by Deakin that the strength of parties in the US was just as great without responsible government, Clark riposted, 'But it cannot upset the ministry for the time-being simply for the purpose of upsetting them and getting their places, and for no other reason whatever'.²⁴ We do not know, of course, how he would have viewed US-style gridlock and government shutdown as a consequence of party posturing.

Clark's career as a legislator took off when he was appointed Attorney-General in March 1887, although he had some experience of introducing private member's bills in his first term.²⁵ Out of parliament for nearly five years after being defeated at the general election in May 1882, Clark won the seat of South Hobart at the election on 4 March 1887. Tasmania followed the Victorian practice whereby a member of parliament appointed to the ministry had to resign and recontest his seat, which Clark did, being re-elected on 7 April 1887.

As Attorney-General, he was responsible for introducing and seeing through the parliament numerous bills, many of which he drafted. He was a very methodical lawmaker who made sensible use of the parliamentary timetable. He tended to introduce multiple bills early in the session, allowing time for them to be considered by select committees, if required, for debate to proceed in due course, and for amendments to be negotiated with the Legislative Council before the session ended, whether by the usual exchange of messages or the occasional conference. He was the man most likely to be nominated as a member of any committee of reasons appointed to draw up reasons for disagreeing with amendments made by the Legislative Council. He continued these habits in opposition when he routinely introduced half a dozen private member's bills at the beginning of a session, proposed select committees in appropriate cases and shepherded the bills through the various stages in the chamber, including negotiations with the Legislative Council before the session ended. (He had a success rate of around 50 per cent in having his private member's bills passed into law.)

This is significant because he had plenty of experience of how routine bicameral negotiations almost always produced an outcome. Failure of a bill was simply an indication that it lacked parliamentary support. In 1897, when he was taking through the committee stages the draft Constitution Bill as it had emerged from the Adelaide session of the Convention, with a view to proposing amendments to be considered at the next session in Sydney, Clark put forward his version of a deadlock provision as an alternative to less acceptable versions that he expected would be proposed by Isaac Isaacs and Bernhard Ringrose Wise. His preference, however, was for no such provision. If it were up to him, he would prefer to see the two Houses fight it out and eventually come to some agreement, without interference. If there were to be a deadlock provision, however, he urged his colleagues to consider his alternative in preference to other proposals which either ignored or coerced the Senate.²⁶

It was shortly before these exchanges that Clark recollected some of the important events of the 1891 Convention. Clark had not attended the Adelaide session. He was undertaking his second visit to the

23 *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 11 March 1891, Legal Books, Sydney, 1986, vol. 1, p. 245.

24 *ibid*

25 See Neasey and Neasey, *op. cit.*, pp. 53–8. The Neaseys' biography of Clark provides detailed information about the bills he introduced and the business he transacted in the Assembly, as well as about the political context.

26 *The Mercury* (Hobart), 12 August 1897, supplement, p. 2.

US but had followed the debates while there and, on his return, had stopped in Sydney to spend an afternoon with Edmund Barton and Wise, catching up on what had happened. He was thus prepared to lead the debate, beginning with a comprehensive speech on a motion for the House to resolve into a committee of the whole to consider the Constitution Bill. According to *The Mercury*, he was greeted with cheers. It was in this speech, six years after the event, that he let fly about the ‘picnic’ that had taken place over Easter 1891 on the ‘pleasure yacht’ *Lucinda* and that while he was in bed with flu, the picnic party had ‘messed’ his Supreme Court provisions, now restored by the Adelaide session.²⁷

By the time Clark came to draft his Constitution in preparation for the 1891 Convention, he had several years’ experience of parliamentary methods and practices, and had become a respected and effective legislator. He had practical experience of parliamentary procedure but had not had to contemplate the standing orders and their implications in isolation. The Assembly did not embark on a revision of its standing orders until 1892 when it spent several days early in the session revising various standing orders before agreeing to them on 17 August 1892 and sending them off to the Governor for approval, a quaint colonial custom that lingers on in some state constitutions (including Tasmania’s). Anyone could be forgiven for missing this otherwise significant event. On the same day, Henry Dobson formed a new government, taking over from Philip Fysh as Premier, after yet another no confidence motion and Clark, too, was out of office.

The other significant aspect of parliamentary practice that Clark appears to have had little exposure to before 1891 was parliamentary privilege. Cases were rare and one did not crop up till October 1891, after the Sydney Convention. It involved a question of contempt by defamation.²⁸ Walter Scott Targett, a former member of the NSW Legislative Assembly (who therefore should have known better according to participants in the debate), was reported as having made defamatory remarks about the Speaker and other members. The House resolved that its Clerk write to Mr Targett to ascertain if the reported remarks were correct but, having received a response confirming the accuracy of the reported remarks, the House found that there was nothing it could do about it. It lacked the necessary powers to punish what it considered to be a contempt. As Clark informed the House, the Tasmanian Parliamentary Privileges Act did not provide any remedy for such a case because defamation of a House or member was not one of the contempts specified in the 1858 Act which had been enacted to empower the Houses to punish several other contempts. He recommended that he be instructed to prepare a bill to address the matter.²⁹ Clark referred to three cases in which the Privy Council had found that colonial legislatures had no inherent power to punish contempts committed outside their doors. Later in the debate, he conceded that it was the first time he had heard of such a thing and was taunted for this gap in his knowledge.³⁰

The gap is surprising because one of the three cases was a Tasmanian case decided by the Privy Council in 1858 (*Fenton v. Hampton*).³¹ In 1855, the Legislative Council established a select committee to inquire into certain alleged abuses in the convict department, with power to send for persons. John Hampton, comptroller-general of convicts, was served with a summons to appear but refused to do

27 *The Mercury* (Hobart), 29 July 1897, supplement, p. 2.

28 Formerly a very commonly pursued contempt, the contempt of defamation of a House or member was abolished at the Commonwealth level by section 6 of the *Parliamentary Privileges Act 1987*, predating by some years the High Court’s identification in the Constitution of an implied guarantee of freedom of political communication.

29 7 October 1891, J.220–1; *The Mercury* (Hobart), 8 October 1891, p. 4; 23 October 1891, J.278; *The Mercury* (Hobart), 24 October 1891, supplement, p. 1. In the event, Clark was out of office before he could introduce such a bill and no amendments proceeded.

30 *The Mercury* (Hobart), 24 October 1891, supplement, p. 1.

31 (1858) 14 ER 727.

so. The refusal being reported to the Council in accordance with normal parliamentary practice, that body resolved that Hampton should attend at the bar of the Council to explain himself. Again, he refused and the Council resolved that he was guilty of contempt, despatching the Serjeant-at-Arms with a warrant from the President to apprehend Hampton and commit him to custody at the Council's pleasure. Hampton won an action for trespass in the Supreme Court on the grounds that the Council, President and Serjeant did not have the authority to take such action against him. The President and Serjeant appealed to the Privy Council which affirmed the Supreme Court's decision.³²

The Privy Council in this case followed its earlier decision in *Kielley v. Carson*³³ which denied to colonial legislatures the inherent power to punish contempts committed outside their doors. The UK House of Commons certainly had that power as part of the *lex et consuetudo Parliamenti* (the law and custom of parliament) but that was no justification for ascribing it to every colonial assembly which, as a matter of common law, possessed only those powers considered reasonably necessary for them to perform their functions.³⁴

Tasmania's response was to enact the *Parliamentary Privileges Act 1858* which gave both Houses powers to summon and examine witnesses and to punish specific contempts for which the relevant Presiding Officer would issue a warrant for the apprehension and imprisonment of the person judged guilty of the particular contempt. The Act authorised those executing such a warrant to break down doors 'in the daytime' if necessary, a power which still exists.

The response was different in other colonies which, instead of specifying in statute the sanctions for particular contempts, had adopted House of Commons powers, privileges and immunities for their legislatures in total, as at the date of the relevant Constitution, thus removing any doubts about the powers of those legislatures to punish for contempt, whether committed inside or outside their doors. The Victorian Constitution, for example, adopted House of Commons powers, privileges and immunities at 21 July 1855. South Australia followed with a similar formula in 1856. Both constitutions provided for subsequent modification of the adopted powers, privileges and immunities by later statute.³⁵ As we have seen, Tasmania took a different route in 1858 in response to a particular case.

How then did Clark deal with the rules and privileges clauses in his 1891 draft?

The relevant clauses are as follows:

14. The privileges, immunities and powers to be held, enjoyed, and exercised by the Senate and the House of Representatives, and by the Members thereof respectively, shall be such as are from time to time defined by Act of the Federal Parliament.
51. The Senate and the House of Representatives from time to time and as there may be occasion shall prepare and adopt such Standing Rules and Orders as shall appear to the said Senate and House of Assembly (sic.) respectively best adapted—
 - I. For the orderly conduct of the business of the Senate and House of Representatives respectively:

32 Report of the case in *The Argus* (Melbourne), 26 June 1858, p. 6.

33 (1842) 12 ER 225.

34 See Lynn Lovelock and John Evans, *New South Wales Legislative Council Practice*, Federation Press, Annandale, NSW, 2008, pp. 52–3, 56–7.

35 Enid Campbell, *Parliamentary Privilege*, Federation Press, Sydney, 2003, p. 2.

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- II. For the mode in which the Senate and House of Representatives shall confer, correspond, and communicate with each other relative to Votes or Bills passed by or pending in the Senate or House of Representatives respectively:
 - III. For the manner in which Notices of Bills, Resolutions, and other business intended to be submitted to the Senate and House of Representatives respectively at any Session thereof may be published for general information:
 - IV. For the manner in which Bills shall be introduced, passed, numbered, and intituled in the Senate and House of Representatives:
 - V. For the proper presentation of any Bills passed by the Senate and House of Representatives to the Governor-General for his assent thereto: and
 - VI. Generally for the conduct of all business and proceedings of the said Senate and House of Representatives severally and collectively:

All of which Rules and Orders shall by the Senate and House of Representatives respectively be laid before the Governor-General and being approved of by him shall become binding and of force.³⁶

Where did they come from?

Clause 14 was based on section 18 of the *British North America Act 1867* which provided for the powers, privileges and immunities of the Canadian Parliament to be defined by Act of Parliament from time to time, provided that they did not exceed those of the UK House of Commons at that date. The latter provision was based on the pseudo-doctrine that ‘a stream cannot rise higher than its source’, a notion that Clark was happy to abandon. That left him with the uncertainties of precisely what powers, privileges and immunities the parliament would enjoy before making such an enactment but, being unaware at this stage of the line of cases from *Kielley v. Carson* on the inherent powers of colonial legislatures, Clark was apparently untroubled. If it had worked for Canada, then it should surely be adequate for another dominion parliament.

In fact, it had not quite worked for Canada and in 1875 the British Parliament had repealed and re-enacted section 18 of the *British North America Act 1867* because of doubts that had arisen over the Canadian Parliament’s powers to legislate in this field, at the same time validating an 1868 Act of the Canadian Parliament providing for the administration of oaths to parliamentary witnesses (a power not then enjoyed by the UK Parliament and only acquired, by statute, in 1871).³⁷

While Sir Samuel Griffith included in his first draft of the Constitution Clark’s clause 14 as drafted,³⁸ it did not survive the ‘picnic’ (as Clark referred to it in 1897) on the *Lucinda* which replaced it with

36 Williams, op. cit., pp. 97, 104–5. When annotating Clark’s draft, Griffith made no mark next to clause 14, but scored a heavy double line next to clause 51, indicating that this was a matter to return to.

37 38-39 Victoria, Chapter XXXXIII, reproduced in R.C. Baker, *A Manual of Reference to Authorities for the Use of the Members of the National Australasian Convention, which will assemble at Sydney on March 2, 1891 for the Purpose of Drafting a Constitution for the Dominion of Australia*, W.K. Thomas and Co, Printers, Adelaide, 1891, pp. 252–3. For background, see A. O’Brien (ed.), *House of Commons Procedure and Practice*, 2nd edn, 2009, chapter 3, under Privilege since Confederation, <http://www.parl.gc.ca/procedure-book-livre/Document.aspx?Language=E&Mode=1&sbid=ABBC077A-6DD8-4FBE-A29A-3F73554E63AA&sbid=7AB38482-E14C-4656-857B-419DAD8AEB0E#9D315269-42D1-4B57-B0DE-F737414A783D>, accessed 22 October 2013.

38 Williams, op. cit., p. 156, and see insert A2, p. 138.

a clause adopting UK House of Commons powers at the date of the adoption of the Constitution, and authorising subsequent legislative revision, provided that House of Commons powers etc. were not exceeded. The first part of the replacement clause can surely be attributed to Charles Kingston who included such a clause in his own draft Constitution, no doubt following the model of the South Australian Constitution of 1856. The second part was scrubbed out at the meeting of the Constitutional Committee on 30 March 1891.³⁹ Clause 14, as significantly modified by the drafting committee in 1891, went through to become section 49 of the final Constitution with only minor subsequent tweaking.

Clause 51 was based on the Tasmanian Constitution⁴⁰ to which Clark added paragraph III about publishing proposed business. While the level of prescription is unnecessary, the most egregious feature of the clause is the requirement for the standing orders of each House to be approved by the Governor-General. Clark may have justified keeping the requirement for external approval on the basis that the Federal Parliament would nonetheless be subordinate to the imperial parliament, as he had argued in the introduction to his draft Constitution, but he was confusing the issues and revealing his lack of familiarity with the subject.

Along with inquiry and disciplinary powers, the exclusive right of a House to control its internal affairs is one of the fundamental elements of parliamentary privilege. The rules and orders of a House regulate its practices, preserve its independence and may be changed to meet new or changing circumstances or requirements; the establishment of a committee system to scrutinise executive performance, for example. For such practices to be subject to external approval is a potential fetter on the exclusive jurisdiction of a House over its own affairs, a possible deterrent to innovation and change, and particularly problematic for an upper house with the function of protecting the interests of the federation partners, interests which may be at odds with those of the government of the day. The degree to which approval by the Governor-General might involve executive input was another question raised by the clause.

Fortunately, the drafting ‘picnic’ on the *Lucinda* also dealt with this potential blunder by deleting the requirement for approval by the Governor-General.⁴¹ The clause was to remain in its highly prescriptive form, however, through successive Conventions and drafts, until the final reconsideration of the draft Constitution by the Drafting Committee in Melbourne in 1898, after the bill had been reported four times with amendments. Only then was it trimmed to its current form and the powers, privileges and immunities clause relocated to immediately precede it.⁴²

Conclusion

The form in which Clark included these machinery clauses in his draft Constitution shows that he had not given any great thought to such fundamental matters. Given his history and his lack of acquaintance with their importance, there is no reason that Clark should have done so. His parliamentary experience from 1887 was as a member of the executive government. While he fully accepted and worked within the traditional parliamentary framework which included the Houses exercising their inquiry powers and the government responding respectfully, he had witnessed no great clashes between government and opposition, other than those political clashes which led to changes of government on votes of confidence.

39 *ibid.*, pp. 120, 169, 190, 217, 266, 736. Comments by the Colonial Office on the 1897 draft show that the Office wanted to restore the ‘stream cannot rise higher than its source’ principle, but these were ignored.

40 See s. 17, *Constitution Act 1934* which re-enacts section 29 of the 1855 Constitution.

41 Williams, *op. cit.*, pp. 173–4, 194–5, 222–3.

42 *ibid.*, pp. 1010–11, 1024–6, 1079.

There was nothing in Clark's experience to demonstrate the need for a House of Parliament to have robust and enforceable inquiry powers and the means to take on the executive if that was the will of the House. There was nothing like a loans affair or children overboard or Australian Wheat Board scandal or, looking through another prism, a scandal over supplies and support for the troops fighting and wounded in the Crimea or over the incompetence of the Royal Navy in allowing the Dutch fleet to sail up the Medway and set the fleet alight while it wallowed at anchor. The Codlin Moth inquiry of 1879, important though it was, was in a different league. While Clark's reading and scholarship were vast, we cannot criticise him for not knowing everything about everything.

It is ironic that Clark took such care to design a Senate that would be structurally appropriate and powerful enough to protect the interests of the states and other minorities yet, in neglecting the machinery provisions, he could have bequeathed us a Senate that was quite hamstrung in practice, without the powers and independence required to fulfil its functions. His view of parliament was not a dim one; it just had some limitations. Fortunately for us all, the Australian Constitution was the product of a great team effort.

Shadow or Illumination? Kingston's Rival Constitution

John Bannon

In mid-October 1890 the Attorney-General of Tasmania Andrew Inglis Clark returned from a trip to Britain and the United States. His journey had taken place after the decision made by the 13 representatives of the Australasian colonies in Melbourne in February 1890 to hold a convention of delegates to commit to an 'early union' of the colonies and 'to consider and report upon an adequate scheme for a Federal Constitution'.¹ It was a well-timed study tour. By the time of his return, all the colonial legislatures except Western Australia had appointed their seven-member delegations (with New Zealand selecting only three). Clark himself was one of the Tasmanian seven. With his recent on-the-spot examination of relevant jurisdictions overseas, and his well-developed ideas on the shape of such a union, he pre-empted the discussion by immediately sitting down to work on a draft constitution for the federation.



Portrait of Charles Cameron Kingston, photographed by Swiss Studios, Melbourne. Image courtesy of National Library of Australia, PIC/6980

The National Australasian Convention had been called for the beginning of March 1891; Clark completed his draft, had it printed, and circulated it with a covering letter on 12 February. It is certain that Sir Henry Parkes, the host of the Convention, and Edmund Barton received a copy in New South Wales, and it seems that he also sent copies to other premiers, among them South Australia's Premier Thomas Playford. Playford in turn passed it on to his protégé and adviser on constitutional matters, his close political colleague and former Attorney-General Charles Cameron Kingston, for his consideration. By 26 February Kingston had produced his own draft. Clark and Kingston had done a remarkable job in the short time available, although clearly they both had the matter under consideration for some time. This paper examines the origins and nature of the two drafts and seeks to restore the significance of Kingston's draft to the process that led to the Constitution of the Commonwealth of Australia and to assess his drafting contribution against that of Clark in terms of its substance, influence and form.²

By 1891, Charles Cameron Kingston had been a member of the South Australian Parliament for nearly ten years. In 1884 at the age of 34 he became Attorney-General in John Colton's government. Out of office the following year, he remained prominent in opposition, and in June 1887 when Thomas Playford succeeded Sir John Downer as Premier, Kingston returned to the portfolio for the ensuing two years. In that year he and Playford met at some length with Henry Parkes in Adelaide and much of Kingston's interest in taking practical steps to federation stemmed from that time. A major topic of this meeting, pressed on Parkes by the South Australians,

1 *Official Record of the Proceedings and Debates of the Australasian Federation Conference*, Government Printer, Melbourne, 1890, p. iii.

2 The major contribution to this study is the work of Alex Castles. See Alex C. Castles, 'Clark, Kingston and the draft Constitution of 1891', in Richard Ely (ed.), *A Living Force: Andrew Inglis Clark and the Ideal of Commonwealth*, Centre for Tasmanian Historical Studies, University of Tasmania, Hobart, 2001, pp. 261–85.

was the need for a common approach and uniform legislation in the colonies to deal with the issue of 'Asiatic aliens' and 'coloured' immigration. A concern from the days of the Victorian gold rush, exacerbated by the use of Pacific Islanders to develop the Queensland sugar industry, it had become a particular issue for South Australia due to its jurisdiction over the Northern Territory.

The outcome was the Intercolonial Conference on the Chinese Question of 1888, which Parkes agreed to hold in Sydney under his chairmanship. Kingston, as the prime initiator of the conference, played a prominent part. As a radical protectionist he was a strong advocate of restricting 'Asiatic' immigration and what became known as the 'White Australia Policy'. His radical position made no distinction between his attitude on immigration and his role as a strong defender of the free movement and full citizenship rights of Chinese and others who were or had become residents in Australia. These were the principles embodied in the draft bill that a committee comprising Kingston, Alfred Deakin (Victoria) and J.M. Macrossan (Queensland) prepared and saw adopted by the conference. Kingston's policy role and his skill as a draftsman were recognised and positively commented on by his colleagues. The aim was for each colony to pass the bill either of its own volition or under the provisions of the new Federal Council of Australasia Act (see below) which could create common laws among its members. The 'Chinese question' was one of a number of issues, including defence, trade and customs and posts and telegraphs, driving the examination of models of federation which would enable such common supra-colonial issues to be dealt with on a unified and uniform basis and this conference provided a further impetus to the federal movement. Neither Clark of Tasmania nor Sir Samuel Griffith of Queensland was present in 1888, but, of the nine delegates, a number were later to attend the 1890 Melbourne Conference (Parkes of NSW, Duncan Gillies and Deakin of Victoria, Playford of South Australia and Macrossan of Queensland) and the 1891 Convention (Parkes, Gillies and Deakin, Playford and Kingston, Macrossan, and Philip Fysh from Tasmania).

The Australasian Federal Council was established by imperial statute in 1885 to facilitate colonial cooperation and uniform legislation among its member colonies. It was seen by some as an end in itself, but for many federalists, including Kingston, merely as a useful precursor to a full federation. The self-governing colonies of Victoria, Queensland and Tasmania joined, as did the Crown Colonies of Western Australia and Fiji. Others rejected it. New South Wales refused to join, Parkes believing that it was half-baked. New Zealand stood out. In South Australia, despite John Downer's strong advocacy and Kingston's support, the Legislative Council rejected the enabling legislation. Kingston, as Playford's Attorney-General on coming to office in 1887, tried again and eventually managed to secure passage of a bill that would enable South Australian representation from 1889. To get the legislation through, Kingston had undertaken to press for a broader and more representative membership to overcome objections in South Australia to the practice of only two members both drawn from the incumbent government forming the delegation. He also had to agree to a 'sunset clause' in the legislation which allowed membership for a period of two years only, subject to renewal of the Act at the end of the period. Although attempts were made to do this in 1890, the support of the upper house could not be gained, so South Australia had just two years membership. The only Federal Council meeting its delegates attended was in 1889 in Hobart.

Playford and Kingston were the South Australian delegates to the 1889 meeting. Here, to welcome him to the fold, Premier Playford was elected as sessional chairman. Clearly the Council was impeded greatly by the absence of New South Wales and, to a lesser extent, New Zealand. Kingston, based on the argument he had successfully pressed in his own jurisdiction, believed his proposal to increase and broaden the membership would be a means of inducing them to get involved as well. But he

never lost sight of the aim of broader union. He lobbied strongly before the meeting for an expanded membership, and helped prepare resolutions in committee which Deakin supported. Kingston's urgency for the Council to be seen as a vehicle for federation was not fully supported by all the delegates, but was influential. Deakin had the Council carry a significant addendum to the committee's motion: 'That in recommending that the constitution of the Council shall be amended by the increase in the number of its members, *this Council contemplates the early consideration of the question of Australian Parliamentary Federation by the enlarged Council*'.³ Among those present at that Council meeting were the soon to be very significant Samuel Griffith (Queensland) and Andrew Inglis Clark (Tasmania). With Kingston they were to form the drafting committee at the 1891 Convention.

Playford lost office in June 1889, but returned to government with Kingston's support in August 1890. Playford again offered Kingston a ministry but he refused, claiming he 'did not feel at liberty' to accept the honour.⁴ The press commented that 'Mr Kingston's private engagements and other circumstances' prevented his joining the ministry.⁵ The reasons for him not doing so are something of a mystery. He did have financial problems, but at no other time in his life do these seem to have affected his willingness to accept public office. It may have been that he was grappling with an illness, as he suffered rheumatism and osteo-arthritis. It was during this period that he began to use a stick to assist his walking. However, Kingston continued to play an active role in the House of Assembly and maintained his support of Playford. His backbench status prevented him from being a delegate to the 1890 Melbourne Conference. This was the only significant federation conference of any kind he missed. He ended the decade as the most consistent individual attender at all the significant meetings: all sessions of the two Federal Conventions, four Premiers' Conferences, and as a member of the London delegation in 1900. On this occasion, despite his 'personal circumstances', he was induced by Playford to make himself available and was elected as one of the five House of Assembly representatives to the 1891 Convention to be held that March.

So it was that in February, when he received a copy of Clark's draft bill, he was able to respond by rapidly drafting a bill himself as a preferred alternative. He must have been toying with ideas prior to receiving Clark's document—his long-term clerk George Sharp's comment made some years later that 'If he prepared one draft of the Commonwealth Constitution he prepared a dozen' may refer at least in part to this period.⁶ In any case his final version was drafted in a very short time. Between the date of its reception, sometime after 12 February, and 26 February Kingston produced his own document and under Playford's authorisation had it printed by the Government Printer and put into circulation. To assist his thinking he had also just seen a manual prepared by his political foe Richard Chaffey Baker which had been published in Adelaide that January and made available to all delegates and others involved. This invaluable document compared the constitutions of the United States, Canada, and Switzerland with commentary on federal systems generally.⁷

J.A. La Nauze refers to the Clark and Kingston drafts as 'forbiddingly formal documents' as they were 'nothing less than complete anticipations of the Convention's task, draft constitutions for a federal union'.⁸ Their significance was not lessened by the fact that there were 'few original points in either

3 Federal Council of Australasia, *Official Record of Debates*, 4 February 1889, The Council, Hobart, 1889, pp. 109, 111 [emphasis added].

4 *South Australian Register* (Adelaide), 18 August 1890, p. 4.

5 *ibid.*, 6 January 1892, p. 4.

6 *The Mail* (Adelaide), 8 July 1922, p. 13.

7 Richard Chaffey Baker, *A Manual of Reference to Authorities for the Use of the Members of the National Australasian Convention ...*, W.K. Thomas, Adelaide, 1891.

8 J.A. La Nauze, *The Making of the Australian Constitution*, Melbourne University Press, Carlton, Vic., 1972, p. 24. Clark and Kingston's drafts are outlined in Appendices 2 and 3 respectively, pp. 292–6.

of them'.⁹ This typically acerbic comment simply meant that they both incorporated examples from the British North America Act and the Constitution of the United States sometimes word for word. There is something of a mystery concerning the whereabouts and distribution of Kingston's draft. It was virtually without reference by contemporaries and can only be found bound-in as document number six with no annotations in the collection made by Samuel Griffith. The existence of Kingston's draft code was to be referred to occasionally during forthcoming proceedings, but was thereafter entirely forgotten. Griffith's lack of acknowledgement, John Quick and R.R. Garran's¹⁰ ignorance of its existence, and later historians such as La Nauze's dismissal of its significance have served it ill. On the other hand L.F. Crisp¹¹ and Alex Castles (whose article has been cited earlier), give it the serious treatment it deserves.

The reason that it deserves serious treatment is that even without knowing how widely circulated it was, Kingston's presence at all critical meetings in the process and his key role as a member of the three-person drafting committee would have ensured that his views were well known and argued. Kingston was no shrinking violet as an advocate. Significantly he and Clark were both included in an informal and private dinner with Parkes on the eve of the Convention, presumably because they had set down their ideas on paper. Clearly it would have been read by Griffith and other members of the core drafting committee in 1891. It would certainly have been advocated by Kingston in the course of the discussions of that drafting committee on the *Lucinda*, chaired by Griffith and comprising Kingston and Barton who had replaced Clark who was ill and only joined the group much later. Others including Sir John Downer were there in the early stages, but the threesome had done most of the work by the time Clark was able to come aboard. Kingston's continuing presence gave him an opportunity to press features of his bill that Clark was denied. Clark later famously claimed that the group had 'tinkered' with his bill, and they 'messed it' but he was unable to restore the situation.¹²

The question remains to what extent was Kingston simply reworking Clark or striking out on his own? La Nauze unkindly describes both drafts as scissors-and-paste work of the two most relevant examples of the Canadian Act and the Constitution of the United States of America. But they both certainly go beyond that. I want to focus on three aspects of the drafts: firstly the content and some of the differences between them; secondly the drafting and drafting principles involved; and thirdly their impact on the final outcome.

In relation to the comparison of the content of the drafts, this has been well analysed by previous scholars including La Nauze, L.F. Crisp and Alex Castles. Clark heavily based his draft on his view of the US Constitution. Kingston was less familiar with that and other examples, but had a more practical and local knowledge of the political issues involved in managing the Westminster system and grafting it onto a federal structure. He was a curious mix of a great national visionary with a radical democratic agenda, coupled with a very strong states'-rights philosophy. He did not wish to inhibit the Commonwealth in the exercise of its authority but he sought to closely define that authority and clearly enunciate its scope. His democratic principles and suspicion of national tyranny attempted to retain accountability to the states and to the general electorate.

9 *ibid.*, p. 24.

10 John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth*, Angus and Robertson, Sydney, 1901.

11 L.F. Crisp, *Federation Fathers*, Melbourne University Press, Carlton, Vic., 1990, at pp. 292–6, which includes a useful table of comparison of some of the more significant features of Clark and Kingston's drafts at Table 5.3.

12 *The Mercury* (Hobart), 29 July 1897, supplement, p. 1.

Clark had left open the question of responsible cabinet government and whether executive councillors needed to be members of parliament or not. Kingston very explicitly required that ministers were members. But his states'-rights views emerged in his requirement that every state should be represented in the cabinet by a minister; that senators had to have been members of their colonial parliament; and that the governors of colonies were to be elected by the electors and again to be drawn from persons who had served in local Houses of Parliament (this can be seen as foreshadowing his long campaign against the Colonial Office recommendations of governors external to the jurisdiction they were to serve in). In relation to the future high court (he called it the Federal Supreme Court), he and Clark were at one on the elimination of the right of appeal to the Privy Council from Australia's highest court. (This became one of his ongoing causes for the next decade.) They agreed that the judges should be appointed by the Governor-General in Executive Council, but Kingston would have them chosen only from those who had been or were state Supreme Court judges.

La Nauze lists 'some interesting variations and additions' to Clark's draft, which is not comprehensive but gives a feeling for the differences.¹³ Crisp does a similar exercise. For these purposes I would just single out a few.

Under 'powers', a particular cause of Kingston's was laws in relation to 'Trades unions and organisations of employers and employés, and tribunals for the settlement of industrial disputes'.¹⁴ His proposal that the Commonwealth have such a power eventually found its way into the Constitution. The power 'to fix the right of any colonies with reference to the user of the water of any river or stream' was something that Clark, as a Tasmanian, was probably not particularly aware of or excited by but it was one of the federal obsessions of the South Australians in particular as the end-users of the River Murray. Not only did it occupy a lot of subsequent futile debating time, but remains an issue to this day.

Two concepts not in Clark's draft had great significance:

The first, based on Kingston's advanced concept of democracy, influenced by Baker's learned exegesis, is the machinery of the referendum. In what would be seen as an extreme form, Kingston provided that one third of the members of either House, or resolutions from any two state legislatures, or 20,000 voters by petition could all demand a referendum before assent was declared to a federal Act. A majority of votes (but with no majority of states provision), would carry the question. The referendum would also apply to amendment of the Constitution requiring at least two thirds of the Colonial legislatures and a two-thirds majority of voters to confirm it. The latter provision as modified is now the means by which the Constitution can be changed or state boundaries altered.

The second is the means by which money bills could be handled and the issue of resolution of deadlocks between the Senate and the House of Representatives. Kingston came from a jurisdiction where this matter was critical, as no South Australian government, whether conservative, populist, or progressive had been able to break the veto of the Legislative Council or overcome its claim of equal power. Kingston recognised this as a great potential sticking point between the Senate and the House of Representatives, while acknowledging the different composition, role and mandate of the Senate in the federal structure to that of a Legislative Council in a colony. A practical way had been found to deal with this, involving what became known as the 'South Australian compromise'. Kingston incorporated it into his draft. Money bills could only originate in the lower house, and the

13 La Nauze, *op. cit.*, p. 295.

14 *ibid.*

Senate would be prevented from altering them although it could ‘suggest’ amendments—but it must either pass or reject. This clause adopted in 1891 and repeated in 1897–98 was critical to the passing of the Constitution. Without it, the night of the ‘providential catarrh’ in Adelaide¹⁵ would have seen a walkout of the big colonies and federation put on hold for many years.

The second aspect of focus is the form of words: the way in which the measure is drafted. La Nauze refers to Kingston having some ‘justified vanity of draftsmanship’ and sees him making some changes of names and some pruning of the verbiage and rearrangement of Clark, ‘with some interesting additions of Kingston’s own’.¹⁶ As mentioned above, Kingston’s reputation as a common-sense draftsman was increasing, and his exposure on the intercolonial scene had reinforced this. Plain English and common sense were his rules, and he sought to reduce verbiage wherever possible. In this context one can compare the respective titles: Clark’s clunky title was *A Bill for the Federation of the Australasian Colonies of New South Wales, Queensland, Tasmania, Victoria, Western Australia, and the Province of South Australia, and the Government thereof: and for Purposes connected therewith*. Kingston’s title was simply *A Bill for an Act for the Union of the Australian Colonies*. Griffith too prided himself on a spare and clear wording and his changes to much of Clark’s text demonstrate this. For example, when dealing with transference of authority from state to governors to the Governor-General, Inglis Clark uses 194 words; Griffith took it down to 168, while Kingston’s was 112. In dealing with a power, Clark writes ‘To regulate commerce and trade with other countries and among the several provinces’; Kingston simply ‘Trade and Commerce’.

A later comment made by the historian Sir Ernest Scott, who was a Hansard man in the early years of the Commonwealth Parliament, puts it well, referring to Kingston’s:

command of a crisp precision of phrase and a sure sense of the value of words that could express a meaning in the shortest and most unmistakable terms. Instead of saying that ‘any person charged with an offence against the said section in the manner aforesaid and being without reasonable cause or excuse should on conviction before a court of summary jurisdiction be liable to a fine not exceeding £20’, Kingston would write at the end of a tersely worded section: ‘Penalty £20’—and, oddly enough, neither courts nor persons affected ever had the least doubt as to what he meant.¹⁷

The Australian Constitution is much more in the language and style of Kingston rather than Clark.

The third aspect is the impact of both men and their draft and ideas. This is very well analysed by Castles in the article cited earlier, who demonstrates the Kingston influence in many sections. While Kingston’s draft is forgotten in the historical record, Kingston’s contribution proved to be critical at this seminal period in 1890–91 and extended, in a way Clark’s did not, through to the end in 1900. A number of Kingston’s solutions or provisions have been maintained. While the structure and form can be attributed to Clark, in terms of practical working provisions Kingston’s legacy remains including that of dealing with money bills, deadlocks and the referendum. He was eventually successful in relation to the settlement of industrial disputes and unsuccessful in relation to the control of the waters of the river. His more succinct, direct, and practical draft clearly influenced or reinforced those principles in the primary draftsman of the 1891 Constitution Sir Samuel Griffith. It deserves not to be forgotten and to be set in context with A.I. Clark’s remarkable contribution.

15 Quick and Garran, op. cit., p. 173. For a dramatic description of this moment of crisis see La Nauze, op. cit., pp. 141–6.

16 La Nauze, op. cit., p. 26.

17 Quote drawn from Crisp, op. cit., pp. 357–8.

Andrew Inglis Clark: From Colonial Patriot to Radical Nationalist

Henry Reynolds

Andrew Inglis Clark was a nationalist and a republican. He wished to cut the ties linking the Australian colonies with imperial Britain. The English author and politician Charles Dilke observed in 1890 that Clark was ‘a great admirer of American institutions and literature, and an anti-imperialist in his opinions upon the future relations between the component portions of the Empire’.¹ These ideas meant that Clark stood out among his contemporaries—those men who dominated the colonial parliaments during the last quarter of the nineteenth century and who both led the federal movement and crafted the Australian Constitution. This was true even when the comparison is made with the native-born leaders of his generation, men like Barton, Deakin, Kingston and Forrest. In his book *The Sentimental Nation*, John Hirst observed that among the members of the National Australasian Convention in 1891, ‘the inner group of founding fathers’, Clark was the only republican.²

This suggests that two questions must be addressed. Why was Clark a republican? And perhaps even more pertinently why was he the only one? The first question relates to the man; the second to the nature of Australian society on the eve of federation.

Clark’s republican nationalism has typically been seen as an exotic growth, even an un-Australian one. Although he grew up in a small, isolated colony Clark was a cosmopolitan intellectual. He was, as Dilke noted, an avid student of American history, literature and jurisprudence. His spiritual home was Boston rather than London. But he had also been inspired by the Italian Risorgimento. He was deeply influenced by the great prophet of the nation state, Giuseppe Mazzini. Clark had a portrait of the Italian in his study and on his first visit to Europe went on a pilgrimage to his tomb. The experience inspired a hagiographical poem.

With these well-known influences it has been easy to assume that Clark’s distinctive republicanism was brought into the Australian colonies from outside. That being so they may be interesting but peripheral to the mainstream history of Australian nationalism. Standard accounts of nationalist evolution often ignore Clark altogether.³ This paper will seek to establish the case that running parallel with Clark’s intellectual interests was the strength of a precocious and distinctive Tasmanian patriotism which had already taken deep root in the colony by the time that Clark was born in 1848. His nationalism absorbed ideas from outside but it was essentially endogenous and more interesting for that reason.

We need then to focus on the ideas of the native-born Tasmanians as they developed in the first half of the nineteenth century. It will be necessary initially to consider the distinctive features of Island development. In his recent book *Van Diemen’s Land*, James Boyce emphasises the differences between the experience of early settlers in Tasmania and those in New South Wales.⁴ The Island was a much more benign environment with a mild climate, abundant water, open grasslands and plentiful game. Convict and free settler alike quickly developed attachment to the soil. The landscape was admired from the very first days of settlement. Island patriotism emerged within a generation. The imperial official G.T. Boyes set out to describe the attitudes he observed among the first generation of native-born youth in a letter home to Britain in 1831, writing:

1 C. Dilke, *Problems of Greater Britain*, MacMillan, London, 1892, p. 225.

2 J. Hirst, *Sentimental Nation*, Oxford University Press, Melbourne, 2000, p. 11.

3 See for instance S. Alomes and C. Jones, *Australian History: A Documentary History*, Angus and Robertson, Sydney, 1991.

4 J. Boyce, *Van Diemen’s Land*, Black Inc Books, Melbourne, 2008.

They are such beauties, you cannot imagine such a beautiful race as the rising generation in this Colony. As they grow up they think nothing of England and can't bear the idea of going there. It is extraordinary the passionate love they have for the country of their birth ...⁵

Twenty years later the native-born became involved in the intense political struggle to force the imperial government to bring an end to convict transportation. In October 1851 an estimated crowd of 300 young men and women held a meeting to add their voice to the campaign. They clearly had a strong sense of being a distinctive group with a powerful identification with the Island. 'It is a duty we owe to that country in which we hope to live and die', one of the evening's speakers observed 'for Tasmanians the love of country is a sacred and soul-ennobling feeling'. Other young orators linked their patriotism to land and landscape, declaring:

Who can ascend our noble and romantic hills without being imbued with a spirit of freedom? What reflecting mind can breathe the pure air of our mountain tops without feeling a desire to accomplish the freedom of his native land?⁶

Similar sentiments were voiced and were met with exuberant, approving applause. The response was so emphatic that we can assume that the young Clark grew up among a generation of native-born men and women who held and openly expressed strong feelings of patriotism and who had taken part in a campaign that was directly opposed to the policies of the British Government.

This helps us understand why, as a bookish adult, Clark found in Mazzini endorsement for ideas he had already absorbed from his environment. Mazzini provided inspiration for anyone seeking to nurture the emergence of a new, or the liberation of a captive, nation. In a much admired passage he declared:

Nationhood is sacred. The pact of humanity cannot be signed by individuals, but by free and equal peoples with a name, a flag and a consciousness of their own life ... God has prescribed the affirmation of its nationhood to every people as the part it must play in the work of humanity: this is the mission, the task that each people must perform upon earth ...⁷

Diverse geography both underpinned the nation and undermined empire. Every part of the world would eventually give expression to distinctive national life. Human beings were bound to their individual homelands. Love of country was 'innate in all men'. Nationality emerged from place, Mazzini declaring: 'The life inherent in each locality is sacred'.⁸

Clark's speeches and essays on nationalism indicate the power of the Mazzini message. During the Federation Conference of 1890 he discussed the requirements for a nation. It needed a sufficient population, he observed:

But that population to be a nation must be localized ... within certain physical limits, and must be responsive to the influences of its physical environment. I believe that it is to such conditions we owe all the nationalities existing in the world. [When people] are brought in contact with each other within a given physical environment, there will be produced a distinct type of life, and, in the case of nations, a distinct type of national life.⁹

5 P. Chapman (ed.), *The Diaries and Letters of G.T.W.B. Boyes, 1820–1832*, Oxford University Press, Melbourne, 1985, p. 496.

6 *Launceston Examiner*, 25 October 1851, p. 5.

7 G. Salvemini, *Mazzini*, Cape, London, 1956, p. 56.

8 N. Gangulie (ed.), *Giuseppe Mazzini's Selected Writings*, L. D. Limited, London, no date, pp. 130, 132.

9 *Official Record of the Proceedings and Debates of the Australasian Federation Conference*, Melbourne, 12 February 1890, Government Printer, Melbourne, 1890, p. 36.

The task for Clark and his contemporaries was to use all their endeavours to bring Australia's latent nationality to triumphant fruition. In 1898 he wrote:

Every one of us who was born on Australasian soil may well be proud of our British origins and traditions; but Australasia is emphatically and peculiarly our country and our home, and our highest duty to our children and to humanity is to do all that is within our power to ensure the development and maturity which Providence has appointed us to create.¹⁰

Both Britain and the United States had parts to play in this crusade. The Americans provided the example of the British colonies which had achieved their independence and created a distinctive way of life with their own institutions, jurisprudence, customs and culture. As he explained to his colleagues at the Federation Conference in 1890: 'a different type of manhood has already developed itself in the United States of America, and the same process is going on in regard to the countries of South America'.¹¹ While Australians had reason to be proud of their British heritage it was only by achieving independence that the national destiny could be consummated. In an essay entitled 'The Future of the Australian Commonwealth: A Province or a Nation', he warned that:

if the Commonwealth of Australia remains forever an appendage of the British Empire, a distinctively Australian nation will never contribute its distinctively national ideals and achievements to the history of the world ...¹²

Australians had a task of global importance. Occupying a large and distinctive part of the world, their true destiny was to create institutions and customs which reflected their geographical location. History indicated that,

the distinctive characteristics exhibited by many of the nations of the world have been largely created by the influences of geographical location and general physical environment upon numerous generations of progenitors.¹³

It was the overshadowing Empire which stood in the way as he explained in his speech to the 1890 Federation Conference. The 'distinct type of national life ... will never come to perfect fruition, will never produce the best results without political autonomy'.¹⁴

This paper began by considering two problems: (1) Why was Andrew Inglis Clark a republican and a nationalist? (2) Why was he the only one among his cohort of colonial politicians? In attempting to answer the first question we begin to approach the second. What then was distinctive about Clark's intellectual heritage? His Tasmanian upbringing was clearly important. During his childhood the colony was absorbed in a long and intense campaign to prevent the British Government from transporting any more convicts to the Island. His parents were involved in the campaign. It was at times explicitly anti-British with attendant hostility directed to both the Colonial Office and the local governor Sir William Denison. By the middle of the nineteenth century a strong sense of local patriotism had developed which was intimately linked with the ubiquitous appreciation of the Island landscape. The native-born

10 Cited in W. Jethro Brown, *Why Federate?*, Angus and Robinson, Sydney, 1898, p. 37.

11 *Official Record of the Proceedings and Debates of the Australasian Federation Conference*, 1890, op. cit., p. 36.

12 Richard Ely (ed.), *A Living Force: Andrew Inglis Clark and the Ideal Commonwealth*, Centre for Tasmanian Historical Studies, University of Tasmania, Hobart, 2001, p. 244.

13 *ibid.*, p. 242.

14 *Official Record of the Proceedings and Debates of the Australasian Federation Conference*, 1890, op. cit., p. 36.

youth expressed their love of their homeland publicly and without embarrassment or restraint. Clark was clearly influenced by the public mood which was pro-Tasmanian and anti-English. When he began his exploration of intellectual currents of his time he found in Mazzini a prophet who placed the pursuit of nationhood among the most noble of contemporary causes. But the idea that human beings were by nature attached to the land of their birth would hardly have been new to him nor the belief that a distinctive physical environment would bring forth unique cultural forms. They in turn would provide the bedrock for an independent nation state. On almost all of these points the United States provided Clark with confirmation of both his nationalism and his republicanism. Here was the proving ground for his belief in the power of the new world to produce distinctive institutions and customs. The Americas as a whole were seeing the emergence of different types of manhood. Australia, he assumed, would necessarily follow in their wake.

It was this particular heritage which provided Clark with immunity to the resurgence of imperial loyalty in the final years of the nineteenth century. Unlike his contemporaries he was not swayed by loyalty to the Crown which became such a powerful force in the final years of Victoria's reign accompanied by those spectacular festivals of royalty, the golden jubilee in 1887 and the diamond jubilee ten years later. He was able to draw on American precedents in law and government to temper the devotion which many of his contemporaries directed to Westminster and the common law. He was also resistant to the growing coeval emphasis on race with the necessary implication that Australia and Britain were bound together by blood. For him his nationalism was grounded in and bounded by place. Race was, among many things, an imperial ideology which tied Australia to Britain in defiance of the dictates of locality and distance.

The South Australian and later federal politician Patrick McMahon Glynn met Clark for the first time in Sydney in January 1901 at the celebrations for the founding of the Commonwealth. He noted in his diary that the Tasmanian was 'a radical with an inspiring faith in the national spirit of the people and not subdued by Imperial temper'.¹⁵ It was a perceptive assessment and helps explain Clark's distinctive sense of national destiny.



QUESTION — I would like to ask Dr Bannon a question. What was it about Charles Kingston's life that made his wife so frightened that she burned all his papers?

Dr BANNON — We are talking today, I thought, in these hallowed halls, about honoured statesmen and makers of constitutions and nations. But, yes, there is a seamy side to many people. Some people say Kingston was a roistering sort of fellow—he drank and smoked and so on. He didn't at all. He did not drink. He did not smoke. He was quite rigorous in his health and fitness and so on, although he suffered very bad health in later years. He was extraordinarily disciplined in his work. His knowledge of parliamentary procedure and so on arose from the fact that he was rarely absent from the House when it was sitting, even as a minister. I have had the experience myself—the House is droning on in the background and you have got important things to do; you do not want to waste your time in there. Kingston would be in there. He is interjecting in debates; he is following things; he is intervening. So he was absolutely assiduous in his public duties. He had a fatal flaw: he was a lecher of the highest order, and he was a bit of a manic depressive, so he would be in high moods and low moods.

15 Patrick McMahon Glynn, Diary, 4 January 1901, National Library of Australia, MS 4653, series 3, box 1, p. 101.

His marriage began with his application as a young man to be admitted to the Bar, which was formally objected to by the brother of a woman he was actually living with at the time, who said that he was not a fit and proper person to be admitted because of his gross immorality. The application was dismissed, and it is alleged that Kingston left the court and pursued the accuser and they had a fisticuff fight in which Kingston came out on top. He married the woman, as it happened, and they were married for the rest of their life, but they had no children—which is not to say Kingston did not have children, because indeed he did. They adopted, in fact, a son, Kevin Kingston, who was the product of a liaison that nearly destroyed his whole political career.

He had an affair with a society lady in the early stages of his career. He was Attorney-General at the time. He was named as a co-respondent in the divorce proceedings—absolutely scandalous and shocking in Victorian South Australia. He went to the electorate. At a famous meeting he pleaded for their forgiveness. He said how appallingly sorry he was and could a man be responsible for his sins for the rest of his life et cetera and he scraped home in the ballot. I think he resolved after that never to get involved in a high-profile, scandalous liaison again. But he had a lot of very different liaisons. Indeed, some forensic work we have done, which may be published at some stage, indicates there are three or four progeny of Charles Cameron Kingston around Adelaide.

There is the scandalous aspect of his life. It was spontaneous. It was exploitative. It was out of character with many other things he did. But it meant that he was excluded from Adelaide society. There were people who would not dine with him or be seen in his company. Mrs Kingston herself acutely felt it.

When Kingston was offered a knighthood in 1897 he refused it. Tom Playford, who was over in London at the time said, ‘Well, Charlie’s knocked back this knighthood. Mrs Kingston is giving him an absolutely terrible time; I don’t know how he can put up with it!’ That is because for Mrs Kingston this just would have been one way of getting back into a society from which she had been excluded. So he paid a heavy penalty socially, but it did not seem to affect his public work.

QUESTION — I refer to Rosemary’s paper. She mentioned that Clark was very opposed to the adversarialism of the parliamentary system. I think you imply that perhaps his liking of the US Constitution combined with the parliamentary system—the Westminster system—was a problem. Clark, of course, later on was the one who introduced proportional representation in Tasmania and also advocated this generally. It was not taken up, but he did advocate it. Could you perhaps explain a little bit more about his preference for proportional representation. That was, of course, the Hare–Clark system later on.

Dr LAING — I am not sure if I am qualified to do that. But Henry will offer a comment. I think that it was really his dislike of responsible government, because he saw it was such a personality thing, that flavoured his early views. But I am not an expert on his electoral work, so I will ask Henry to respond to that.

Prof. REYNOLDS — Yes it is very interesting, because it was very innovative for a small colony. There were various reasons that came together. One was that if you had multiple electorates in Hobart then landlords could have many votes, because they would have a vote in each electorate. There was still a property qualification.

Secondly, I think he had been profoundly influenced by the whole convict and post-convict experience. It was in many ways a caste society: those who had been convicts—even the children of convicts—were

marked for life. It was a small place and everyone knew who was and who wasn't. Therefore, I think it was important to him to have an electoral system which gave an exact reflection of the vote, and that everyone's vote would be equal.

Beyond that was his intellectual background. He was a mid-Victorian liberal—John Stuart Mill was one of his great influences, and Thomas Hare, who had first proposed this. John Stuart Mill regarded this as one of the great liberal advances, this idea of proportional representation.

So it was introduced and very few of the rest of the parliament understood the detail, but it was accepted in 1896 for the elections in Hobart and then eventually in 1909, just after Clark's death, it was adopted for the whole state and has been there ever since. So, yes, of his state and of his colonial political reforms it was probably the most important and the one most enduring.

Dr BANNON — Just a quick footnote, if I may, in relation to this: one of Clark's great disciples and followers in this respect was Catherine Helen Spence in South Australia, who actually stood—she was the only woman—to be a delegate to the Federal Convention in 1897. She did not get elected. She did not do too badly, but her whole platform was based not around the rights of women to be represented or anything like that, it was about the promotion of the Hare–Clark system and proportional representation and the way in which representation could be gathered.

Such were her principles that she was actually offered a place on one of the tickets which may well have secured her election, interestingly, but she refused because she said, 'No, that is inappropriate. I am campaigning for a broad, non-party approach to selecting political candidates'. I am going to blame Inglis Clark for denying us the only woman delegate to the making of the Constitution.

QUESTION — You basically talked about the contribution of these people to how we run our country. I am also interested in some of the ways that we do not run our country: some of the things that made it into the Constitution and then got strangled at birth—things like the Inter-State Commission; or you read the Constitution and it will tell you that ministers get appointed for a year, I think, and they do not have to be MPs. There are all sorts of things that have nothing to do with how we run the country. How much of that was influenced by these early draftings by Clark and so forth? And how much of it happened later?

Dr LAING — This is not an actual response. I think that is a fantastic question and I think it is probably a question for our last session, because I think that throughout the day we will get some insight into some of those very important matters that you have raised.

Dr BANNON — The Inter-State Commission is a very good point. I think it is one of the great lost opportunities of the federation—it has been attempted to revive it from time to time—struck down over jurisdiction issues. It was going to handle things like rivers and railways and various national issues that the Constitution or the powers of the federal government have not clarified in a particular way. It was visionary, but it was strangled at birth, unfortunately.

QUESTION — Do you think that Clark, by making the Supreme Courts or the High Court strong, helped kill it?

Dr BANNON —No, I don't think so. I think it was important for that independent High Court

with its interpretive powers, but you could argue, of course, that from time to time the attitude of the courts, their strict interpretations and so on, have undermined what is clearly parliament's will, or even popular will. But sometimes it works the opposite way as well—sometimes they are a bulwark to our liberties, as some people describe. You have got to look at each case on its merits, but I think in that one they were clearly wrong.

QUESTION — My question was predominantly for Professor Reynolds. You mentioned locality as a significant aspect in this notion that Australia and Australia's native people had something of their own to contribute in a global sense, particularly intellectually. I think that notion runs rather contrary to other ideas in our history like, for instance, 'the same minds under different stars', popularly propagated by institutions like Sydney University in that case. I was wondering if you might be able to speak a little more concretely on what particularly about Australia's geography, isolation and so forth could actually have shaped specific ideas that Australia might have turned up as opposed to other nations in other parts of the world with a similar degree of talent perhaps.

Prof. REYNOLDS — Firstly, the big distinction between Clark, who says the nation has to be 'bounded'—'That is the nation'—to many of his contemporaries who said, 'No, we're part of the British nation'. I mean, Sir John Forrest, exact contemporary, native-born, said, 'We are not a nation, we are merely part of a nation'. If you looked at race and culture then there were no boundaries, so your patriotism became British. And that is the difference between particularly race and place, and on those foundations two quite different sets of ideas are developed.

If you said to Clark: 'Well, come on, the Italians, after all, they are bounded by the sea and the alps, it is a very distinctive area, they have got a long tradition' and all the rest of it. What did he think Australia had? Well, he looked to America and said, 'Look what the Americans have done with independence: they have created totally distinctive institutions and ways of life and literature', of which he was very familiar. And quite apart from, as he would say, climate and soil and physical environment, he also included the institutions that were developing.

In one of the famous exchanges in the 1890 meeting, when I think one of the South Australians said, 'We live under the Westminster system', he said: 'No, we don't. We don't live under the Westminster system; each colony in effect has developed their own institutions and in no way are we any longer under the Westminster system'. So he saw the development of ideas and institutions through parliament as one of the distinctive features, and this in a way was dependent on the development of local traditions as well as physical locality. So he is the one who is outraged, among many, when the appeal to the Privy Council remains in the Constitution and, despite being a Supreme Court judge, writes a long, angry letter, furious letter to *The Sydney Morning Herald* saying how dreadful this was. So, yes, it was a combination of: you've got a distinct environment, you've got distinct traditions and we are developing our own institutions, and, as for many people up to about 1870 and 1880, why wouldn't we become like America or like the republics in South America? That seemed to be the natural destiny that Australia would follow.

Four Degrees of Separation: Conway, the Clarks and Canberra

David Headon

In October 1883, American Unitarian minister and controversial ‘freethinker’, Moncure Conway, delivered four public lectures in Hobart. He had been invited by Andrew Inglis Clark who, as Conway would recall in his fascinating travel memoir, written late in life, ‘told me of a small club of liberal thinkers who met together to read liberal works and discuss important subjects’.¹

Conway’s understanding of the small Australian island colony had been shaped and, as he wrote, ‘darkened’ at a distance by his reading of Marcus Clarke’s classic Australian novel, *For the Term of His Natural Life*, published less than a decade before, in 1874. Conway remarked on the book’s ‘tragical power’, an impression dramatically reinforced by an apparition of a ‘gloomy forest’ that he experienced at night, mid-ocean, on the ship voyage from Melbourne to Launceston. However, many years later, reminiscing about his southern sojourn in the memoir, *My Pilgrimage to the Wise Men of the East* (1906), he noted that ‘All gruesome imagination about Tasmania vanished when I found myself in the delightful home circle at Rosebank, residence of the Clarks at Hobart’.² Conway delighted in the serious discussions that took place in the Clark study, discussions, he remembered fondly, on ‘high themes’.³

Moncure Conway’s visit to Tasmania had a profound impact on both men, the 51-year-old, London-dwelling, rebellious Virginian and the 35-year-old Tasmanian. It would alter the course of their lives.

Two weeks after Conway’s departure from Hobart back to the Australian mainland, Andrew’s wife Grace gave birth to the couple’s fourth child, a boy. They named him Conway Inglis Clark. An architect in later life, Con Clark would play an unobtrusive yet distinctive role in Canberra’s grand foundation narrative—the result, at least in part, of his father’s political and cultural affinities and preoccupations, and the three and a half years that Con spent in the north-east of the United States, from May 1905 to December 1908.

Conway Clark was working in New York in 1907 when, on 14 November, his much-loved and admired father died suddenly in his home, the elegant ‘Rosebank’, apparently of a ruptured blood vessel in the heart. He was 59. The very next day, on 15 November, in far-off Paris, Moncure Conway died peacefully in his apartment, aged 75. While this symbolic connection is not quite the equal of the extraordinary 4th of July, 1826, Independence Day 1826, that witnessed the deaths of esteemed American Revolutionary fathers, Thomas Jefferson and John Adams, there is nonetheless a neat accord in the historic link in death between the American Conway and the Australian Clark. As with Jefferson and Adams, from their first meeting they too would maintain an active correspondence for the rest of their lives, a correspondence based on mutual affection, as well as common interests, attitudes, reading, and a like-minded philosophical and spiritual stance.

1 Moncure Daniel Conway, *My Pilgrimage to the Wise Men of the East*, Archibald Constable & Co., London, 1906, p. 80.

2 *ibid.*, pp. 80–1.

3 Moncure Conway to Andrew Inglis Clark, 28 May 1884, A.I. Clark papers, University of Tasmania Library—Special and Rare Materials Collection, C4/C28–36 (hereafter referenced as Clark papers). Chapters IV and V of *My Pilgrimage to the Wise Men of the East* (pp. 70–103) detailing the months in Australia, provide some engaging reading. Conway is a keen observer. His comments on the Melbourne Cup, more than a decade before Mark Twain’s famous remarks about the same race, deserve their own place in Australian sport literature (see pp. 74–5 of this volume).



Photograph of Andrew Inglis Clark's home, 'Rosebank', Battery Point, Hobart. Image courtesy of the University of Tasmania Special and Rare Collections, <http://eprints.utas.edu.au/11793>

Through an assessment of selected aspects of the lives and careers of Andrew Inglis Clark and Moncure Conway, and using as a sounding board those American writers and thinkers that they most admired (such as Tom Paine, Ralph Waldo Emerson and Walt Whitman), this paper will reveal some surprising ties that bind them. Conway Clark and Canberra enter the frame briefly, at the end. My discussion will concentrate on two compelling individuals, and the cluster of radical ideas that shaped them, passed with enthusiasm in correspondence between them, and contributed to the articulation of a new democratic nation in the south.



In his seminal essay, 'The Future of the Australian Commonwealth: A Province or a Nation?', written in late 1902 or early 1903, Andrew Inglis Clark quotes with approval Professor J.A. Woodburn's *Causes of the American Revolution*, and that writer's acknowledgement of how ridiculous it would be to account for the American Revolution merely as the result of the 'imposition of a tax'. 'Rather', as Woodburn suggests, and Clark obviously endorses, 'the great movements of history have been the result of moral and spiritual forces which, gathering for centuries, have needed only favourable circumstances for the manifestation of their power'.⁴ We better understand the dimensions of Clark's imposing legal and constitutional career if we consider some of those 'moral and spiritual forces' that he absorbed. To do this, we must start early.

Clark was born in Hobart on 24 February 1848, the exact day of the proclamation of the Second French Republic. Perhaps this was an omen. His parents were warm and loving, Andrew's younger brother Carrell, or 'Tiff', remarking in his unpublished 'Personal Memoir' that it was a 'sacred treasure' to have known them.⁵ Clark's father, Alex, and his mother, Ann, were Baptists—she devout, he not so much. Clark's two sisters and five brothers were subject to a clearly articulated social code that insisted on no smoking, drinking, gambling or dancing. The Hobart Baptist Church's doctrinal machinations

4 Andrew Inglis Clark, 'The future of the Australian Commonwealth: a province or a nation?', in Marcus Haward and James Warden (eds), *An Australian Democrat: The Life, Work and Consequences of Andrew Inglis Clark*, Centre for Tasmanian Historical Studies, University of Tasmania, Hobart, 1995, pp. 213–14.

5 See Alex C. McLaren, *Practical Visionaries—Three Generations of the Inglis Clark Family in Tasmania and Beyond*, Centre for Tasmanian Historical Studies, Hobart, 2004, p. 162.

in Clark's youth, on the other hand, were quite the opposite. Biblical interpretation, the rituals of the communion, were bitterly contested.⁶ After a literal full immersion baptism in his early 20s, Clark soon after rejected Baptist strictures, not just withdrawing his participation but actually moving in a meeting that his parish be dissolved (which, for a short time, it was).

We know that from an early age Clark had an admiration for the United States. During his middle teens, as the American Civil War raged, he became a staunch supporter of the Union, expressed primarily as a rejection of what he would always refer to as the 'hideous' institution of slavery.⁷ Clark's career path in his father's successful engineering firm appeared assured when, in the late 1860s, and barely in his twenties, he became a qualified engineer and the firm's business manager.

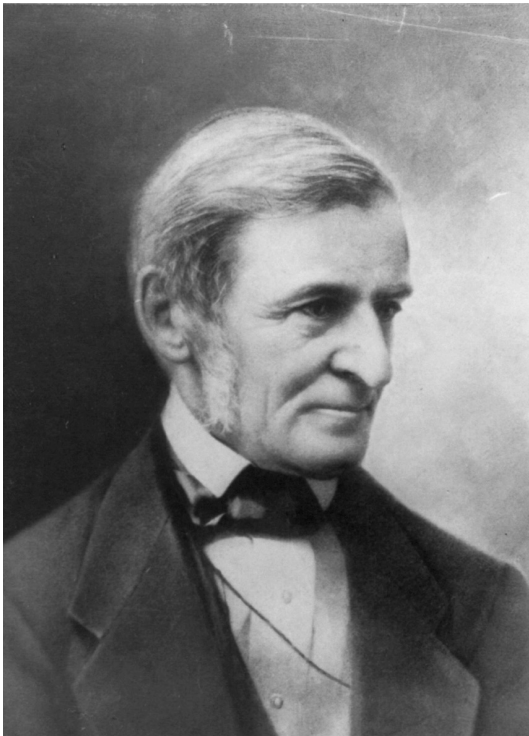
This apparently settled, predictable world changed irrevocably in the decade of the 1870s, and the young Clark was himself the main catalyst. In 1872, a milestone year, he evidently went on strike, defying the family's chosen vocational path and becoming articled to R.P. Adams, the colony's long-serving Solicitor-General. He was called to the Bar in 1877. By mid-decade, Clark had embraced Unitarianism. He began writing poems, and became increasingly radical in his politics as he gathered about him an exuberant group of like-minded mates. One of them, A.J. Taylor, would later become the Librarian of the Tasmanian Public Library. Taylor's eloquent obituary upon Clark's death in 1907 provides us with genuine insight into the engaging personality of his close friend. He brings Clark to life:

Intense to a degree, and enthused with a divine unrest, that soon made him a leading spirit in all movements having for their object the uplifting of humanity ... The convictions that governed him then governed him up to the time of his death; and at no period of his life could it be said that he proved false to the principles that he professed, or betrayed the trust reposed in him. Generous by nature ... he was a passionate advocate for the true democracy which means the affording of equal opportunity to all men ...⁸

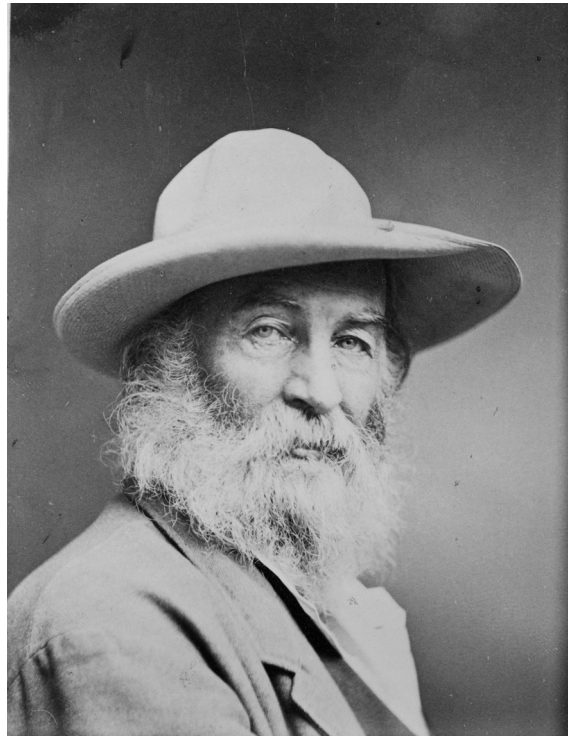
Clark's commitment to this 'true democracy' had, by 1878, become so combative (under the influence of American political theory), and public, that the *Mercury* newspaper censured him for 'holding such very extreme ultra-republican, if not revolutionary, ideas'.⁹ He properly belonged, the paper sneered, 'in a band of Communists'. While such claims were nothing but a nineteenth-century version of routine News Ltd pejoratives, Clark's speeches, toasts and debates, at sometimes rowdy venues such as the Macquarie Debating Club, the American Club and, in particular, the Minerva Club, along with his growing list of publications, are instructive markers of a rapidly maturing intellect. A sharp, enquiring, independent intellect. Richard Ely's creative phrase, his 'disputatious dynamism', fits nicely.¹⁰ Clark's mates dubbed him 'the Padre'.¹¹

The list of contents of the twelve issues of the short-lived periodical, *Quadrilateral*, edited by Clark through the calendar year, 1874, adds some depth to this portrait of the artist (and thinker) as a young lawyer. The title page declared the journal's thematic directions: 'Moral, Social, Scientific and Artistic'. This is a fair summary of intent, for the journal included articles on the French Republic, John Stuart Mill and the Australian poets, Adam Lindsay Gordon and Henry Kendall; two pieces, in 1874 note, on 'Our Australian Constitution'; and, in keeping with the era, especially in the United States, no less than five articles on phrenology and two on spiritualism.

6 See Alex C. McLaren, 'Andrew Inglis Clark's family and Scottish background', in Haward and Warden, op. cit., p. 1.
7 See Frank Neasey, 'Andrew Inglis Clark and Australian federation', *Papers on Parliament*, no. 13, November 1991, pp. 83–4.
8 A.J. Taylor, 'Andrew Inglis Clark (1848–1907), an Australian Jefferson', in McLaren, *Practical Visionaries*, op. cit., p. 96.
9 *The Mercury* (Hobart), 15 July 1878, p. 2; John M. Williams, "'With eyes open": Andrew Inglis Clark and our republican tradition', *Federal Law Review*, vol. 23, 1995, p. 155.
10 Richard Ely, 'The tyranny and amenity of distance: the religious liberalism of Andrew Inglis Clark', in Haward and Warden, op. cit., p. 102.
11 Quoted in Ely, op. cit., p. 106.



Ralph Waldo Emerson, 1803–1882, Library of Congress Prints and Photographs Division, <http://www.loc.gov/pictures/item/2003670025/>



Walt Whitman, 1819–1892, Library of Congress Prints and Photographs Division, <http://www.loc.gov/pictures/item/00649765/>

Of significance for this paper are two articles on America's most important nineteenth-century writers, Ralph Waldo Emerson and Walt Whitman. Clark may have written both. Regardless, the sentiments expressed under his editorial imprimatur add substance to a bold statement in the journal's second issue (that we know he definitely did write) when he referred to 'a universal Church of conscience and Commonwealth of Righteousness'.¹² The two Americans are essentially proposed as exemplars of this new order.

One of the articles, 'The Teaching of Emerson', praises the Transcendentalist author for his strong egalitarian instincts, his mysticism embracing the religions and philosophies of both West and East, and, above all, his determination to resist any hint of pedagogy in his writings in favour of stimulating, provoking and inspiring his readers. For Emerson, the purpose of books was not just to inform but, rather, to 'lead [a person] to think ...'¹³

This last phrase is *Quadrilateral's*. The long piece on Whitman, with its assertion of the American poet's claims to greatness and written in response to the publication of the uncompromising 'Democratic Vistas' essay of 1870 and the 1872 iteration of *Leaves of Grass*, deserves its own literary recognition as one of the earliest and most searching Whitman analyses to appear in Australia to that point. The 'good gray poet' is lauded as a 'true artist, prophet, teacher ... revealer', a 'Genius, Poet'—and notably, a writer with special relevance to Australia:

[Whitman's] utterances [are] more capable than those of any European teacher of guiding the Australias to that moral unity which alone can afford a basis for that nationality, which, through whatever difficulties and windings, they must one day arrive at, or decay.¹⁴

12 Andrew Inglis Clark, 'Prelude', *The Quadrilateral—Moral, Social, Scientific and Artistic*, vol. 1, no. 1, 1874, p. 2.

13 'The Teaching of Emerson', *Quadrilateral*, vol. 1, no. 11–12, 1874, p. 255 (page incorrectly numbered—it should be p. 245).

14 'Walt Whitman', *Quadrilateral*, vol. 1, no. 7, pp. 163–4.

The cluster of lengthy excerpts in the *Quadrilateral* article, drawn from some of Whitman's finest Civil War *Drum Taps* poems, are astutely chosen by someone comfortable discussing Whitman's work—his subjects, poetic innovations, politics and provocative moral and spiritual stance. This was Whitman for an antipodean audience, and in 1874. Surprisingly early.

The 1870s decade shaped the young Andrew Inglis Clark and, it would appear, a number of those close to him. Clark's 'boys', as they would be called, responded to his 'ideals and aspirations', as Alfred Taylor remembered, and his firm principles. In his 1876 toast to the Declaration of Independence, at the American Club, Clark foreshadowed an enlightened future where the life principles he had forged would be:

... permanently applicable to the politics of the world & the practical application of them in the creation & modification of the institutions which constitute the organs of our social life to be the only safeguard against political retrogression.¹⁵

Shift now to 1883, a second eventful year in Clark's life, when he learned from his mainland friends that two Melbourne Unitarians, influential banker and lay preacher, Henry Gyles Turner, and his associate, Robert J. Jeffray, had invited a celebrated American Unitarian minister, Moncure Daniel Conway, to deliver a series of lectures in their city. Conway tells us in his 1906 memoir that the invitation came about because both Turner and Jeffray had made occasional visits to his London church, South Place Chapel, the famed home of 'freethinkers' in Finsbury, London.¹⁶ But what were the American's credentials? His attraction for an Australian audience?

Where do you start?

The career of Moncure Conway, son of Virginian slave-holding Methodists, is straight out of *Ripley's Believe It Or Not*. As Paul Collins puts it in his terrific yarn, *The Trouble with Tom—The Strange Afterlife and Times of Thomas Paine* (2005), Conway was 'a veritable Forrest Gump of the Victorian world'.¹⁷ Author of over seventy publications, Conway provided the best summary of his Gump-like life in the 'Dedication and Preface' to his two-volume, *Autobiography—Memories and Experiences*, written late in life, about the time of Australian federation:

The eventualities of life brought me into close connection with some large movements of my time, and also with incidents little noticed when they occurred, which time has proved of more far-reaching effect ... I have been brought into personal relations with leading minds and characters which already are becoming quasi-classic figures ... [already] invest[ing] themselves with mythology ...

In my ministry of half a century I have placed myself, or been placed, on record in advocacy of contrarious beliefs and ideas. A pilgrimage from proslavery to antislavery enthusiasm, from Methodism to Freethought, implies a career of contradictions.¹⁸

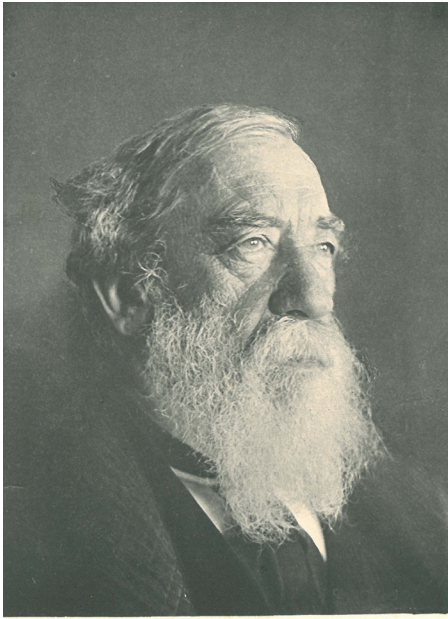
It was this extraordinary life pilgrimage, his internationally publicised 'contrarious' advocacy of the liberating qualities of 'freethought', that surely appealed to his Australian sponsors in Melbourne, and to Andrew Inglis Clark.

15 See McLaren, *Practical Visionaries*, op. cit., p. 103.

16 See Conway, *My Pilgrimage*, op. cit., p. 8.

17 Paul Collins, *The Trouble With Tom—The Strange Afterlife and Times of Thomas Paine*, Bloomsbury, London, 2005, p. 260.

18 Moncure Daniel Conway, 'Dedication and Preface', *Autobiography—Memories and Experiences of Moncure Daniel Conway*, vol. 1, Houghton, Mifflin and Company (The Riverside Press, Cambridge), Boston and New York, 1904, p. vi.



Moncure D. Conway

Moncure Daniel Conway, 1832–1907

Moncure Conway was a promoter's dream. This was the man who, a Methodist circuit rider in Pennsylvania, stumbled upon a community of Elias Hicksite Quakers, was overwhelmed by their spirit and harmony, and changed his denominational affiliation and, in turn, his life course, almost immediately. This was the rabid slavery-defender who, after reading Emerson's essays, struck up a lifelong friendship with the Concord divine, travelled to Boston to undertake a Doctor of Divinity degree at Harvard, became a Unitarian minister and outspoken abolitionist, and in the process befriended virtually every significant writer of what F.O. Matthiessen labelled the 'American Renaissance'—among them, Henry David Thoreau, Nathaniel Hawthorne, the Alcotts, George Ripley, Ellery Channing and Theodore Parker. Conway met and befriended Walt Whitman in New York, before the poet met Emerson. He was the go-between. Later, he looked after the publication rights, in England, of Whitman, Emerson and his close friend in later years, Samuel Clemens (Mark Twain); he championed Margaret Fuller, Elizabeth Cady Stanton and Louisa May Alcott; he lobbied Abraham Lincoln about the detail of the Emancipation Proclamation; he went to London in 1863 to raise funds for the Union cause, and stayed on, in the first instance for 21 years as the minister for the South Place

Chapel, reputedly 'the oldest and largest association of free and independent thinkers in the world'¹⁹; and he produced fine biographies of George Washington, Emerson, Thomas Carlyle and Giuseppe Mazzini. Each of these works was widely acclaimed during his lifetime, though none could rival the international impact of his 1894 two-volume biography of Thomas Paine—the American Revolutionary writer who President Theodore Roosevelt dismissed as a 'filthy little atheist'. As Australian scholar John Keane, in his majestic 1995 biography of Paine puts it: Conway's study today is 'the standard ... still considered by every authority of Paine [to be] the key reference'.²⁰

In 1883, 'Marvellous Melbourne', Sydney and Hobart played host to a bona fide celebrity. The spare details of Conway's Australian stay are these: he was in the country for two and a half months, delivering at least thirteen lectures in Melbourne, four in Hobart, and an unknown but large number in Sydney. His Melbourne and Hobart series were advertised as Conway's 'Lectures for the Times', to be delivered by the 'finest intellect in the southern hemisphere', on marketable subjects such as 'Mother Earth', 'Woman and Evolution', 'Development and Arrest in Religion', 'The Pre Darwinite and Post Darwinite World', 'Emerson', 'Shakespeare', 'America' and, a very popular one wherever he delivered it, 'Demonology and Devil Lore'.²¹

With the benefit of hindsight, we know that when he embarked on his epic 1883–84 journey, Conway's religious, cultural and social attitudes and beliefs were undergoing change, his secular stance hardening, his interest in the world's non-Christian religions growing.²² In his memoir he states that, in Australia, 'Some handling of religious themes was expected of me, but my opening lecture (on Darwin) must

19 'Mr Moncure Conway', *Launceston Examiner*, 20 October 1883, p. 3.

20 See John Keane, *Tom Paine—A Political Life*, Bloomsbury, London, 1995, p. 393.

21 See, for example, 'Mr Moncure Conway', *Launceston Examiner*, 20 October 1883, p. 3; Editorial, *The Mercury* (Hobart), 12 November 1883, p. 2; Letter to the Editor, 'Mr Moncure Conway', *The Mercury* (Hobart), 17 November 1883, p. 2.

22 See Conway, *Autobiography*, op. cit., vol. 2, p. 416.

have revealed to the keen-eared sectarians heresies of which I was not yet conscious'.²³ In the lecture to which he refers, he did put his argument bluntly: '[After Darwin] Not only could not man any more look upon the world with the same eyes as before, but the new Genesis called Evolution was necessarily followed by a new Exodus from the land of intellectual bondage'. Here, the conscious allusion is to his mentor Emerson's famous opening to the culture-redefining 'Nature' essay (1836), where he states that: 'The foregoing generations beheld God and nature face to face; we, through their eyes. Why should not we also enjoy an original relation to the universe?'.²⁴

On his Australian trip, Conway acted on this momentous invocation with audacity. In an article on Queen Victoria, intentionally placed in the Sydney *Evening News* to coincide with his first visit to that city, he critiqued the dowager Queen, warts and all. The English people remained fiercely loyal to the Crown, Conway wrote, but as for Victoria Regina, 'a Queen less loved, or even cared for, never reigned in England'.²⁵ And more: 'She is variously objected to as morose, morbid, stingy, grasping, ugly, sullen, ill-humoured, and torpid, if not stupid'. Australian audiences had a taste of what was to come.

In Tasmania, in front of attentive Hobart crowds, including Clark and his 'boys', Conway's heresies directed at prevailing community mores multiplied: churches, he observed in lecture one, were 'propagating superstition'²⁶; in the anti-war second lecture, 'Woman and Evolution', with informed reference to Brahmin, Babylonian, Iranian and Rabbinical creation myths, he declared that while Evolution was 'giving women more courage, more strength, more self-respect', female equality would only be inevitable if a '“reign of peace” could be appointed'; his message for Australian orthodox Christians in lecture three was, as he described it with Tom Paine-like trenchancy, 'At the very moment this dogma of the Trinity was formed, the humanity of Christ was doomed'²⁷; and in the final talk on 'The Martyrdom of Thought', he 'argued at length against the creed of Christianity', spoke of the 'death' of God, and concluded with a few pithy sentences drawn from a key source, Tom Paine's *Rights of Man*.²⁸

Such incendiary remarks did not go unchallenged. There was a conservative backlash, the *Launceston Examiner* maintaining that 'Moncure Conway proved a frost in Tasmania', but if that was so, the fire certainly burned bright within the cosy Rosebank circle of friends. One observation by Conway in his final Hobart lecture may well have been directed at his set of new companions when he stated that 'the real martyrdom of thought [occurred when] young men of promise were brow-beaten into mean conformity with Conservative codes when their brilliant talents should be bestowed to freeing their fellow men'.²⁹ This was surely Conway's antipodean call to arms.

Did this challenge provide new inspiration for Andrew Inglis Clark's evolving, ostensibly secular views? We don't know for sure. What we do know is that he and Conway established a friendship during the short visit that endured. In a letter from Conway to Clark written in Sydney shortly after his Hobart visit, the American was already ending his communication with love to 'Mrs Clark ... [and] the children',

23 Conway, *My Pilgrimage*, op. cit., p. 74.

24 Ralph Waldo Emerson, 'Nature' (1836) in Larzer Ziff (ed.), *Ralph Waldo Emerson—Selected Essays*, Penguin Books, New York, p. 35.

25 'Her Majesty the Queen, as regarded by her subjects', *Evening News* (Sydney), 26 September 1883, p. 7.

26 'Mr Moncure Conway at the Tasmanian Hall', *The Mercury* (Hobart), 27 October 1883, p. 2.

27 'Mr Moncure Conway's lectures—Woman and evolution', *The Mercury* (Hobart), 31 October 1883, p. 3. See also 'Mr Moncure Conway's lectures—Development and arrest in religion', *The Mercury* (Hobart), 1 November 1883, p. 3.

28 *ibid.*; 'Mr Moncure Conway's lectures—Toleration and the martyrdom of thought', *The Mercury* (Hobart), 2 November 1883, p. 3.

29 'Mr Moncure Conway at Hobart', *Launceston Examiner*, 2 November 1883, p. 2.

and he drew attention to the alteration to his standard salutation, shifting from the polite ‘Mr Clark’, to the very English informality of ‘My dear Clark’.³⁰ When he heard while still in Sydney about the Clark family’s new arrival, he was tickled. His response, a delightful one, is worth quoting in full:

I must not let even one mail go without congratulating you on the birth of your new boy, and gratefully acknowledging your exceeding goodwill in giving him my name. Gratefully—yet rather tremblingly,—for now I must try and ‘live up to’ that baby, in order that he should not have reason in the future to regret the confidence of his parents. But I deeply appreciate this mark of your friendship, which is very dear to me. I feel with you that in the future we shall have thoughts that must pass and repass between us. Hobart, by you and your circle of ‘Friends in Council’, has been made a beautiful souvenir of my visit to the Antipodes.³¹

While it is common knowledge amongst Clark scholars that the Italian republican Mazzini’s portrait hung on the walls at Rosebank, perhaps on every wall the story goes (see Paul Pickering’s comments in this volume pp. 68–71), less well-known is that Moncure Conway was up there as well. In a letter written to Conway some fifteen years after the Australian trip, Clark mentions that his tight group continued to meet in the Rosebank library ‘where your portrait looks down upon us as we exchange our thoughts upon our respective experiences in the two worlds in which we live’.³²

The fifteen or so years between Conway’s ‘beautiful souvenir’ letter, and Clark’s endearing missive to his friend written on ‘Tasmanian Judges’ Chambers letterhead, 1883–99, effectively bookend a remarkably productive and eventful period for both men. Shortly after his return to London from his southern ‘pilgrimage’, Conway informed Clark in May 1884 that he had resigned from his South Place Chapel ministry in London, after 21 years of polemical preaching, to devote himself to writing and, as he said, ‘[giving] lectures from time to time in America’.³³ Conway would write prolifically in his later years. Clark’s notable trajectory into Tasmanian and national public life over the same period has been amply documented elsewhere, including in this issue of *Papers on Parliament*. My interest lies in the evidence for an emergence of identifiable Conway preoccupations in Clark’s work. As expected, the dominant themes of Conway’s Australian lectures do frequently surface in Clark’s array of socio-cultural writings in the ensuing years. John Reynolds, Henry Reynolds’ father and the first serious Edmund Barton biographer, in his 1958 *Australian Law Journal* article on Clark puts it succinctly: ‘[Conway] the American divine, abolitionist, publicist and author ... exercised a considerable influence upon his host’s thinking upon ethical and social problems’.³⁴ While Reynolds does not pursue the statement in any detail, there is ample evidence for its validity.

Clark’s 1884 article, ‘An Untrodden Path in Literature’, enlarging on the new religious trend in theosophy, surely had as its stimulus Conway’s experiences in India, immediately after the Australian stay, when the American met the controversial Madame Blavatsky, together with a significant number of Indian political and religious figures.³⁵ Alfred Sennett’s book, *Esoteric Buddhism* (1884), a cult hit in Victorian England and a cited source for Conway, was also studied closely by Clark. His mid-1880s Minerva Club

30 Moncure Conway to Andrew Inglis Clark, 25 November 1883, Clark papers, C4/C28–36.

31 *ibid.*, 23 November 1883.

32 Andrew Inglis Clark to Moncure Conway, 26 August 1899, Moncure Daniel Conway papers, Rare Books and Manuscripts, Butler Library, Columbia University, MS#0277.

33 Moncure Conway to Andrew Inglis Clark, 28 May 1884, Clark papers, C4/C28–36.

34 John Reynolds, ‘A.I. Clark’s American sympathies and his influence on Australian federation’, *Australian Law Journal*, vol. 32, July 1958, p. 63.

35 See Conway, *My Pilgrimage*, *op. cit.*, chapter X, pp. 195–214.

presentation, 'A Critical Approach to Religion', drew heavily on Conway's philosophical peregrinations while in Australia, Clark also advocating 'intellectual emancipation', the need for the liberated thinker to estimate impartially the claims of 'the various religious beliefs of mankind as moral forces', along with 'the respective claims of science and intuition'.³⁶ The sentiments are straight out of the Emerson/Conway songbook. Clark's 1886 Minerva Club essay, 'The Evolution of the Spirit', begins with two sentences that could well have been Conway's own: '[S]ince Emerson, Carlyle and Darwin wrote, the course of thought in the world has been changed. No man now thinks as he thought before their ideas became known to him'.³⁷



MADAME BLAVATSKY

It was inevitable that Clark would visit the country that had steadily become his primary moral and political/legal compass. And he did, in 1890, embarking on the first of three trips, and meeting many Americans who further shaped his ideas and his life path—political movers and shakers, as well as a host of cultural, literary and religious figures, among them high-profile Unitarians in Boston. One individual stands out from the rest. Moncure Conway—there is that man Gump again—provided his Australian friend with a letter of introduction to the feted New England man of letters, the 'Autocrat of the Breakfast Table', Dr Oliver Wendell Holmes. As it happens, Dr Holmes was out of town, and he asked his lawyer son, the jurist Oliver Wendell Holmes (1841–1935), to look after the Australian visitor while in Boston. As John Reynolds points out, meeting this new acquaintance would be, for Clark, a defining moment:

The two men immediately became friendly, a friendship which continued in spite of geographical separation ... With Clark's strong predilection towards American institutions and his study of American history, it is safe to assume that Holmes had much influence in the final development of his thinking upon the structure and working of the Australian Constitution.³⁸

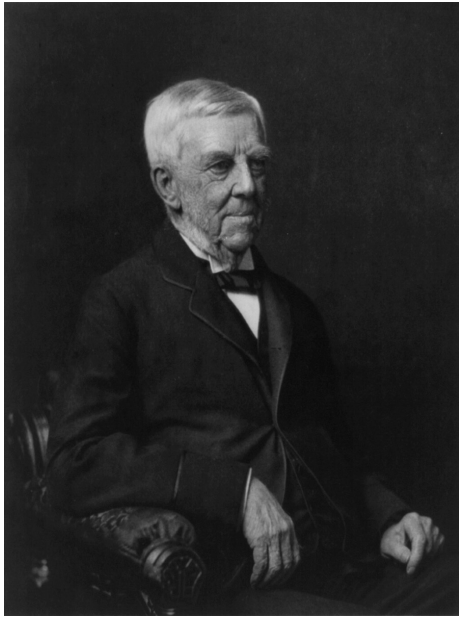
As the career arcs of both men rose sharply in the later 1890s and early years of the new century, they drew strength from a mutually beneficial correspondence. Holmes would spend a remarkable thirty years, 1902–32, on the bench of the United States Supreme Court.

In 1905, a few years after Clark's third and last American trip, the opportunity arose for his architect son Conway (Con, as he was called) to pursue his promising architectural career in America. He lived first in Boston, and this was no accident. Through Moncure Conway, Andrew Inglis Clark had made many Unitarian friends when staying in the Unitarian Church's most populous city. On his arrival, Con house-sat for a family of one of these Unitarian connections, the Cummings, at 104 Irving Street, Cambridge. The Cummings, husband and wife, we know from other sources, met through Harvard-based philosopher William James. Edward Cummings, a former Harvard sociology professor, became the Unitarian minister for the influential South Congregational Church in Boston, which for many

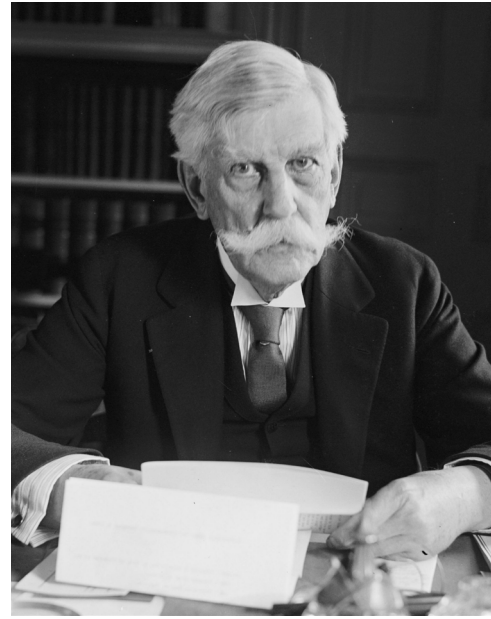
36 Andrew Inglis Clark, 'A critical approach to religion', quoted in Ely, op. cit., p. 115.

37 Andrew Inglis Clark, 'The evolution of the spirit', quoted in Ely, op. cit., p. 104.

38 Reynolds, op. cit., p. 63.



Oliver Wendell Holmes, 1809–1894, Library of Congress Prints and Photographs Division, www.loc.gov/pictures/item/2003653451/



Justice Oliver Wendell Holmes, 1841–1935, Library of Congress Prints and Photographs Division, www.loc.gov/pictures/item/npc2008006912/

years dedicated itself to the task of alleviating the plight of the under-privileged. Edward resolutely implemented the church's motto, 'That They May Have Life More Abundantly' (a favourite biblical phrase of another Australian Clark, Charles Manning Hope).³⁹

The Cummings' son, Edward Estlin, ten years old when Con was in Boston, would go on to become one of America's most famous modernist poets, e e cummings, he of the non-negotiable small 'i' who wrote some of the twentieth century's most admired nature and love poems.

In Boston, Con Clark worked for the prestigious firm of Shepley, Ruten and Coolidge, or, as he mischievously tagged it in one of many letters home to his father, 'Simply, Rotten and Foolish'.⁴⁰ The University of Tasmania Library has a selection of these letters, son to father, written over a number of months in 1905 and, later, in New York, in 1907, where Con had his last job. The last letter in the archival collection takes us to within several months of his father's death.⁴¹

It is apparent in the first letters in the correspondence that Con made sure that he did the right thing by his father, including meeting all Andrew's 'Cambridge friends', and undertaking the obligatory pilgrimage to Concord—Emerson country—and Lexington, site of the shot heard round the world. On at least two occasions Con also attempted to meet up with the man after whom he had been named. We don't know whether he was successful in meeting Moncure Conway, but he skited to his dad that, searching for the right words to introduce himself, he 'worked out quite a masterpiece'.⁴² Andrew must have been chuffed. As the correspondence progresses, Con proved himself to be something of a student of the contemporary American political scene. This, too, must have pleased his ailing father.

39 Richard S. Kennedy, *Dreams in the Mirror: A Biography of E. E. Cummings*, Liveright Publishing Corporation, New York, 1980, p. 14.

40 Conway Clark to Andrew Inglis Clark, 5 August 1905, Clark papers, C4/C2–8.

41 *ibid.*, 21 July 1907.

42 *ibid.*, 9 September 1905.

When he finally returned home in December 1908 (the same month that ‘Yass–Canberra’ was declared as the official site for the new national capital), little did Con Clark realise that, when the time came to promote an international design competition for Australia’s new national capital city in 1911, the incumbent Minister for Home Affairs would be the ‘legendary’ King O’Malley, an extroverted member of the House of Representatives, representing a Tasmanian constituency—and an American. O’Malley was supposed to be Canadian, but his political colleagues knew the truth of his background. Both of these facts would not have harmed Con’s prospects when he was chosen, in February 1912, as the proactive, informed secretary to the competition’s judging committee.⁴³

It is probable that Con Clark was more familiar with contemporary town planning and architectural trends—better qualified than the three judges to assess the hundred-odd serious, professional entries in the competition. It is virtually certain that he was aware of the origins of the 23 American entries, including number 29 from a design dream team from Chicago, Walter and Marion Griffin.

The 2013 Centenary year of the national capital was, by any reasonable assessment, a community triumph. Yet Robyn Archer, the Centenary’s Creative Director, was right in saying that the franking of such a great year would come after, in the range of legacy projects that expand on Canberra’s foundation story. The unlikely threads that link the city to Andrew Inglis Clark, Moncure Conway and Conway Clark deserve a prominent place in the burgeoning narrative.

43 See ‘The most beautiful city’, *The Sydney Morning Herald*, 27 May 1912, p. 8.

Oh, to Be in Boston Now That Federation's Here

Marilyn Lake

The dynamics of desire

This paper is about the strong ties—and dynamics of desire—that joined progressive Australians and Americans at the end of the nineteenth and into the beginning of the twentieth century. They are fresh on my mind after recent travels on the trail of Frank Lloyd Wright's architecture that took me to the breathtaking 'Falling Water' in Pennsylvania, as well as his home and studio in Chicago, where it is believed Marion Mahony and Walter Burley Griffin, the designers of the city of Canberra, first met. It was for good reason Andrew Inglis Clark sent his son Conway to study architecture in the United States; architects were making their modernist mark in Chicago, New York and Boston—and skyscrapers were soaring.

From Boston, Conway wrote to tell his father that he had attended a series of lectures presented by the Boston Architectural Club on 'Modern Office Buildings'. In 1905 he worked on a Court House Competition in Chicago and the Hancock building in Boston, 'built entirely on the steel frame system' as he noted proudly.¹ Fittingly, Conway would return to the new Commonwealth of Australia—as Dave Headon has found—to work as secretary to the panel that judged the entries in the design competition for the national capital, that Marion Mahony and Walter Burley Griffin would win with their modernist vision matching the 'bold radical steps in politics and economics' that they, along with other progressive Americans, admired in the new nation.²

In 1901, the year of the founding of the Commonwealth of Australia, whose Constitution he helped draft, Andrew Inglis Clark, republican and nationalist, wrote to his friend Oliver Wendell Holmes Jr, who had just returned from a visit to London (and to his aristocratic mistress) of how he longed to be in Boston. Holmes' correspondence at the same time detailed his longing to be with his lover across the Atlantic: 'I am nigh insane with the question of coming to England'.³ Clark wrote to Holmes about his desire to cross the Pacific:

I suppose that you had a good time in England. I often wish that Australia was as near to California as Massachusetts is to England. I should then see Boston every three or four years, and would probably be preparing now for a journey there early next year. But I must bow to the geographical configuration of the earth and all its consequences and wait in patience until my time to cross the Pacific Ocean again arrives.⁴

This rich and extensive correspondence, held in the Harvard Law School Library, illuminates different kinds of longing, desire, yearning, fantasy and the mix of personal and political that informs these

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- 1 Conway Clark to Andrew Inglis Clark, 26 August 1905, A.I. Clark papers, University of Tasmania Library—Special and Rare Collections, C4/C4 (hereafter referenced as Clark papers).
 - 2 Walter Burley Griffin quoted in Nicholas Brown, 'Canberra 1913', in Michelle Hetherington, *Glorious Days: Australia 1913*, National Museum of Australia Press, Canberra, 2013, p. 73.
 - 3 Holmes to Lady Clare Castletown, 9 June 1898, Mark DeWolfe Howe research materials relating to the life of Oliver Wendell Holmes Jr 1858–1968 (hereafter referenced as Holmes papers), Harvard Law School Library, HOLLIS 12642017, 19-8, seq. 34.
 - 4 Clark to Holmes, 26 October 1901, Clark papers, C4/C211 (1).

states.⁵ Diminutive Clark was Chief Justice of the Supreme Court of the colony of Tasmania, described by Alfred Deakin as ‘[s]mall, spare, nervous, active, jealous and suspicious in disposition, and somewhat awkward in manner and ungraceful in speech, he was nevertheless a sound lawyer, keen, logical and acute’.⁶ Holmes was strikingly tall and handsome, a thrice-wounded hero of the Civil War, former Professor in Law at Harvard and Chief Justice of the Supreme Court of Massachusetts, soon to be appointed to the United States Supreme Court.

As historian John Reynolds pointed out many decades ago, and John Williams more recently, in *Makers of Miracles*, Clark was a devoted admirer of the United States and its republican political history and legal culture.⁷ ‘It was hero worship as well as admiration of intellect’, wrote Reynolds in a letter to Holmes’ biographer, Mark DeWolfe Howe, in 1947, a letter also to be found in the Holmes papers.⁸ Williams quoted Patrick Glynn as noting of Clark at the time of federation: ‘He feels the significance of the sense of independence, and the feeling, in the case of the American citizen, that his nationality has been created or won, not acquired’.⁹ But as another of Clark’s heroes, George Higinbotham, reminded Clark in 1891, Australian colonists were not yet, it seemed, ‘prepared to assume the burden of independence’.¹⁰

Still some liberal colonists nevertheless liked to fantasise the possibility and Clark was more dedicated to the cause than most.¹¹ Like Alfred Deakin, and H.B. Higgins after him, Clark found intellectual sustenance and stimulation in the United States example of independence as well as in manly American writings, fiction and non-fiction.¹² Clark was a particular admirer of Holmes’ classic text *The Common Law*—it supplied ‘an annual course of instruction in first principles’ and was the basis of lectures to law students in Tasmania.¹³

Holmes also recommended contemporary American sociological works to Clark, in particular the publications of Lester Ward and E.A. Ross’ *Social Controls*, ‘a mighty sharp little popular work’.¹⁴ Ross was the originator of the theory of ‘race suicide’ and was sacked by Stanford University because of his anti-Chinese and anti-Japanese views.¹⁵ Ward was a Progressive and founder of the discipline of sociology, believing that its primary function was to improve society. The subject of Ward’s most important book, *Dynamic Sociology* (1883) was education. In 1903, he published *Pure Sociology*: Holmes recommended ‘all that he writes’ to Clark.¹⁶

5 Clark’s letters to Holmes held in this collection have been copied and also placed in the Clark papers at the University of Tasmania Library—Special and Rare Collections.

6 Alfred Deakin, *The Federal Story: The Inner History of the Federal Cause, 1880–1900*, Melbourne University Press, Parkville, Vic., 1963, p. 32.

7 John Reynolds, ‘A.I. Clark’s American sympathies and his influence on Australian federation’, *Australian Law Journal*, vol. 32, July 1958, pp. 62–75; John Williams, ‘Andrew Inglis Clark: the republican of Tasmania’, in David Headon and John Williams (eds), *Makers of Miracles: The Cast of the Federation Story*, Melbourne University Press, Melbourne, 2000, pp. 44–55.

8 John Reynolds to Howe, 10 March 1947, Holmes papers, HOLLIS 12642017, 14-4, seq. 13–15.

9 Williams, ‘Andrew Inglis Clark’, p. 55.

10 George Higinbotham to Clark, 8 March 1891, Clark papers, C4/C206.

11 As did Alfred Deakin, intermittently. See Marilyn Lake, ‘“The brightness of eyes and quiet assurance which seem to say American”: Alfred Deakin’s identification with republican manhood’, *Australian Historical Studies*, vol. 38, no. 129, April 2007.

12 Marilyn Lake, ‘“This great America”: H.B. Higgins and Transnational Progressivism’, *Australian Historical Studies*, vol. 44, no.2, June 2013.

13 Clark to Holmes, 20 January 1892, Clark papers, C4/211 (5).

14 Holmes to Clark (undated), Clark papers, C4/C210.

15 Marilyn Lake and Henry Reynolds, *Drawing the Global Colour Line: White Men’s Countries and the Question of Racial Equality*, Melbourne University Press, Melbourne, 2008, pp. 99, 171, 313.

16 Holmes to Clark (undated), Clark papers, C4/C210.

In 1897, on his second visit to the United States, Clark carried with him a letter of introduction, designed for new acquaintances, from the American consul general in Sydney recommending Clark as ‘a great admirer of the splendid manhood of our dear America’.¹⁷ Manhood was a key value. To be independent was to realise the full potential of manhood; to live life as a ‘dependent’ was to remain in a compromised, feminine, condition. When the Chinese imperial government wished to put the Australian colonists in their place, its representatives routinely referred to the colonies, correctly, as ‘dependencies of the British Crown’.¹⁸ To which studied slight, nationalist liberals such as Deakin, Higinbotham and Clark retorted that they were, to the contrary, ‘self-governing communities’, with a recognised right to run their own affairs.

The republic of the United States was conceptualised as an expression of masculine power: embodying strength, virility, ruggedness, and the proven capacity for complete self-government. It called up masculine desire. When Clark’s favourite English historian, the leading Anglo-Saxonist, and Regius Professor at Oxford, E.A. Freeman, visited the United States, in the early 1880s, and addressed the graduate seminar at Johns Hopkins, whose library featured his famous motto on its walls—‘History is past politics and politics are present history’—he expressed his admiration for the New World republic in a series of lectures and essays that cast Washington as ‘the expander of England’ and Anglo-Saxonism as a story of progress from ‘Old England [the Teutonic forests of Germany] to Middle England [England itself] to New England [Boston]’.¹⁹

Freeman was one of the most cited authorities in the Australian constitutional debates—and often quoted by heart. His writings were especially influential in the New World societies of Australia and America, where audiences were receptive to his coupling of democracy and race, his elucidation of the Anglo-Saxon origins of self-government and insistence that racial exclusion was the precondition of a self-governing democracy. Anglo-Saxonism was not a species of racial science, but a theory of history, a history of linguistic and political continuity and Clark, like many other liberals, including Irish Patrick Glynn and Jewish Isaac Isaacs, was an ardent subscriber. Clark’s copies of Freeman’s books were donated to the University of Tasmania Library—as David Mitchell’s copies of Freeman were among the founding collection of the Mitchell Library in Sydney.

Anglo-Saxonism represented an alternative to, not a synonym for, Britishness as a founding identity.²⁰ Anglo-Saxonism encouraged, rather, a strong identification with the republic of the United States. ‘One of the pleasing results of the war between the United States and Spain’, wrote naval officer George Dewey to Clark in 1898, ‘is the strengthening of the bonds that bind the Anglo-Saxon peoples’.²¹ Holmes wrote similarly to his ‘dear Hibernia’: ‘I am glad that this war should draw our countries nearer together ... if there is to be a world row then I hope with all my heart that we should back you and you us—to bring out the English-speaking race on top’.²²

17 George Bell, letter of introduction, 15 March 1897, Clark papers C4/C391 (12).

18 Marilyn Lake, ‘The Chinese empire encounters the British Empire and its “colonial dependencies”’, *Melbourne*, 1887’, *Journal of Chinese Overseas*, vol. 9, no. 2, 2013, pp. 176–92.

19 Marilyn Lake, ‘“Essentially Teutonic”: E.A. Freeman, liberal race historian: a transnational perspective’, in Catherine Hall and Keith McLelland (eds), *Race, Nation and Empire: Making Histories, 1750 to the Present*, Manchester University Press, Manchester, 2010.

20 Marilyn Lake, ‘British World or New World? Anglo-Saxonism and Australian engagement with America’, *History*, vol. 10, no. 3, 2013.

21 Dewey to Clark, 29 July 1898, Clark papers, C4/C46.

22 Holmes to ‘Hibernia’ [Lady Clare Castletown], 10 May 1898, Holmes papers, HOLLIS 12642017, 19-8, seq. 22–23.

Paul Kramer has documented the depth of this sentiment of Anglo-Saxon solidarity in his book *The Blood of Government*.²³ Yet, asked another of Clark's correspondents, Charles Stockton, what would become of the Malays who predominated in the Philippines? 'We cannot make them Anglo-Saxons'.²⁴ Like other not-white peoples, they would be governed by others. For the United States it was a 'novel ... colonial experiment'.²⁵ White men were deemed not just especially endowed with a genius for self-government, but also with the special attributes required to govern others.

In the United States, especially in New England, historian E.A. Freeman found—so he thought—the fullest expression of Anglo-Saxon democracy, self-government and liberty. Freeman also had occasion to deplore, in letters home, the political condition of Canada, that 'poor dependent land on the other side': 'Fancy being a province and having governors sent, when it might be a state and choose its own'.²⁶ This was a sentiment with which Clark would have agreed.

New England, on the other hand, especially its capital, Boston, and its pre-eminent university, Harvard, were magnets for liberals and republican-sympathisers from England and the Australian colonies: Goldwin Smith, James Bryce whose tome *The American Commonwealth* would inspire the name of the Australian Commonwealth, Charles Pearson, Alfred Deakin, Andrew Clark, and H.B. Higgins among them. All of them would have concurred with Deakin's observation that Boston was a fine and remarkable city of 'many historic memories'. These were the shared memories of nineteenth-century liberal democrats. Deakin had been mentored at the University of Melbourne by Charles Pearson, former lecturer in History at King's College, London and Cambridge, who had journeyed to Boston from England in the late 1860s.

One of a number of Oxford-educated liberals who travelled to the US, in part, to express solidarity with the cause of the Union in the Civil War, Pearson recalled:

My ten days in Boston will always remain in my memory as among the pleasantest incidents of my life. Acland had told me that the society he met in Boston could not, he thought, be surpassed anywhere in the world, and I had listened incredulously; but I am bound to say I came over to his opinion.

When I was there, Ticknor, Longfellow, Agassiz, Lowell, Wendell Holmes, Charles Norton, Wendell Phillips, Bowen Fields and Shattuck were among the ordinary society of Boston and Cambridge; and Emerson was a frequent visitor.²⁷

Emerson, the prophet of American literary independence, died in 1882. Pearson wrote a review of his work, while Deakin undertook a pilgrimage to the site of his grave in Concord in 1885.

Pearson would use his observations of developments in the United States, gleaned on two separate visits—of white men being 'cramped for land' and the global spread of Chinese migration—in his future magnum opus, *National Life and Character: A Forecast*, which Oliver Wendell Holmes in Boston and Theodore Roosevelt and his circle in Washington read and exclaimed over in the year of its publication, 1893.

23 Paul Kramer, *The Blood of Government: Race, Empire, the United States and the Philippines*, University of North Carolina Press, Chapel Hill, N.C., 2006.

24 Charles H. Stockton to Clark, 26 October 1901, Clark papers, C4/C268.

25 *ibid.*

26 Lake, '“Essentially Teutonic”', *op. cit.*, p. 65.

27 Charles Henry Pearson, 'The Story of my Life', in William Stebbing (ed.), *Charles Henry Pearson, Fellow of Oriel and Education Minister in Victoria: Memorials by Himself, His Wife, and His Friends*, Longman and Green, London, 1900.

Anglo-Saxonism and America

Clark first visited the United States in 1890. He initially sought a letter of introduction to Holmes from his good friend, the Unitarian preacher, Moncure Conway, but Conway regretted that he didn't know Holmes Junior, only his father, the celebrated poet, Wendell Holmes Senior.²⁸ Clark then asked Conway to write to him instead, but as it happened he meanwhile met J.H. Allen of the New York Bar, who agreed to write the letter that led Clark to meet Holmes Junior.²⁹ On that first trip he met Alfred Deakin's good friend, Josiah Royce, whom Deakin had met two years before in Melbourne, and who lived in Irving Street, Cambridge, where Clark's son, Conway would take rooms. He also met the economist, F.W. Taussig and the Harvard historian, Albert Bushnell Hart, who taught a course on comparative constitutional law and federal political systems. Hart became a grateful recipient of Clark's copies of Australian convention debates, which he deposited in the Widener library. 'The friends of good government throughout the world', Hart assured Clark in 1900, 'are rejoiced at the final accomplishment of your long task'.³⁰

In 1897, Clark became a subscriber to the *Harvard Law Review*, the journal for which H.B. Higgins, a later convert to 'this great America' would write his commissioned article on 'A New Province for Law and Order' in 1915. Higgins' justification of a legal minimum wage would later be quoted at length by Holmes in his celebrated dissent in *Adkins v. Children's Hospital* in 1923. Holmes sent Clark copies of the *Harvard Law Review* containing his articles on 'Agency' and a copy of his collected *Speeches*. Clark replied with characteristic enthusiasm:

The perusal of the speeches has given me very much pleasure and has vividly revived the memory of the very delightful time I spent in your company in Boston. Whether that short period of personal intercourse warrants one or not in regarding myself as included in the 'few friends' for whom those 'chance utterances of faith and doubt' were printed, I shall always have a place among those 'who will care to keep them'.³¹

In the correspondence between Clark and Holmes, Clark often detailed the cases in which he was involved on the Tasmanian Supreme Court and he sought Holmes' advice. In November 1899, Clark wrote with characteristic longing:

I often wish that you were much nearer to me than you are so that I might discuss a point of law with you. A short time ago, I differed from my colleagues on a question relating to the distribution of the assets of a deceased insolvent ... I found several American decisions in support of my opinion, but could not discover any English authority directly on the point. If at any time you deliver a judgment on a point of law in which you think I would be interested I shall be glad to receive a copy of it.³²

Convinced by the American example and the challenges posed by the need for uniformity between the Australian colonies, as well as the writings of Anglo-Saxonists such as Freeman, whose text *The History of Federal Government* was a key text for delegates to the constitutional conventions, Clark became an

28 Many accounts of Clark's first meeting with Holmes have assumed incorrectly that his introduction was enabled by Moncure Conway.
29 Clark to Holmes, 4 October 1890, Clark papers, C4/C211(6).
30 Hart to Clark, 14 April 1900, Clark papers, C4/C198.
31 Clark to Holmes, 20 January 1892, Clark papers, C4/C211 (4).
32 Clark to Holmes, 3 November 1899, Clark papers, C4/C211 (4).

ardent supporter of the move towards federation. He represented Tasmania at the Federal Council meetings in 1888 and 1889, at the Federation Conference in Melbourne in 1890 and at the federal convention in 1891, but he missed the later convention because he was on his way to the United States. ‘I am very sorry that you will not be at the Federal Convention’, Sir Samuel Griffith wrote to Clark. ‘I hope that your trip to America will do you good’.³³

Clark followed Freeman in believing that Anglo-Saxons had a special genius for self-government and it followed logically for them that those descended from peoples who had not inherited this capacity must be excluded from Anglo-Saxon communities. Freeman’s racism intensified during his visit to the United States where blacks had been enfranchised after the Civil War; ‘I am sure ‘twas a mistake making them citizens’.³⁴ Plantation societies rested on and produced a caste system; democracies enshrined equality of political status. Many white liberals including Freeman and Clark found the prospect of racial equality difficult to contemplate.

In the racial violence that followed emancipation, the United States provided ‘history lessons’ that Australian nationalists—Clark, Deakin, Higgins, Isaacs—would take to heart.³⁵ Lynchings in the United States reached a peak in Australia’s federal decade. Talk of the necessity of deporting blacks to Africa was widespread. Increasingly a multi-racial democracy came to seem an impossibility. Chinese ‘fixedness of character’, as Clark would write, meant that they could never assimilate into the Australian ‘homogeneous community’.³⁶

In the United States, Chinese exclusion had been enacted through legislation in 1882. In 1888 Clark wrote a ‘Memorandum on Chinese Immigration’ in the context of the Sydney discussions that followed the visit of the Chinese Imperial Commissioners in 1887 and the ‘Afghan crisis’ in 1888. His ‘Memorandum’ was reprinted in *The Sydney Morning Herald* at the time of the intercolonial meeting there on Chinese immigration restriction and pointed to the limits of Australian self-government.

Clark wrote:

Our Australian kinsmen, having done as much as they believed they could within the powers granted to them by the Imperial Legislature to restrict and repress the tide of Chinese immigration, now declare that these powers are insufficient for the purpose, and are crying aloud for the aid of the British Government to enable those Anglo-Saxon communities flourishing under the Southern Cross to preserve their ‘type of nationality,’ and to save them from the misfortune of having in their midst a large number of a race which could not mix with them socially or politically; and the question of the day is how, and to what extent, can this aid be best rendered ... the United States and Australia are seeking to raise the barriers between the Chinese and the rest of the world ...³⁷

The comparison, of course, highlighted the difference: the United States was a sovereign republic able to enact international treaties and its own laws. The extent of the Australian colonies’ powers as self-governing communities had been tested in the Victorian Supreme Court case of *Ab Toy v. Musgrove*

33 Griffith to Clark, 26 February 1897, Clark papers, C4/C187.

34 Lake, ‘“Essentially Teutonic”’, op. cit., p. 65.

35 Lake and Reynolds, *Drawing the Global Colour Line*, op. cit., pp. 138–43.

36 Richard Ely (ed.), *A Living Force: Andrew Inglis Clark and the Ideal of Commonwealth*, Centre for Tasmanian Historical Studies, University of Tasmania, Hobart, 2001, pp. 78–9.

37 *ibid.*, p.71.

and on appeal to the Privy Council. Radical nationalists such as writers for the *Age* newspaper threatened separation.³⁸ In the end, as we know, the British Government submitted to Australian demands for race-based immigration restriction and the inauguration of the new Commonwealth as ‘White Australia’. This was the cost for keeping the empire intact.

But still Clark worried about the ‘race problem’. In September 1903 he received a letter from Chris Watson, the leader of the Labor Party, who was responding to a newspaper article Clark had sent him arguing the necessity of the deportation of African Americans:

Many thanks for your letter and kindness in forwarding copy of American paper. I think it especially significant to find deportation put forward as the only solution to the race problem in the States. I was interested too to notice the reference to the opinion of Lincoln as to the impossibility of the negroes living side by side with the whites. I had not encountered the reference before but he evidently had the gift of prophecy in this connection.³⁹

In his essay on Clark’s ‘Memorandum on Chinese Immigration’, Richard Ely asked whether Clark’s essay on democracy and his views on Chinese exclusion represented a contradiction: were there two Andrew Inglis Clarks?⁴⁰

I would suggest, rather, that an understanding of Clark’s Anglo-Saxonism and the racialised nature of the discourse on self-government and democratic equality in the late nineteenth century led precisely to the policies of exclusion favoured by Clark and his fellow white men in the New World democracies of Australia and the United States. His son Conway reflected this understanding when he wrote from Boston, in 1905, deploring the advertisements he saw calling for ‘Tenders for the supply of 5000 Chinamen for 5 years’ to build the Panama Canal. ‘[A]lmost as bad as South Africa eh!’ he commented, referring to the controversy over the importation of Chinese indentured labour to work the Rand mines. Drawing the colour line was clearly a global challenge. Conway also reported to his father on the debate over Theodore Roosevelt’s efforts to exclude or segregate Japanese immigrants. ‘The Americans have long ceased to worship the “little Brown Angels of the East”’, he wrote,

In the Harvard University graduation classes of last year there were 2 Chinese and 4 Japs. The Chows beat the Japs out of sight. I am still to be convinced about the angelic qualities of the little Brown Man.⁴¹

His father would have agreed with his son’s sentiments, but might not have dismissed Japanese capacity so easily. That year the Japanese defeat of Russia—a European power—sent shock waves around the world. In the last two years of his life, Andrew Inglis Clark witnessed some signs that the old racial order—the rule of white men—might be about to change.

38 Lake, ‘The Chinese empire encounters the British Empire and its “colonial dependencies”’, op. cit., p. 187.

39 Watson to Clark, 28 September 1903, Clark papers, C4/C312.

40 Ely, op. cit., p. 83.

41 Conway Clark to A.I. Clark, 16 September 1905, Clark papers, C4/C6.

Andrew Inglis Clark Deserves to Be Remembered Across the Great Divide

James Warden

The centenary of the United States was a surprisingly significant event in Tasmania in 1876. This paper traces the connections that developed between the United States of America and Tasmania as the context for Andrew Inglis Clark's developing ideas about civil and political society and his understanding of the comparative historical experiences of the two places. The paper is concerned with the context in which ideas and materials were transferred around the globe in politics, culture, literature, theology, science, technology, metaphor and spectacle.

Across the great divide

Clark died on the morning of Thursday 14 November 1907 at his residence 'Rosebank' in Battery Point, Hobart. He was 59 years of age. Two days after his death an obituary appeared in *The Mercury* under the pen name 'Jacques' who remarked with tenderness on the exit of a friend:

A spotless private life was the crown of a useful public one, and the name of Andrew Inglis Clark deserves to be remembered across the great divide with a tenderness and regard which few other public men have been able to so justly claim at the hands of their fellow countrymen.

Jacques indicated not only the length of his own association with Clark and Tasmanian politics but more importantly gave clues to the early formation of Clark's political ideas¹:

My earliest recollections of Andrew Inglis Clark take my thoughts back to the early seventies when he used to preside at the American dinner which was held annually, on July 4, at Beaurepaire's.

The obituary note in *The Mercury* provides evidence for the early origins of Clark's enthusiasm for the United States and the political and philosophical inspirations that were to cascade through his life and into the design he proposed for the Australian Constitution. This encompasses his influence in the early Australian federation meetings, the First Convention in Sydney in 1891 and the importance of his draft model for an Australian constitution when, amongst other things, he deflected the Canadian constitutional version of the division of powers in favour of that of the United States.² Crucially, Clark's American ideas were not restricted to constitutional drafting or questions of judicial review. The republic that Clark saw before him represented a great human achievement and imposingly stood in comparison with his own home and place of birth, Van Diemen's Land. This paper explores some of those associations that inspired Clark in the 1870s.

1 *The Mercury* (Hobart), 16 November 1907, p. 8. Alas, the identity of Jacques remains obscure. He was clearly an experienced local political participant and long-time associate of Clark, perhaps a man of many parts. Without any knowledge of Jacques' identity the inspiration for the pen name is a matter of speculation but a likely candidate is the melancholic observer of life in *As You Like It* for whom, 'All the World's a Stage / And men and women merely players / They have their exits and their entrances ...'.

2 As it happens Clark's father-in-law, John Ross, the Hobart shipbuilder, was a native of Nova Scotia and he may have had books about North America to which Clark had access.

Clark's American dinners

Beaurepaire's was the eponymous nickname of the Telegraph Hotel in Morrison Street on the Franklin Wharf. So, what were the American dinners at Beaurepaire's all about? Indeed that question is the departure point for this paper. Larger questions are then entailed about how ideas travel across the great intellectual and political divides and across the world. To rephrase the question: How did Clark in Hobart by the early 1870s, aged in his mid-twenties, make the transition from received mid-century British ideas to Reconstruction era American republicanism?

Clark was born in 1848 to a sound and respectable family. He lived in Collins Street Hobart. He was home educated then attended a local private school. Prior to entering the legal profession he had engineering training with facts, measurements and mechanics. Locally and circumstantially he also ingested the rule of law, the utilitarianism of Jeremy Bentham and John Stuart Mill, responsible viceregal government with a restricted franchise, the anti-transportation movement, Chartism and the various denominations of English and Scottish churches that surrounded him in everyday life. He also lived in a place steeped in civic shame in the half-light of the convict shadow over Tasmania and with the continuing shame, felt even at that time, in the spectre of Truganini and her people. Around him in the streets of Hobart were former convicts and their keepers. Every day of his life the young Clark passed amongst the broken bodies and lost souls of those who had outlasted but never really escaped the system. For good measure, Andrew Inglis Clark's father Alexander Clark was the engineer who had built the treadmill and granary at Port Arthur in 1843–44, the building that later became the Benthamite model prison.

Such questions of historical context that arise for Clark may be elevated even further, to sharpen them, to make them more acute: How did Clark, the local Tasmanian boy, come to adopt American pluralist democracy, the ideals of republicanism, natural rights theory, proto-feminism, the case for a written federal constitution as well as the New England version of Unitarianism and the Transcendentalists? In other words, in a rhetorical turn, how did Clark get from Van Diemen's Land to Massachusetts, from Collins Street to Concord, from Hampton Road to Harvard and from Battery Point to Boston and back? How did he get across that great divide? Manchester, if anywhere, might have been a more obvious philosophical cradle for a young independent-thinking Tasmanian. Becoming a freethinking natural-rights republican is a prodigious intellectual leap. In this context the American dinners are of real interest. It may be surmised that he must have read Thomas Jefferson to find his way to Beaurepaire's on that evening in July 1876. That evening he ideationally went to Morrison Street via Monticello. For a short walk it was quite an intellectual journey.

Louis Isidore Beaurepaire, a Frenchman, was a professional chef who left the service of Governor Frederick Weld in 1875. In advertising his new establishment, Monsieur Beaurepaire styled himself as previously the *chef-de-cuisine* for Sir George Bowen and Sir James Fergusson.³ This may have been during their time in New Zealand where they had successively been Governor.⁴ Weld and Fergusson were friends and Weld had visited Fergusson in New Zealand just before he (Weld) took up the Tasmanian position. So, Beaurepaire joined Weld's service from Governor Fergusson either directly from New Zealand or from his previous position in South Australia. However, Louis Beaurepaire did not stay long in the service of Governor Weld, for within a just a few months he had taken the licence of the

3 *The Mercury* (Hobart), 13 May 1876, p. 3. Monsieur Beaurepaire also advised patrons and friends in his advertisement that luncheon is available from 1 pm and 'French Café and Dinner Parties attended to at any time'.

4 Bowen was the New Zealand Governor from 5 February 1868 to 19 March 1873 and Fergusson from 14 June 1873 to 3 December 1874. On 4 March 1874 a *dejeuner* was given by the citizens of Wellington to his Excellency Mr F.A. Weld, Governor of Western Australia. *Evening Post* (NZ), 4 March 1874.

Telegraph Hotel on the Hobart wharf. Previously the hotel had been called the Electric Telegraph Hotel, to distinguish the earlier usage when telegraph meant what we now call the semaphore. In Hobart the semaphore had been associated with signalling from Port Arthur but the electric telegraph was modern and when it joined Hobart and Launceston in 1857 it was surely a signal that the convict days may be left behind. In 1875, as a symbol of social progress, politeness and good taste, Beaurepaire's had quickly become the best establishment in the colony.



Telegraph Hotel photographed by the Anson Bros, c. 1887. Image courtesy of Tasmanian Archive and Heritage Office, AUTAS001125642355

Louis Beaurepaire's licence to the Telegraph Hotel was granted in late 1875 and renewed on 2 December 1876. From late 1875 Monsieur Beaurepaire was already catering for Tasmanian society at various events including viceregal functions, race day luncheon at Elwick, the prestigious Poultry Association dinners, visiting cricket teams and the Hobart Regatta.⁵ If there had been Michelin stars then Beaurepaire's would have had them. But, misfortune seems to have befallen the Beaurepaire family, for on 1 October 1877 a notice of public auction appeared in *The Mercury* for all the goods and chattels of the Telegraph Hotel. By then the hotel was being operated by a woman by the name of Harriet Clark (no relation) followed by a succession of other licensees. The standards of the hotel appear to have markedly declined. So, although the American Club in Hobart was seemingly born on the fourth of July 1873, the number of celebration dinners of the American Club at Beaurepaire's could have been only two at most.⁶ The first possible 4 July dinner at Beaurepaire's was 1876 and the second in 1877.

5 On Monday 15 May 1876 Monsieur Beaurepaire paid £4 for the concession to the committee rooms booth and bar at the public auction of catering booths for the Queen's Birthday race meeting at Elwick (8 booths in total were auctioned). Henn and Co paid £1 for the right to publish the official program (also publisher of the *Quadrilateral*). *Cornwall Chronicle*, 17 May 1876.

6 John Reynolds reproduces the speech in his paper 'A. I. Clerk's American sympathies and his influence on Australian federation', *Australian Law Review*, vol. 32, no. 3, 1958, pp. 62–75. Clark stated in his presidential address that the 1876 event was the fourth such gathering.



Portrait of Marcus Andrew Hislop Clarke photographed by Batchelder & Co. Image courtesy of State Library of Victoria, H29322, image a15338

So, let us get to the 1876 dinner. The meeting on 4 July 1876 in the dining room of the Telegraph Hotel was convened by the 28-year-old President Andrew Inglis Clark with other ‘young, ardent republicans’.⁷ There could not have been many of them. When rendered into English *beau repaire* means beautiful retreat. For ‘ardent young republicans’, especially in Tasmania at that time, their endeavour ought to be seen as an audacious advance.⁸ Clark said in his speech that evening:

We have met to-night in the name of the principles which were proclaimed by the founders of the Anglo-American Republic ... and we do so because we believe those principles to be permanently applicable to the politics of the world.⁹

The cadence of this sentence may have a little bit of Lincoln to it. ‘We have met here to-night ...’, said Clark. ‘We are met on a great battlefield ...’, said Lincoln, and so forth. But this would be an exaggeration because by present standards Clark regrettably is not a particularly engaging writer. He is long-winded and often laborious.

His language generally lacks rhythm and it is too ornate. His meaning wilts in imprecision. Perhaps that style made him a good Judge of the period. While Clark read Lincoln deeply he did not have an ear for Lincoln’s lean, rich language. If the American historian Garry Wills is right that the Gettysburg Address profoundly changed political language then unfortunately Clark did not grasp that point.¹⁰ Clark writes as a high Victorian rather than as a new republican of the reconstruction era. Wills argues that Lincoln of the later period wrote with spare elegant phrasing because he had spent the Civil War in the Telegraph Office of the White House. He was the first telegraph President. Alas President Clark in the Telegraph Hotel lacked that style. Clark wrote long letters. He should perhaps have written more telegrams or at least have applied more consistently that economy to his drafting style and to his own prose.

Despite the three earlier meetings of the American Club, the date 4 July 1876 is the moment when Clark’s political interests solidified into permanent principles—as Lincoln would have it—dedicated to the proposition that ‘all men are created equal’. Lincoln got the phrase of course from Jefferson in the *Declaration of Independence*, for whom men are endowed with ‘unalienable rights’. The point here is that Clark in 1876 in Tasmania adopted and expressed those audacious self-evident ideas. He may also have adopted Jean-Jacques Rousseau’s proposition that ‘man is born free’ which Jefferson in the

7 H. Reynolds, ‘Clark, Andrew Inglis (1848–1907)’, *Australian Dictionary of Biography*, vol. 3, Melbourne University Press, Carlton, Vic., 1969; *Launceston Examiner*, 5 July 1878, p. 2.

8 Contemporary works on Jefferson to which Clark likely had access were: George Bancroft, *History of the United States*; Henry S. Randall, *The Life of Thomas Jefferson*, 1871; Samuel Schmucker, *The Life and Times of Thomas Jefferson*, 1857.

9 John Reynolds, op. cit., p. 62

10 Garry Wills, *Lincoln at Gettysburg: The Words That Remade America*, Simon and Schuster, Riverside, 1992. Lincoln according to Wills greatly admired the prose style of General Ulysses S. Grant who wrote clear, precise, concise orders from the saddle as he prosecuted the war.

shadow of slavery of course could not say. Clark, via John Stuart Mill, also seemingly grasped Mary Astell's fundamental question about women. Astell, writing in 1700, anticipated Rousseau with the question that if men are free why are women 'born to be their slaves' to be 'now and then ruin'd for their Entertainment'?¹¹

The language of freedom in Tasmania

Such high-flown language is almost entirely absent from Tasmanian political prose. Yet somehow Van Diemen's Land, born in chains in 1803, turned into the Tasmania of 1903 with the universal franchise. The magnitude of that change ought to be emphasised and more fully appreciated. No polity in the history of the world has had such transformation. In 1808, on the Hobart town parade ground, a woman called Martha Hudson was brutalised on the arbitrary orders of Lieutenant Edward Lord. For insubordination, she was tied to a moving cart, stripped to the waist and publicly flogged to unconsciousness.¹² In 1914 three women living in Tasmania also by the name of Martha Hudson are shown on the electoral rolls.¹³ By 1903 in Tasmania the powers of government can be seen to arise from the consent of the governed. The transformation occurred almost wholly within the span of Clark's own short lifetime. Liberal democracy, whatever its shortcomings, was achieved in Tasmania without poetry, statuary, arches, marches, bronze busts, stone monuments or even an annual day of celebration. That extraordinary transformation goes still unnoticed and remains to this day pitifully unremarked. Yet all of the republican ideas of consent, constitutions and freedom that are associated with liberal democracy were at play in the formalities of the dinner that cold Hobart evening in 1876 in the dining room of Beaurepaire's as Andrew Inglis Clark's proposed the toast to the *Declaration of Independence*. His speech that night can stand as the moment that brought forth, for him at least, the idea of a new republican nation.

The republic here is not just a narrow constitutional question of the Crown and the viceregal office. Clark held the wider idea that Tasmania needed a new birth of freedom. The faces in the streets of Hobart in 1876 would have told him so, for Clark natively understood the tyranny portrayed in Marcus Clarke's *His Natural Life*, published as a serial between March 1870 and June 1872. The first edition of the book in 1874 was called *For the Term of His Natural Life*. It has never been out of print. Moreover, Port Arthur did not finally close until 1878. Even if Van Diemen's Land was somewhat luridly presented in Marcus Clarke's literature, the penal system nonetheless achieved its mundane objective of grinding rogues down (if not 'honest' as Jeremy Bentham prescribed).¹⁴ Social contract theory, the bearer of the political concept of consent, had been so diluted as to be absent under the Crown in Van Diemen's Land. At best it was Thomas Hobbes' grim version of the social contract, not the more liberal versions of Grotius, Locke or Rousseau. *Natural Life* in Van

11 Mary Astell, *Some Reflections upon Marriage Occasion'd by the Duke and Duchess of Mazarine's Case Which is Also Consider'd*, John Nutt Stationers Hall, London, 1700, p. 65.

12 The notorious flogging of Martha Hudson created an administrative crisis for Lieutenant Governor David Collins. The Magistrate G.P. Harris who saw the incident and questioned Lieutenant Lord was immediately placed under arrest for defiance of military authority. This situation exposed an almost impossible contradiction between military and civil authority at the same unsteady time that Governor Bligh was overthrown in Sydney. The controversy followed both Collins and Harris to their early graves in 1810. The corrupt and brutal Edward Lord would become the richest man in Van Diemen's Land. John Currey, *David Collins: A Colonial Life*, Miengunyah Press, Carlton, Vic., 2000, pp. 269–70. Barbara Hamilton-Arnold (ed.), *Letters of G. P. Harris 1803–1812*, Arden Press, Sorrento, 1994, pp. 105–15.

13 The Tasmanian electoral roll of 1914 shows three women by the name of Martha Hudson, two in the division of Bass and one in Franklin

14 Bentham's proposition about the utility of the penal system was that it would 'grind rogues honest'.

Diemen's Land was designed and intended to be solitary, poor, nasty, brutish and long. The sentence that precedes the famous quotation from *Leviathan* is worth revisiting. The state of nature is a place for Hobbes with:

no knowledge of the face of the earth, no account of time, no arts, no letters, no society and which is worst of all, continuall feare, and danger of violent death. And the life of man, solitary, poore, nasty, brutish and short.¹⁵

The central contradiction of the convict system in Van Diemen's Land was to maintain the solitary, nasty, brutish system whilst simultaneously willing society, arts, letters and science to emerge over time. Moreover, maintaining brutality and developing productive economic labour were also fundamentally at odds.

On natural life

For a while—take the year 1822—two jurisdictions exemplified how the state of nature was internalised into captive institutions: Van Diemen's Land for convictism and Virginia for slavery. Both places, for some pitiful people, simultaneously allowed both the iron manacles of the Leviathan state and the ever-present menace of the state of nature. Even Hobbes himself did not apparently contemplate that miserable co-existence. Leaving slavery aside, *natural life* in criminal law was a term denoting penal detention of no definite period. The phrase was originally informed by protestant theology wherein *natural life* also meant the base existence of the corrupted flesh. This idea or origin of natural life appears to lie in the theological distinction between natural life and spiritual life. Two examples from evangelical literature will suffice. For example, the relationship between natural life and spiritual life was described in a sermon by the nonconformist clergyman Phillip Henry (1631–1696) who had suffered in the 'Great Ejection' from the newly established church under the Act of Uniformity of 1662. His sermons were finally published in 1833 with those of his son, Matthew Henry (1662–1714) who was a strenuous and influential Presbyterian sermoniser and commentator on the Bible. For Phillip Henry, 'Life is three-fold; there is natural life, spiritual life and eternal life'. The life of the body flowed from its union with the soul, when body and soul part, we die. Spiritual life is the life of the soul flowing from its union with God; when God and the soul come together the soul lives, when they part it dies. Only Jesus can bring soul and God together. Without the union of body and soul the natural life of the body is already in immanent death. The third stage after natural life and spiritual life is eternal life, which is life in heaven.¹⁶ The second example is from the implacable Edward Irving (1792–1834) of the Church of Scotland who was obsessed with biblical prophecy and the book of Revelation. For him the natural life was deemed to be dead and wicked, as in the embodiment of the fallen Adam in a devil-possessed world. For Irving:

This is the true idea of original sin: That man like God hates all natural life, and loves to make it die because it once, and but once, sinned against God.¹⁷

Natural life in this context is an unredeemed pitiless state of sin, stain and immanent death in contrast to the spiritual life, when one is joined to God through Jesus Christ allowing the entry into eternal life, everlasting. Natural life, in this form, is a living death of venality, spiritual abandonment and terminal incarceration. Natural life here is dramatically embodied in the

15 Thomas Hobbes, *Leviathan*, 'The Incommodities of Such a War'

16 Phillip Henry, 'Christ is our Life', Sermon X in *Miscellaneous Works of Rev. Matthew Henry*, vol. 2, Joseph Ogle Robinson, London, 1833, Appendix p. 30.

17 Edward Irving, *Exposition of the Book of Revelation*, vol. 3, Baldwin and Craddock, Paternoster Row, 1831, p. 1145.

doomed figures of—say—the cannibal Alexander Pearce and the benighted abused Rufus Dawes. Or, as Sir Francis Forbes in evidence to the Molesworth Committee of the British Parliament in 1837 said of convict transportation, ‘in my opinion ... may be made more terrible than death’.¹⁸ That quotation is given as the frontispiece to the first edition of *For the Term of His Natural Life*. That proposition is oddly the general reason too why John Stuart Mill in 1868 was able to justify the utility of capital punishment. Mill argued that natural life in incarceration may be worse than death. Execution was justifiable on utilitarian grounds.

That is one version of natural life—the miserable Van Diemen’s Land version. However, on the other side of the great divide, the idea of natural life is embodied by Henry David Thoreau who deeply yearned for a natural life of organic individual freedom. The sort that might ring from the prodigious hilltops of New Hampshire to the snow-capped mountains of the Rockies.¹⁹ Thoreau’s natural life was to be realised at Walden. But he used the phrase natural life in 1849 in the final chapter of his book *A Week on the Concord and Merrimack Rivers*.²⁰ ‘A natural life’, wrote Thoreau ‘round which the vine clings, and which the elm willingly shadows’. Such a life ‘needs not only to be spiritualized, but naturalized, on the soil of earth’. This happy expression of natural life as a shelter would soon be *Walden: A Life in the Woods* (1854).²¹

So a natural life in Van Diemen’s Land and a natural life in Massachusetts were not the same. In linguistics, in technical language, this is called an auto-antonym or a contronym; words or phrases with the same spelling but with diametrically opposite meanings. Apt examples are the words *sanction*—to permit or to punish—and the word *bolt*—to hold fast or to go free. Thus there is an auto-antonym inherent to the term ‘convict bolters’, escaping the bolts to go free, and if the bolters were lucky they would get to China. Surely a defining theme of the history of Tasmania from convictism to the present has been the ambition to cross over from the misery of Alexander Pearce’s natural life pining on the Gordon River to Thoreau’s version of the natural life to let the Gordon and Franklin wild rivers run free and the people to run free with them. From the Concord and Merrimack to the Franklin and Gordon and Derwent and Tamar rivers, this is an emotional social and political Tasmanian dream of freedom and Andrew Inglis Clark himself had that dream or vision of civic, political and psychological freedom. He hoped for Tasmanians to cross that great divide of the convict sanction of natural life to a deliberate examined natural life, born in the larger idea of republicanism. He was reaching for a new world of freedom and independence—to domesticate to Tasmania that version of a civic religion. The birth of that idea for Clark may be tendentiously placed, or perhaps just symbolically placed, in his presidential speech at Beaurepaire’s in 1876. For three decades, to come, he pursued that ideal derived from American liberation philosophy as he tried, without hyperbole, to apply it in Tasmania.

18 The frontispiece quote to *His Natural Life* (1874) carries the following passage: ‘It is apparently your opinion that Transportation may be made one of the most horrible punishments that the human mind ever depicted?’ – ‘It is in my opinion that it may be made more terrible than death’. Evidence of Sir Frances Forbes before the Select Committee on Transportation of the British House of Commons, 28 April 1837, Q1347.

19 ‘Let freedom ring from Stone Mountain of Georgia and Lookout Mountain of Tennessee ... from every mountain side. Let freedom ring’. In 1963 Martin Luther King tied the landscape of the United States to its ‘true creed that we hold these truths to be self evident, that all men are created equal’.

20 David M. Robinson, *Natural Life: Thoreau’s Worldly Transcendentalism*, Cornell University, Ithaca, NY, 2004, p. 1.

21 H.A. Page’s book *Thoreau: His Life and Aims* was sold by the Hobart stationer Walch and Birchall in 1879 for 3s 6d.

And so to Philadelphia

The immediate reason for the toast by Clark that night in 1876, and the reason everyone else was interested in the United States at that time, was the centenary of the *Declaration of Independence* for which there is a substantial material Tasmanian connection. The central event of the centenary was the Philadelphia International Exhibition, styled as the first World's Fair.²² It ran from 10 May to 10 November 1876. The date 10 May was chosen as the opening day as that day was the seventh anniversary of the completion of the Transcontinental Railroad in 1869 when the eastern and western rail lines were tied with silver and golden spikes at Promontory Summit, Utah, below the snow-capped mountains of the Rockies. The Central Pacific and the Union Pacific lines were joined. After the Civil War this was the single most important event that made the nation. The railroad surveys of the continental watershed in the Rocky Mountains in the mid-1860s also delivered the phrase 'across the great divide', according to *Webster's Dictionary*. Ten million people attended the Philadelphia Exhibition in 1876, one fifth of the American population. It had 200 buildings. The main building was the largest in the world, temporarily. Richard Wagner, deeply indebted, wrote the music for the Centennial March. He reputedly said 'the only good thing about that piece of music was the fee' which was \$5,000 and paid in advance.²³ The grand march was played on the morning of 10 May by an orchestra of 150 musicians with a chorus of 800 voices before an audience of 25,000. Reviews were mixed.



The centennial event had been planned since 1868. In the wake of the Civil War it was a supra-national reconstruction project. Accordingly, the Fair was interpreted in the context of the founding principles of the Union, just as Lincoln had done for the Constitution itself at Gettysburg in 1863, four score and seven years after 1776. Philadelphia was a huge ideological and technological international event. Earlier exhibitions in London, Paris and Vienna had been studied and copied. Eleven nations had their own buildings, as did twenty-six of the 37 US states. Philadelphia showed the first typewriter (Remington), the first galvanised steel cables for the Brooklyn Bridge, Heinz Ketchup from Pittsburgh, penny farthing bicycles, Wallace-Farmer dynamos that made electric light and the right arm and torch of the Statue of Liberty. The exhibition showed the first telephone by Alexander Graham Bell that he had developed in attempting to improve Samuel Morse's telegraph. In just two years, by 1878, Bell Telephone would already rival the telegraph. Also on display were the objects and results from the extensive global scientific exercise by the United States

Navy to plot the 1874 incidence of the Transit of Venus, just over one hundred years since Captain Cook had undertaken the same task.

So, how does Philadelphia relate to Tasmania? The answer is found as a direct consequence of the visit to Hobart by the United States Navy from October 1874 to February 1875 on the Transit of Venus expedition. The USS *Swatara* visited for the purposes of that scientific endeavour and left behind in

22 Robert W. Rydell, *All the World's a Fair: Visions of Empire at American International Exhibitions 1876–1916*, Chicago University Press, Chicago, 1984.

23 Lieselotte Overvold, 'Wagner's American Centennial March: genesis and reception' *Monatshefte*, vol. 68, no. 2, 1976, pp. 179–87.



Crew of the USS *Swatara* on deck, 1874. Image courtesy of Tasmanian Archive and Heritage Office, PH30/1/112

Tasmania great public enthusiasm for the United States of America.²⁴ (Much more so than the visit of the USS *Enterprise* would achieve in 1976.) The Commander, Commodore Ralph Chandler, became a celebrity in Tasmania along with William Harkness who led the scientific party. On the evening of Tuesday 24 November 1874, Captain Chandler was seated beside Governor Charles Du Cane at the Governor's substantial farewell ball in Hobart. It was a 'brilliant assemblage in the Town Hall'. Moreover, wrote *The Mercury*, 'we have had nothing equal to it in Tasmania for a long time'. It was deemed as big as or bigger than the Duke of Edinburgh's visit. The British flag hung on one side of the large room and the American flag on the other in honour of the presence of the *Swatara* and thanks to Captain Chandler the committee had been able to display flags of all nationalities.²⁵ All things American were embraced.²⁶ The Governor regretted that the breakup of his household prior to his departure did not permit the sufficient extension of hospitality to 'our gallant visitors from the other side of the Atlantic. (Loud Applause)'.²⁷ Note, that the Governor did not say 'the other side of the Pacific'. He said, 'the other side of the Atlantic', which neatly locates both Tasmania and its departing Governor sentimentally within the bosom of Mother England. Had Andrew Inglis Clark been at the gala dinner that evening he would surely have had a different perspective. Neither the Clark nor the Ross families appear to have attended. Perhaps they were not sufficiently socially well recognised as to be invited.²⁸ But, according to the *Australian Dictionary of Biography* entry on Charles Du Cane, Truganini attended the Governor's last levee. Four days later he departed for England. The transit of Venus occurred on 9 December 1874. A month later, on 13 January 1875, Governor Weld assumed office and his household retinue had a new *chef-du-cuisine*.

24 As reported in *The Mercury*, 18 February 1875, p. 2. The *Swatara* arrived in Hobart on 3 October 1874, one of the main places identified by the US Navy. Two observation posts were established, one in Hobart and one in Campbell Town.

25 *The Mercury* (Hobart), 25 November 1874, p. 2. 'Over the principal entrance, and the entrance to the ante room, stars of bayonets and swords were placed which had the effect of greatly enhancing the novelty of the scene'. In the centre of the main table was a memento of the visit of the officers of the *Swatara* in the shape of a cake 'surmounted by an eagle and a bannerette, with two flags on each side, the word "welcome" inscribed thereon'. The decorations were mounted under the supervision of Mr Thomas Whitesides and the Quartermaster of the *Swatara*. Captain Chandler participated in the first dance and he took the central seat at the supper table. A gushing address about the excellence of appointed governors was made by the Chairman of proceedings, Sir Robert Officer, the Speaker of the House of Assembly, which was surely not intended as a slight on political systems with elective governors. There was bunting everywhere.

26 The crew of the *Swatara* was celebrated when on 9 October a heavy squall hit Hobart and a local boat had to be regained by the American crew. *The Mercury* reported in the same article that Mr Clark's cab that was left in front of his house in Collins Street was blown across the road by the high winds and in consequence a pole was smashed. *The Mercury* (Hobart), 10 October 1874, p. 2.

27 *The Mercury* (Hobart), 25 November 1874, p. 2.

28 Andrew Inglis Clark was later invited to viceregal levees on 25 May 1879. See *The Mercury* (Hobart), 9 June 1879, supplement, p. 1 and Governor Weld's farewell, *The Mercury*, 7 April 1880.

During early 1875 the Tasmanian Government of the progressive Premier Alfred Kennerley was heavily pressured by the Victorian Government and the Tasmanian newspapers to participate in the Philadelphia Exhibition. Melbourne was driving the Australian campaign led by Sir Redmond Barry. In preparation for Philadelphia the Victorians initiated a Melbourne intercolonial exhibition in late 1875 to funnel and filter the Australian exhibits.²⁹ By April 1875 the Tasmanian Government agreed to participate and established a Royal Commission for both the Philadelphia and the Melbourne intercolonial exhibitions, with Sir James Wilson MLC as the chair supported by about twenty commissioners, north and south. It was a significant organisational and financial commitment.

Philadelphia was a colossal event and a very substantial Tasmanian effort was made.³⁰ Tasmanian businesses and individuals provided minerals, native seeds and timbers, fleeces and skins, agricultural produce, manufactures, artworks and handicrafts. Lengthy essays emphasising the pride of Tasmania were written that allowed only the slightest mention of a convict past. Much statistical information was included. When the time came the Australian colonies sent commissioners to Philadelphia to curate their exhibitions. The Tasmanian stall was at the rear of the large New South Wales stall. The main day in Philadelphia was of course 4 July 1876. The *Declaration of Independence*, the original document itself, was unveiled, on loan to the city with special permission from President Ulysses S. Grant. Richard Henry Lee's grandson (of the same name) read the Declaration aloud because in 1776 his grandfather had proposed the Resolution of Independence from which Jefferson's Declaration followed two days later.

On that same day in Tasmania, 4 July, the *Launceston Examiner* published the entire text of the *Declaration of Independence*. That night in Hobart, President Clark's American dinner took place at Beaurepaire's Telegraph Hotel. Whilst in Melbourne the celebration took place at the home of the American vice-consul S.P. Lord, 'Manhattan', in Carlisle Street, St Kilda. Toasts were drunk to President Grant, Queen Victoria and the Governor of Victoria, who was none other than Sir George Bowen who by this time had transferred from New Zealand. By invitation of Mr Lord the *Declaration of Independence* was read 'with good elocutionary effect' by the Reverend Charles Clark. A toast to the Declaration was proposed with musical honours moved by Mr Lord.³¹

At the close of the Philadelphia Exhibition the official review had this to say about Tasmania:

From Tasmania there was much to interest, (sic) prominent among the exhibits being some curious photographs of aboriginal women, one of them being the sole survivor of the Tasmanian aborigines. There was also a companion portrait of 'Billy Lanney', the last Tasmanian aboriginal man. There were also shown some pretty tables painted in groups of native ferns, wreath of flowers, etc., the handiwork of some Hobarttown ladies.³²

In fact on 8 May 1876, two days prior to the Philadelphia opening, Truganini had died. She was buried on 10 May at midnight at the old convict Female Factory in South Hobart. At that very moment, across the other side of the globe at nine o'clock in the morning in Philadelphia, the gates opened to the World's Fair.³³ One hundred thousand people attended that day. The Tasmanian photographs

29 Sir Redmond Barry was here appointed for the fifth time as the commissar for such exhibitions.

30 Tasmanian contributions to the Intercolonial Exhibition, Melbourne, 1875, and the Philadelphia International Exhibition, 1876, Government Printer, Hobart, 1875.

31 The US Consul General Thomas Adamson was visiting Sydney and more guests would have attended but for the opening of the Deniliquin–Moama railway. *The Argus* (Melbourne), 5 July 1876, p. 6.

32 J.S. Ingram, *The Centennial Exhibition, Described and Illustrated: Being a Concise and Graphic Description of this Grand Enterprise Commemorative of the First Centenary of American Independence*, Hubbard Bros, Philadelphia, 1876, pp. 425–6.

33 Mindful that in 1876 there was no world time as such. The International Meridian Conference of 1884 in Washington DC saw the adoption of Greenwich Mean Time. Tasmania moved to an Australian standard eastern time in 1895.

on display were those taken in 1866 at 42 Macquarie Street, the studio of Charles A. Woolley, for an earlier Melbourne Intercolonial Exhibition. Woolley was assisted at that time by Louisa Meredith. The suite of portraits was loaned for the 1876 exhibitions by H.M. Hull, the Clerk of the House of Assembly and Secretary of the Royal Commission for the Philadelphia Exhibition.³⁴ That Tasmanian highlight of the World's Fair was not chosen just at random by J.S. Ingram for his official publication of the Philadelphia event. The portraits were not mere curiosities or a courteous inclusion to represent an otherwise distant and irrelevant place. On the contrary, the pictures were central to one of the main themes of the entire Philadelphia Exhibition.³⁵ It was organised around ethnological themes that were presented as the sturdy base for the idea of American national progress. An exhibition directive from the Washington Office of Indian Affairs mandated that photographs of American aborigines, as they were called, were to be collected and displayed.³⁶ Accordingly, the Tasmanian Aborigines could thus be measured directly against the American aborigines.



C.A. Woolley, Portrait of Truganini, 1866.
Image courtesy of National Library of
Australia, an23378504

In Philadelphia, three hundred Native American people from 53 nations were also brought to the exhibition. But on 6 July news reached Philadelphia of the disaster in the Montana Territory at the Little Bighorn River where General Custer's cavalry unit was destroyed with 268 killed by the Lakota Sioux led by Sitting Bull. In Tasmania *The Mercury* reported the battle and predicted a 'war of extermination against the Red Skins'.³⁷ American news was prominent in Tasmanian newspapers. The Philadelphia story, in the wake of the Emancipation proclamation, was all about industrial progress and national development that met on the intersection of Victorian anthropology and scientific racism.³⁸ The Federal Office of Indian Affairs under John Quincy Smith, a friend of President Grant, imposed the theoretical framework for the ethnology at the exhibition. It was adopted from the work of the German anthropologist Gustav Klemm and his theory of *Kulturgeschichte* that was directly applied by the Smithsonian curator Otis T. Mason. Klemm was also the main influence on Edward Burnett Tylor with a variation of the hypothesis of the three stages of culture—for Klemm these were savagery, domestication and freedom.³⁹ It was Tylor who wrote the preface for Henry Ling Roth's book of 1890, *The Aborigines of Tasmania*, and so the lines of thought across the continents join again.

- 34 *Cornwall Chronicle*, 19 December 1866. Woolley won a tender to take the photographs for £10 assisted by Mrs Meredith. The Aborigines were given permission by the government to come up from Oyster Cove. *The Mercury* (Hobart), 6 June 1866. Three pictures were taken of each subject: full face, side face and profile. *The Mercury* (Hobart), 12 September 1866.
- 35 *The Mercury* (Hobart), 7 August 1875.
- 36 Otis T. Mason, *Ethnological Directions Relative to Indian Tribes of the United States*, Government Printing Office, Washington, 1875.
- 37 'American Indian Massacre', *The Mercury* (Hobart), 26 August 1876, p. 3. The *Cornwall Chronicle* and the *Examiner* also reported the story.
- 38 John Wesley Powell, who had surveyed for the railroad across the Rockies, was given a collecting role for the Philadelphia Exhibition for native materials in the west.
- 39 Ingram, op. cit., p. 22. For a discussion of Klemm, see Chris Manias, 'The growth of race and culture in nineteenth century Germany: Gustav Klemm and the universal history of humanity', *Modern Intellectual History*, vol. 9, no. 1, April 2012, pp. 1–31.

The effect of the Philadelphia Exhibition on ethnology and museums was to be lasting. Both the Smithsonian and the Pitt Rivers museums adopted similar strategies for curating ethnological exhibits and that global influence reached the Australian colonies.⁴⁰ On a wider scale, Spencer Fullerton Baird of the Smithsonian Institute acquired all the exhibition materials and shipped them to Washington in forty rail cars. After Philadelphia the Smithsonian added a new museum, called the National Museum in which much of the material was housed. The National Museum was proposed by President Grant and funded by Congress. The same thing happened in Chicago in 1893. The Chicago exhibition gave the world the Ferris wheel, Wrigley's chewing gum, Frederick Jackson Turner's 'frontier thesis' and it hosted Buffalo Bill's Wild West show. As a direct consequence of the 1893 exhibition Chicago got the Field Museum as well as skyscrapers. Indeed both American exhibitions followed the lead of the Great Exhibition of 1851 when the South Kensington Museum was established, now called the Victoria and Albert. The Smithsonian still retains a few Tasmanian items from 1876, including the handiwork of Louisa Meredith and a painting of *Avoca* by Mrs H.M. Hull, wife of the Secretary to the Tasmanian commission.

Conclusion

The fate of the American Club in Hobart is not known⁴¹ but we do know what happened to Clark. Two years later, in 1878, he was a member of the Tasmanian Parliament whilst denounced as a republican and a communist by *The Mercury* that had not forgotten his 1874 essay on the French Republic. *The Mercury* imputed the republicanism of the 1871 Paris Commune to Clark rather than that of the American naval officers of the *Swatara* or the enthusiasms of the 1876 Centennial, or the republicanism of Jefferson, Madison or Lincoln or Whitman or Thoreau or Emerson.

The importance and lasting influence of Clark's American political ideas have been traced since his own lifetime and appear to hold the interest of generations of Australian historians. However, a good deal of work yet remains to be done in that vein. This paper of course represents a retrospective and rather expansive reading of a small dinner amongst friends in Hobart in 1876. In the technical realms of historical method the argument here may appear to fall into the sins of teleology and historicism—of seeming to inflate historical moments by, as it were, reading history backwards. The intention of the paper is rather to develop the context for the early development of political ideals that Clark took from the United States and to show how Tasmania was connected to the rest of the world or at least to significant parts of the world that were on the rise. Clark was highly unusual in his time and place. From the 1870s he looked from Tasmania across the Pacific. In the main, his elders and contemporaries still thought that from the vantage point of *home* the United States lay across the Atlantic.

40 For a fine survey of the period see George W. Stocking, *Victorian Anthropology*, Free Press, New York, 1987.

41 The club appears to have lasted until at least 1878, when the *Examiner* reported a meeting noting 'the peculiar opinions' of those who attended (*Launceston Examiner*, 5 July 1878, p. 2).

A Few of Clark's Hidden Stories

The Boy Patriot

Prof. REYNOLDS — This is a book I remember from early childhood. For a child who grew up when toys were scarce my father's library provided many books of all sizes and colours within the reach of small hands and short arms. They could be piled up to make towers, houses and tunnels for my big brother's train set. *The Boy Patriot* was the only light blue book and the only one with a picture on the cover—a dramatic picture of a red-coated soldier threatening a boy with an up-raised sword.

I inherited many of the books but only recently opened the one in question and to my amazement read my father's inscription:

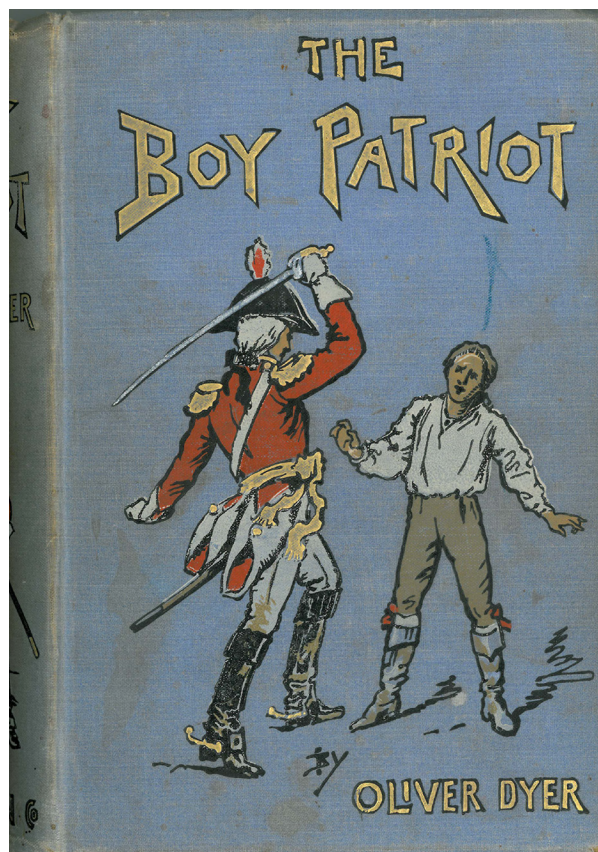
Given to Jack Reynolds by Justice A.I. Clark in August 1907 at 189 Collins Street after reading the first paragraph to Mr Henry Clark.

It had been given to him when he was six by A.I. Clark a few months before Clark's death. I knew my father had taken a deep interest in Clark and obviously knew members of the family but he had never mentioned the gift of the book. I realised that Clark would have known who my father was. He was brought up by his Aunt Edith who was the daughter of James Rules who had been part of Clark's circle of friends who worked together to produce the short-lived journal *The Quadrilateral*.

CHAIR (Ms Jacobs) — What do you know about the connection between your father and Clark?

Prof. REYNOLDS — I imagine he was taken to see Clark by his stepfather, who was a leading public servant. Hobart being a relatively small place, I presume the families knew each other. There is another important connection. My father's grandfather was James Rules. My father was taken in by Henry Reynolds and Edith Rules, his aunt, and so had the name Reynolds. He was never formally adopted so his birth name was really John Rules. James Rules was not native-born but arrived in Tasmania as a 20-year-old in the 1850s and became eventually director of education. He was one of Clark's intellectual friends and was certainly part of that *Quadrilateral* circle. So A. I. Clark would almost certainly realise that my father was the grandson of James Rules, who had died in about 1901. So there is that ongoing family connection which may seem strange but such connections are very common in Tasmania!

CHAIR — It is very unusual to have a revolutionary book in an Australian context. I just wonder what this tells us about your father's mindset and the kinds of thoughts and ideas that he perhaps passed on to you?



The Boy Patriot: or, From Poverty to the Presidency, Being the Story of the Life of General Jackson ... by Oliver Dyer (Hutchinson & Co., London, [1893])

Prof. REYNOLDS — He didn't have as much interest in America as the generation before him, or that Clark did. He never struck me as being particularly anglophile. He was very much a Tasmanian and then, at one remove, an Australian. He was a self-taught historian who wrote lots of articles about all sorts of things and of course wrote a biography of Edmund Barton. So he knew his federation story very well. Just as he had been taken to meet A.I. Clark, he would take me to meet important men and took me to meet Douglas Mawson when Mawson was an old man. Douglas Mawson was a very tall chap and I was a very shy little boy and all I can remember about Douglas Mawson is his brown boots! My father gave evidence to a royal commission on the Constitution and he took me down there and introduced me and the one I remember mostly was this young politician called Gough Whitlam. He was an expert on the Constitution.

So my father was not an Americanist, but nor was he particularly tied to the British. They were not republicans initially but I certainly got absolutely no training in why one should respect the British or the royals. I also had absolutely no military background whatsoever, because my father was too young for the First World War and too old for the Second World War and my mother was a committed pacifist. Nor were they Christians. So I had none of the normal intellectual training.

Created or Won, Not Acquired

Prof. WILLIAMS — There are many moments in Andrew Inglis Clark's life that provide some insights into how he viewed the world. Fortunately he left an array of essays and his letters can be found in numerous archives and libraries around the world. We now have a number of biographical works and reviews of his scholarship.

The item that I wish to highlight in connection with Inglis Clark was not created by him. It comes from the Patrick Glynn diary. Glynn, who was one of the South Australian delegates to the 1897–98 conventions, would have had little contact with the Tasmanian. Both were lawyers and shared an interest in constitutional matters. For his part Glynn is perhaps best remembered for getting married during the Convention and working to have the Almighty mentioned in the Preamble to the Constitution. J.A. La Nauze described Glynn as he arrived at the 1897 Convention as:

Patrick McMahon Glynn (42), an Irish barrister and like O'Connor a Catholic, was rather self-consciously well-read in English literature and classics, eloquent in an incomprehensible brogue, a likeable little man prepared to do his homework.¹

On 1 January 1901 in Sydney, representatives from around the country and beyond joined with the thousands of spectators to witness the Inauguration of the Commonwealth of Australia. The delegates from the various conventions were also in attendance. A few days later Glynn recorded the day and his encounter with Inglis Clark. He stated:

It is an eight day club of Conventionalists, Ministers of the Crown, leading politicians, Judges, Bishops, and other celebrities. Inglis Clarke (sic), a member of the Convention of 1891, now a Tasmanian Judge, was there, but left with Deakin for Melbourne en route for Tasmania last night. He is small, quietly genial, unobtrusive, well read in constitutional matters, a political pamphleteer, a radical with an inspiring faith in the national spirit of the people and not subdued by Imperial temper. Clarke (sic) is a believer in the genius of the people of the United States, with their love of the simple in what is symbolic; their

1 J.A. La Nauze, *The Making of the Australian Constitution*, Melbourne University Press, Carlton, Vic., 1972, pp. 102–3.

mutual reliance and self respect. He feels the significance of the sense of independence, and of the feeling, in the case of the American citizen, that his nationality had been created or won, not acquired ...²

The summation touches on something which was essential to Inglis Clark. It captures his republican sympathies, his liberal nationalism and his belief that the federation was an act of independence. That he had played a part in establishing a citizenship rather than been the passive recipient of it from what would become a foreign power.

CHAIR — When we are doing constitutional history, which can be quite dry, do we lose sight of the importance of people's humanity and their individual character for understanding their purposes?

Prof. WILLIAMS — I was recently reflecting on this. There is some great correspondence by Henry Higgins, writing to Felix Frankfurter. Justice Higgins' son was killed in the Great War. In this correspondence we hear about how his son is going to enlist and then the next letter talks about how he is not sure where he is going. The trouble is you know what is going to happen. Finally the letter comes. Higgins, one of the constitutional framers, is absolutely shattered. The correspondence with Frankfurter, another judge in the US, keeps going on for five or six more years and on the anniversary there will be a message about how it is the anniversary of his death. It is most poignant. Without this I don't think that you can understand Higgins the judge. Unlike Isaac Isaacs on the High Court during the First World War, who thought the High Court should waive through all Commonwealth legislation to the last man and the last shilling, Higgins doesn't do that. He is very concerned about the Commonwealth's powers because he is living the result of it.

CHAIR — This is the great value of letters, because we have that sense of the kind of personal agonies, the mechanisms of support, the values, the tragedies that shape these great decisions, which are not recorded in the newspapers of the day. We know nothing from the official records of the day about people's emotional reactions to these matters, do we?

Prof. WILLIAMS — That's right and we see nothing, of course, in the Commonwealth Law Reports.

A Forgotten Gem

Dr HEADON — In the introduction to my paper in this special issue of *Papers on Parliament*, I refer to the extraordinary American Moncure Conway's travel memoir, *My Pilgrimage to the Wise Men of the East*. While the 416-page volume was published in a prestigious, trans-Atlantic edition (Archibald Constable in London, and Houghton Mifflin in the USA) in 1906, the year before Conway and Andrew Inglis Clark died, it describes in detail Conway's travels much earlier, in 1883–84, his 'pilgrimage' to 'the east'—to Australia and New Zealand, and then to Ceylon (Sri Lanka) and India. Conway's seventy-odd books sold exceptionally well worldwide, over a long period, including his *Autobiography* (1904) and *Pilgrimage*, both of which were published in what proved to be his last years.

During this same period, another famous American writer, Samuel Clemens (Mark Twain), also travelled to Australia and New Zealand (and many other parts of the globe, in 1895) and wrote about it. Twain's travel memoir/lecture tour came out shortly after as *Following the Equator*, in 1897. Here were two internationally celebrated overseas visitors passing a keen and critical eye over the Australian colonies, and their Australian hosts, Clemens spending 175 pages on his observations and Conway 35 pages.

2 Patrick McMahon Glynn, Diary, 4 January 1901, National Library of Australia, MS 4653, series 3, pp. 613–14.

Conway and Clemens were good friends, and a few of the correspondences and contrasts between their respective travel works are worth noting:

- Conway went ‘east’ intentionally (passing through Australia) on a spiritual journey which, by the end, had effectively demolished the last of the ‘old foundations’ of his Christian beliefs; the agnostic Twain embarked on his lecture tour for more pragmatic reasons—to address serious debts incurred by failed investments in the new technology of the typewriter.
- Conway included Australia in his itinerary because of the Unitarian Church connections mentioned in my paper; Twain had no personal contacts as such, just an ambitious agent.
- Both writers (Conway in 1883, Twain in 1895) were astounded at the unprecedented cultural impact on the Australian community of a horserace, the Melbourne Cup. Conway recalled: ‘It is odd that Melbourne, rigidly Presbyterian, should have for its Pan-Australian synod a horse-race. Melbourne has, however, made its racing week a social congress of the colonies. The betting is universal. Sweepstakes were arranged in the schools (by the teachers), and Cup Day is a holiday.’³ Twain’s response has become an integral part of Australian sport literature folklore, and is often quoted: ‘[Melbourne] is the mitred Metropolitan of the Horse-Racing Cult. Its raceground is the Mecca of Australasia ... The Melbourne Cup is the Australasian National Day. It would be difficult to overstate its importance ... Cup Day is supreme—it has no rival. I can call to mind no specialized annual day, in any country, which can be named by that large name—Supreme ... no specialized annual day, in any country, whose approach fires the whole land with a conflagration of conversation and preparation and anticipation and jubilation. No day save this one; but this one does it.’⁴
- Both authors felt compelled to comment on Australia’s distinctive approach to religion, and religious matters. Twain sardonically noted that the colonies are ‘tolerant, religious-wise ... Sixty-four religions and a Yankee cabinet minister [King O’Malley, in South Australia, before he entered the Commonwealth Parliament in 1901]. No amount of horse-racing can damn this community.’⁵ Conway marvelled, for example, at the 144 denominational names cited in the 1881 census for Victoria—including the ‘Saved Sinners’, ‘Believers in parts of the Bible’, ‘Rational Christians’ and ‘Reasonists’⁶.
- Both Conway and Twain spent a significant (essentially sympathetic) percentage of their Australian section on the country’s indigenous inhabitants, and both referred to ‘the last of the Tasmanians’ (Conway) and ‘the last of her race’ (Twain—whose book even includes the iconic photograph of Truganini). Consistent with the more sympathetic writers of the era, both felt that they were observing the last, sad ‘survivors of a dying race’.
- Both writers display a knowledge of, and enthusiastic engagement with, Australian literature, and the broader culture. Marcus Clarke’s classic novel, *For the Term of His Natural Life*, is a defining work for them, Twain making reference to ‘Ralph [sic] Boldrewood, Gordon, Kendall, and others, [who] have built ... a brilliant and vigorous literature, and one which must endure.’⁷ Conway revelled in his personal encounters with the locals, particularly the Clark circle in Hobart, his ‘philosophical friends’, including his ‘scientific interpreter’, Robert M. Johnston, who had a touch of the ‘Baird, Thoreau, Agassiz’ about him.⁸

3 Moncure Daniel Conway, *My Pilgrimage to the Wise Men of the East*, Archibald Constable & Co., London, 1906, p. 70.

4 Mark Twain, *Mark Twain in Australia and New Zealand*, Penguin Books Australia, Ringwood, Vic., 1973, pp. 161–3.

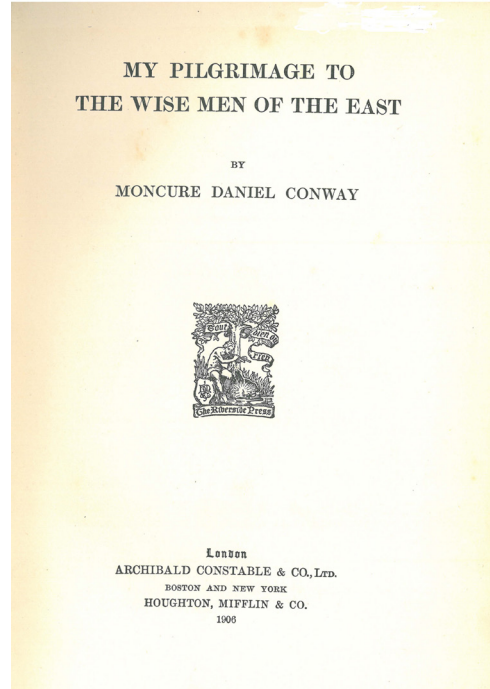
5 *ibid.*, p. 190.

6 Conway, *op. cit.*, p. 72.

7 Twain, *op. cit.*, p. 214.

8 Conway, p. 81.

- And finally, both make many acute observations. I will limit myself to one for each. Conway: 'I left Australia with a feeling that I had seen it at its best, and that the tendencies were in a direction of retrogression. Many of the best people were already looking forward with favour to that federation of the colonies which has since been achieved, and which I felt would be ... adverse ... Where either individuals or states are fettered together, their movement must be that of the slowest; and the slowest is apt to be the colleague that refuses to move at all, unless backward ... The old shout of "Liberty and Union, one and inseparable," has a fine sound, but so has the prophecy of the lion and the lamb lying down together.'⁹ Twain (in perhaps his best-known 'Australian' comment): 'Australian history is almost always picturesque; indeed, it is so curious and strange, that it is itself the chiefest novelty the country has to offer, and so it pushes the other novelties into second and third place. It does not read like history, but like the most beautiful lies. And all of a fresh new sort, no mouldy old stale ones. It is full of surprises, and adventures, and incongruities, and contradictions, and incredibilities; but they are all true, they all happened.'¹⁰



Railways, Resignations and Today's Senate

Dr LAING — 1897 was a busy session for Clark. He returned from the US at the end of June, stopping in Sydney to get a briefing on the Adelaide Convention from Edmund Barton and B.R. Wise. Back in Hobart, in July and August, Clark led the debate on consideration of the Adelaide draft through many days in committee of the whole, during which amendments to be moved at the Sydney session were debated. The Sydney session resumed in September and then Clark's political career turned to ashes.

The catalyst was railways, construction of which was the subject of much legislation, including private bills, introduced for the benefit of particular companies seeking access to land and resources (as opposed to public bills which were of general application). One such bill was the Van Diemen's Land Company's Waratah and Zeehan Railway Bill which received Royal Assent on 24 October 1895. The Act allowed the company to construct a main railway line from Waratah to Rosebery, or on to Zeehan, and to construct branch lines with the consent of the minister and Governor-in-Council. It was amended the following year to remove the 10-mile limit on branch lines.¹¹ Another was the Great Western Railway and Electric Ore-Reduction Company's Bill which received Royal Assent on 26 November 1896.¹² It was allowed to construct a branch line from a point on the Derwent Valley Railway to a point within the Western Mining Division to be approved by the minister.¹³ In the meantime, the Emu Bay Railway Company took over the affairs and rights of the Van Diemen's Land Company. The Great Northern Railway Company appears to have been the parent company of Emu Bay.

9 *ibid.*, pp. 104–5.

10 Twain. *op. cit.*, p. 169.

11 *The Mercury* (Hobart), 15 October 1897, statement by the Emu Bay Railway Company, p. 3.

12 See summaries of proceedings on bills in the Journals of 1895 and 1896.

13 *The Mercury* (Hobart), 15 October 1897, statement by the Emu Bay Railway Company, p. 3.

Apparently, after the passage of the 1895 legislation, four cabinet ministers had given approval to Emu Bay to build the line to Mt Lyell, in the opposite direction, instead of Zeehan on the basis that it could be described as a branch line. Clark wasn't one of the four ministers and none of this came out during the select committee inquiry into Great Western's proposals in 1896, preparatory to the passage of the authorising legislation for that company's proposals.

A director of Great Western, reading about Emu Bay's prospectus in a Sydney newspaper, considered that the construction of a line to Mt Lyell was in breach of Great Western's rights to build a line into the Western Mining Division and wrote to Premier Edward Braddon demanding an explanation and calling on the government to respect the legal powers and position of both companies.¹⁴

By mid-October, questions were being asked in parliament, including about Premier Braddon's earlier directorship of Great Northern, whether the ministers had deliberately excluded the Attorney-General from their deliberations (it appears that they had) and whether the Surveyor-General had recommended against Emu Bay's line to Mt Lyell (he had). *The Mercury* was referring to the matter as 'the railway muddle'. A want of confidence motion was moved and debated over several days.

In the meantime, Clark, as Attorney-General, provided a legal opinion that Emu Bay's proposal to build the line to Mt Lyell could not be classified as a branch line. Approval of it was not authorised by the legislation. Clark's ministerial colleagues rejected his opinion. Statements were made in the House by Clark sympathisers arguing that the Mt Lyell proposal should have been submitted to parliament for its approval. It was noted that had the ministerial approval of Emu Bay's proposal been known at the time that Great Western's bill was being considered, Great Western would probably not have gone ahead with its plans.¹⁵

His advice rejected by his colleagues, Clark resigned as Attorney-General during the course of debate on the no-confidence motion on 21 October 1897, tabling his legal opinion before the House adjourned for the day. Clark had clearly been kept in the dark by his colleagues but he spoke without rancour, concluding that the Premier had placed him in a difficult position:

The Premier was not prepared to take his opinion as to what the law was, and what interpretation the Ministry should put on the Act of Parliament. What was the objection to the amendment [to the no-confidence motion, effectively rendering it ineffective as such]? He was only asked that the Cabinet should lay the question before the law officers of the Crown for their advice. If the Premier was not prepared to accept that amendment, all he (the Attorney-General) could say was that the Premier would have to find another adviser who would advise him in a manner more comfortable with his wishes than he could. (Loud Opposition and cross bench cheers)¹⁶

Clark moved to the opposition benches. Braddon hung on to the letter of resignation for several days, trying to persuade Clark to change his mind but Clark was adamant. Braddon submitted the resignation to the Governor on 28 October.

14 F.M. Neasey and L.J. Neasey, *Andrew Inglis Clark*, University of Tasmania Law Press, [Hobart], 2001, p. 200; *The Mercury* (Hobart), 15 October 1897, supplement, p. 1.

15 *The Mercury* (Hobart), 16 October 1897, speech by Mr Mulcahy, supplement, p. 1.

16 *The Mercury* (Hobart), 21 October 1897, p. 4. The paper also reproduced Clark's legal opinion.

Clark stayed on briefly as Opposition Leader but resigned at the beginning of the following session and was shortly afterwards appointed as a judge of the Tasmanian Supreme Court. Was this as a consequence of an attempt by Braddon to try to make amends? Clark's last reported speech was on a motion to postpone polling on the Constitution Bill until three weeks after the polls scheduled in New South Wales and Victoria. Clark spoke in detail about the effect of the financial provisions on Tasmania and expressed his support for the Premier. There was no mention of the previous year's unpleasantness. The motion was withdrawn.¹⁷

All this is known. It is also known that the director of the Great Western Railway Company was one Sir Richard Baker, South Australian businessman, but let's join some dots.

Baker was a native-born South Australian who had nevertheless been educated at Eton and Trinity College, Cambridge. A former Premier who had been challenged to a duel by (and remained an implacable enemy of) Charles Cameron Kingston, Baker was now a member of the Legislative Council and its President.¹⁸ Clark and Baker were well known to one another. Both had been delegates for their respective states to the National Australasian Convention in Sydney in 1891. Both had made significant preparations for the Convention. Clark had prepared a draft constitution bill. Baker had prepared a manual for constitution-makers, citing all the great constitutional theorists and commentators from Montesquieu and the writers of the Federalist Papers, to Walter Bagehot, James Bryce, Albert Dicey and Alexis de Tocqueville.¹⁹

Both were strong federalists and both attempted to have responsible government written out of the Constitution.

Unlike Clark, Baker would go on to be a participant in the 1897–98 conventions and to continue pushing for the strongest possible Senate as the expression of the federal principle. Baker stood for the first Federal Parliament and was elected as a senator for South Australia. The Senate chose him as its first President. In that role, he exerted enormous influence in shaping the character of this new institution, ensuring that it cut the umbilical cord to Westminster in terms of practice, procedure and outlook, particularly in the assertion of its financial powers. He took the lead role in shaping new standing orders for the Senate. Instead of relying on Westminster practices, the Senate would determine its own course in confronting situations not specifically provided for in standing orders (or encountered at Westminster which was not, of course, a parliament for a federation). Rulings of the President would have the force of standing orders unless altered by the Senate and, in making such rulings, Presidents would lean towards the interpretation which preserved or strengthened the powers of the Senate and the rights of senators. They still do.

No two men had a greater influence on the shape and character of the Senate today than Clark and Baker. Clark's initial US-based design for the Senate with its equal representation of states regardless of population set the character of the institution from the start. He was a great advocate for proportional representation which was finally adopted in 1948 and changed the face and potential of the Senate forever. It was Baker who established a procedural capacity and independence for the Senate that it

17 *The Mercury* (Hobart), 6 May 1898, p. 4.

18 See his entry in Ann Millar (ed.), *The Biographical Dictionary of the Australian Senate*, vol. 1, University of Melbourne Press, Carlton, Vic., 2000, pp. 139–43.

19 Clark's 1891 draft Constitution is reproduced in John M. Williams, *The Australian Constitution: A Documentary History*, Melbourne University Press, Carlton, Vic., 2005, pp. 63–93. R.C. Baker, *A Manual of Reference to Authorities for the Use of the Members of the National Australasian Convention Which Will Assemble at Sydney on March 2, 1891 for the Purpose of Drafting a Constitution for the Dominion of Australia*, W.K. Thomas, Adelaide, 1891.

would rediscover as the impact of proportional representation began to be felt from the 1950s and 1960s. How ironic that it should be Baker whose lobbying of Braddon in Great Western's interests should indirectly bring about the resignation of Clark as Attorney-General and presage the end of his parliamentary career.

CHAIR — When you were doing your research did you discern any difference in the political process by comparison with today?

Dr LAING — The current political processes, particularly those in the Senate, are much closer to what they were in the first decade of the Senate's operations. With the First World War Australia turned towards Mother England and the need to save the Empire and I think the Senate was quite a supine place for some decades until the impact of proportional representation took hold in the 1950s and 60s. I think we have gone back to some of that early bolshiness of the Senate in sticking up for itself.

CHAIR — John Williams, I think that you have a comment to make about Andrew Inglis Clark and railways?

Prof. WILLIAMS — Railways were very important to Andrew Inglis Clark and his thinking in another way too, and this was in 1891. Inglis Clark had a very low regard for the Privy Council. It is one of the reasons for his view that appeals should end with the High Court, which he described as the Supreme Court. The reason we know he has a low regard is because in 1891 he had to go as the Attorney-General to argue an appeal for the Main Line Railway Case in England in front of the Privy Council. In the report in the Tasmanian Parliament, when he came back, Inglis Clark is reported as saying the solicitor employed in the case pointed out to him the desirability of having a good court but that they had some 'old fossils' on the bench. He went one day to hear the case and found the judges were sitting in ordinary clothes around a common table. Only one of the judges was awake and the others all were dozing and that was the grand and august tribunal superior to anything that Australia could muster.

Dr LAING — Can I add something to that? It is, I think, Sir Anthony Mason who did the foreword to that. He notes that those remarks were made initially in 1897, around the time that Clark was taking the Adelaide Convention bill through the Tasmanian Parliament, and he got into great trouble for making these remarks about the Privy Council, but Sir Anthony Mason notes that they were made under parliamentary privilege!

Clark's Gallery

Prof. PICKERING (read by Dr HEADON) — Andrew Inglis Clark—or so the story goes—had a picture of one man in every room of his house. Who was this individual that, purportedly, was so honoured by one of Australia's leading constitutional architects?

It wasn't Washington, Jefferson, or Emerson, or Lincoln. Nor was it Lafayette, Danton or Marat. It wasn't Locke, Paine, Bentham or John Stuart Mill, nor Moncure Conway, Oliver Wendell Holmes, or George Higinbotham. It was not John Dunmore Lang, and it certainly wasn't Sir Henry Parkes. The portraits were, in fact, of one of the three great Giuseppes of the nineteenth century—but to be truthful it was the least famous of them. Rather than Garibaldi or Verdi it was Giuseppe Mazzini.²⁰

20 H. Reynolds, 'Clark, Andrew Inglis (1848–1907)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <http://adb.anu.edu.au/biography/clark-andrew-inglis-3211/text4835>.

The story of Clark's gallery is surely apocryphal—or at least exaggerated—but withal there is no doubt that Clark was an ardent admirer of Mazzini. When he visited Mazzini's tomb in Genoa in 1890, he recorded his thoughts in a long poem entitled 'My Pilgrimage'.²¹ Of course, this poses the question of why was Clark a devoted acolyte? Mazzini was a nationalist, a democrat and a republican, but it is important to remember that the latter was founded upon a deep religiosity, a profoundly moral understanding of the notion of individual behaviour that was known as 'ideal republicanism'. Clark's outlook was shaped by a trans-Atlantic cluster of ideas, with the US Constitution the shining example he advocated in the antipodes. Although some American thinkers and commentators were influenced by Mazzini's nationalism, the effect of his 'republicanism' was perhaps even more profound on the *mentalité* of British radicals. The Italian's conception of 'ideal republicanism' supplied a crucial gap that was missing in their democratic agenda: the notion of Duty. First appearing in 1860, Mazzini's *Duties of Man* was the ideal bookend to Thomas Paine's iconic manifesto published seventy years earlier. Indeed he took Paine further. 'My voice may sound to you harsh, and I may too severely insist on proclaiming the necessity of virtue and sacrifice', he wrote, 'but I know, and you too,—untainted by false doctrine, and unspoiled by wealth,—will soon know also, that the sole origin of every Right, is in a Duty fulfilled'.²²



Portrait of Giuseppe Mazzini from the photograph album of Andrew Inglis Clark, A.I. Clark papers, University of Tasmania Special and Rare Collections, www.eprints.utas.edu.au/11710/

For radicals, this notion of 'Duty', meant (to borrow the words of one of his British disciples, W.E. Adams) 'sacrifice, service, endeavour, [and] the devotion of all the faculties possessed and all the powers acquired to the welfare and improvement of humanity'. 'The Duties of Man, in the great Italian's conception of the revolutionary programme,' Adams continued, 'were the necessary accompaniment of the Rights of Man. Rights, indeed, took a secondary place, being ... of value only as enabling nations as well as individuals to fulfil their obligations to each other'.²³

Adams' view was common among British radicals, many of whom had rubbed shoulders with Mazzini during his long years of exile. Listen to George Jacob Holyoake, the Secretary of the National Charter Association, arguably what was Britain's first working-class political party:

The personal character of Mazzini never needed defence. In private life and state affairs, honour was to him an instinct. He saw a path of right with clear eyes. No advantage induced him to deviate from it. No danger prevented his walking in it.²⁴

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- 21 See Zelman Cowen, 'One people, one destiny', *Papers on Parliament*, no. 13, 1991, p. 6; Ros Pesman, 'Australians in Italy: the long view', in Bill Kent, Ros Pesman and Cynthia Troup (eds), *Australians in Italy*, Monash University Publishing, Clayton, Vic., 2008, p. 5.
- 22 Joseph [sic] Mazzini, *The Duties of Man*, Chapman & Hall, London, 1862, p. xiii.
- 23 W.E. Adams, *Memoirs of a Social Atom*, Hutcheson & Co., London, 1903, vol. 2, pp. 261–9.
- 24 G.J. Holyoake, *Bygones Worth Remembering*, vol. 1, T. Fisher Unwin, London, 1905, p. 229.

‘It was from belief in his heroic and unfaltering integrity’, Holyoake mused, ‘that men went out at his word, to encounter the dungeon, torture, and death ...’²⁵ In this way, for many radicals, the Mazzinian notion of ‘ideal republicanism’—the duty of the individual to work for the good of all—became inextricably linked to the campaign for democratic rights. Indeed, Duty and Rights were different sides of the same coin. ‘Ideal republicanism’ was the republic of the self. The institutional structures of society—even monarchy—were less important than the individual moral behaviour of its citizenry.

One route by which Mazzini’s ideas came to the Australian colonies was in the suitcases of British radicals, many of whom subsequently helped to shape Australia’s political trajectory. Take Holyoake for example. Holyoake was, to borrow the words of an old Chartist living in Broken Hill at the turn of the century, ‘the connecting link between Mazzini, the great Italian patriot, and the Chartists and the advanced thinkers of England’.²⁶ At the same time as Holyoake was secretary of Britain’s foremost working-class political association, his brother, Henry, was one of the leaders of the goldfields protest movement in Victoria.²⁷ Of course, alongside Henry were many Italian migrants, including men such as Raffaello Carboni that were veterans of the struggle for freedom in Italy.²⁸

In important respects the notion that Rights and Duty are inextricably linked is part of our core understanding of Australian society and values. For example, I suspect that the great store that was set by the fact the first Australian Imperial Force was a *volunteer* army owes something to it. Of course, the ANZACs were subjects of the Empire, but they volunteered, and by so doing they behaved like citizens not subjects. Indeed, it is also possible that the trope of ‘mateship’ is tintured with the idea of civic responsibility. As Manning Clark, invoking Henry Lawson’s notion of ‘chivalry-upside down’, noted with grim eloquence, ‘the better part of a people’s life came uppermost in a storm’. ‘The Australians at Gallipoli’, he continued, ‘were in the mood to receive such a message. In their misery they saw themselves as men who knew that some things were worth fighting and dying for, as men who had fought with some of the finest mates that ever existed’. War had wrought their ‘miracle of a secular transfiguration’.²⁹

Mazzini enjoyed nothing like the broad appeal or fame of his compatriots—there were no stirring melodies and no coloured shirts. As a young man Clark was inspired by Mazzini, a passion he carried into later life. Clark was among a relatively small number of influential progressive, radical and reformist commentators and politicians that embraced Mazzini’s ideas.

When Clark looked up at the portraits of Mazzini on his walls what did he see? Nationalist? Patriot? Democrat? Moral guide? Or an ideal republican: a citizen?

Two related questions remain, however. In his extensive contributions to the federation debates and the founding of the Australian Commonwealth—as a delegate to the Federal Council in 1888, 1889, 1891 and 1894 and the Australasian Federation Conference—Clark did not mention Mazzini. Why? John Hirst has noted that if Clark had given way to his ‘heart’s desire’ he would have penned a draft constitution that provided for a Mazzinian republic—a blueprint for nation with a historic mission

25 *ibid.*

26 *Barrier Times*, 16 January 1909.

27 See *Gold Diggers Advocate* (Melbourne), 10 February 1854; Paul Pickering, ‘A wider field in a new country: Chartism in colonial Australia’, in M. Sawyer (ed.), *Elections Full, Free and Fair*; Federation Press, Sydney, 2001, p. 39.

28 See: Jennifer Lorch, ‘Carboni, Raffaello (1817–1875)’, *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <http://adb.anu.edu.au/biography/carboni-raffaello-3163/text4733>.

29 C.M.H. Clark, *A History of Australia*, Melbourne University Press, 1997, p. 466. Lawson’s line comes from his ‘The Star of Australasia’, 1895.

not unlike that which Mazzini envisaged for Italy.³⁰ Why didn't he? This paper is a preliminary sketch of part of a wider study of Mazzini's influence on political thinking in the Anglophone world and Clark's papers may reveal a comprehensive answer. But my hunch is that it was because Clark was also an astute politician. For Mazzini and many of his followers republicanism had less to do with kingship than citizenship. Speaking on behalf of many of those influenced by Mazzini, W.J. Linton put it in 1867 thus:

What do we mean by republic? We mean not only the displacement of a form of government; but, believing that presidents are but slightly improved constitutional sovereigns, we mean the abolition of class government, which is monarchy, under whatever name ... We mean that duty shall no longer be an idle word; that it shall really express the relation of the parts to the whole, the relation by which a man or a woman becomes the servant of the actual time or the surrounding society—of family, of country, of the world...³¹

Clark, however, understood that the use of the word 'republicanism' would do more harm than good among the vast majority of delegates who were fundamentally committed to the British Empire with a monarch safely ensconced on the throne.

Mazzini, on the other hand, was not a compromiser. His subordinate role in the unification of Italy was in large part due to the greater willingness of his contemporaries, Garibaldi and Cavour, to engage in realpolitik. Did Mazzini, therefore, stare back at Clark with a glare of rebuke?

30 John Hirst, *The Sentimental Nation: The Making of the Australian Commonwealth*, Oxford University Press, Melbourne, 2000, pp. 10–13.

31 *National Reformer*, 16 June 1867.

The Over-rated Mr Clark?: Putting Andrew Inglis Clark's Contribution to the Constitution into Perspective

Helen Irving*

Every commemoration needs its Doubting Thomas. This is the role I have assumed. It is not my intention to question whether Andrew Inglis Clark deserves recognition or honour. I do not doubt for a moment that he does. Clark, I am happy to agree, was a distinguished liberal democrat, a man of vision, knowledge and talent, one of the significant contributors to the progressive politics of his era and the achievement of Australia's federation. But I do want to question the many claims that have been made for him above and beyond these attributes. I want, in particular, to challenge his elevation to the status of 'Founding Father' or 'primary architect' of the Australian Constitution,¹ not to mention 'the most important ideas man of our whole nation in terms of structure, in terms of the current laws and institutions that we have today'.² I also want to question the equally persistent claim that Clark valiantly (albeit unsuccessfully) proposed a bill of rights for the Constitution.

My scepticism finds expression in several questions:

Was Andrew Inglis Clark the 'primary architect' of the Constitution?

Clark's claim to be the architect of the Australian Constitution rests on the role he played in the framing of what I will refer to as the 1891 constitution bill (with a lower case 'c' and a lower case 'b').

Let me be blunt. The 1891 constitution bill is a fine, historical document, but it is not *the Constitution* (upper case 'C') of the Commonwealth of Australia. It was not adopted by any parliament or approved by any sovereign. It went nowhere. It was, in reality, a draft, with no official status, any more than Clark's own (now celebrated) draft—the one he circulated for discussion prior to the 1891 Convention—or Charles Cameron Kingston's similar-purpose draft, for that matter. For sure, the 1891 bill was to prove useful in the later process of drafting the Constitution, but that fact does not make it *the Constitution* or even an earlier version of the Constitution. Indeed, none of the authors of the 1891 constitution bill can claim to be the primary or even secondary architect(s) of the Constitution.

This is not just pedantry, or a type of reverse 'stone soup' in which the person who puts the final pinch of salt in the pot is credited with being the chef. It is based on an evaluation of the relationship between the 1891 constitution bill and the Constitution—the one that was approved by popular referendums and passed by the imperial parliament in 1900: the one with which Australia works today. The Constitution and the 1891 constitution bill have many similarities, but they are different documents.

The Constitution was written at the 1897–98 Federal Convention (the second Convention), by delegates from five colonies—a total of 54 men, only 17 of whom had been at the 1891 Convention. Most significantly, the majority were popularly elected. They were *representatives*. Unlike the appointed members of the 1891 Convention, they represented the Australian voters. This fact influenced their approach.

* The author is grateful to the Clerk of the Senate, Rosemary Laing, for presenting this paper on her behalf, in her unavoidable absence.

1 Deane J, *Theophanous v Herald & Weekly Times Limited* (1994) 182 CLR 104 at 172. Clark is similarly described as 'Principal Architect of the Constitution' on a portrait in the Hobart registry of the Federal Court of Australia.

2 Peter Botsman (author of *The Great Constitutional Swindle*, Pluto Press, Sydney, 2000). Interview: *The 7.30 Report*, ABC, 20 December 1999.

The delegates at this Convention unambiguously affirmed that their work was to be their own—that it was neither their role nor their intention to follow the 1891 constitution bill. Indeed, on the opening day of the second Convention, Edmund Barton, the Convention leader, declared that, '[w]hile ... a great deal of instruction may be derived from the Bill of 1891, the business of this Convention is to arrive at a conclusion, not under the influence of the previous work, but by its own efforts'.³ He added, somewhat inelegantly (the Hansard reporters got it down verbatim): 'This is the first Convention directly appointed by the people, and therefore the inference from that is that the desire of the people is that, as far as possible, this Convention shall originate the Constitution'.⁴ The Convention needed to take into account the mandate of 'the people'. Furthermore, the delegates knew that their work—a bill for the Commonwealth of Australia Constitution Act—would be subject to the people's approval in the referendums which, under the colonial Enabling Acts that framed the Convention, were to be a precondition for submitting the bill to the imperial parliament. To maintain that a constitution bill written by political appointees and a Constitution Bill written by elected representatives (and popularly approved) are effectively the same thing is to neglect this vital, democratic distinction.

It is true that the second Convention did not entirely adhere to its undertaking to start afresh, and many of the 1891 constitution bill's provisions wound up in the Constitution, but influence and a similarity in words do not make an early document the equivalent of a later document, any more than the many similarities between the Australian Constitution and the United States Constitution make the latter an early version of the former. (We would readily accept—would we not?—that the similarities between the Australian and the US Constitutions do not give the framers of the latter the status of framers of the former.) Clark was not a member of the second Convention. He could not, at least from this perspective, have been the 'primary architect' of the Constitution.

Was Clark an 'architect' of the Constitution all the same?

Many people, I am sure, will be unpersuaded by my claim that the 1891 constitution bill should be distinguished from *the* Constitution (and, indeed, the Justices of the High Court are likely to be among them, since the court has frequently and freely conflated the two in using history as a guide to constitutional interpretation⁵). But even if the 1891 bill and the Constitution were effectively continuous, Clark's contribution would still need to be put into perspective.

Clark, as noted, produced and circulated a draft 'constitution' prior to the first Convention as a means of getting discussion going, and, certainly, many of the provisions in Clark's draft ended up in the 1891 constitution, as well as in *the* Constitution. It has been calculated (and frequently repeated) that, of the 96 sections in Clark's draft, 86 'found a recognisable counterpart in the final Constitution'.⁶ I haven't tried to replicate this count, but there is no reason to think it is not accurate. However, another count is also relevant. Of those 86, a very significant number also find a 'recognisable counterpart', to say the least, in the United States Constitution, and a further substantial number in Canada's Constitution, the British North America Act of 1867 (a quick skim of the latter reveals at least 20 parallel provisions).⁷ It

3 *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 23 March 1897, Legal Books, Sydney, 1986, vol. 3, p. 11.

4 *ibid.*

5 See Helen Irving, 'Constitutional interpretation, the High Court, and the discipline of history', *Federal Law Review*, vol. 41, no. 1, 2013, pp. 95–126.

6 John Williamson, 'Clark, Andrew Inglis', in Helen Irving (ed.), *The Centenary Companion to Australian Federation*, Cambridge University Press, Cambridge, England, 1999, p. 345.

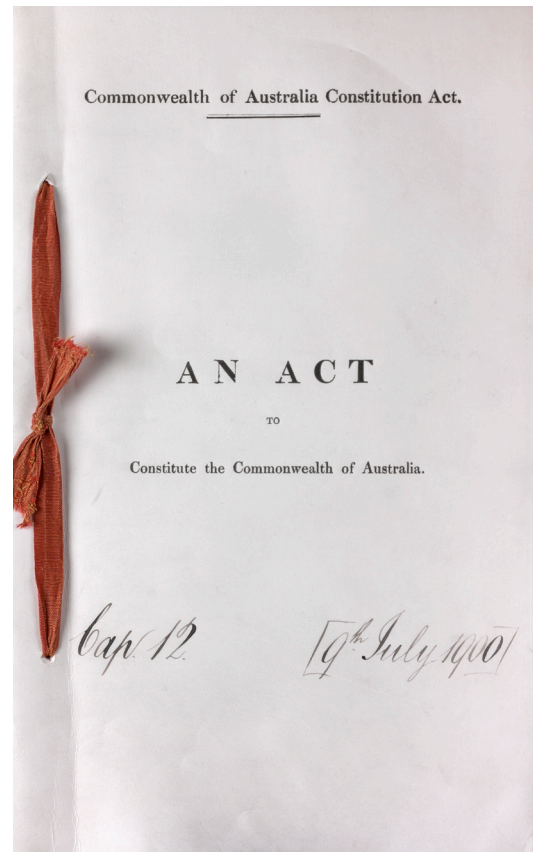
7 A small handful can also be found in the *Federal Council of Australasia Act* (Imp) of 1885, which was drafted by Sir Samuel Griffith.

is, in fact, readily evident that the very large majority of the provisions in Clark's draft are versions of provisions found in these other instruments. Some are virtually cut and pasted. Clark did not pretend otherwise. Indeed, in his 'Memorandum to Delegates' which accompanied his draft constitution bill, he stated that he had examined both, and (understating his borrowing from the Canadian) had 'followed very closely the Constitution of the United States'.⁸

The borrowing of American provisions is unsurprising. A year earlier, a federal conference had met in Melbourne to consider whether to proceed with the (hitherto unsuccessful, but long-held) goal of federation. The Conference had agreed to do so, and, from the start, Clark, one of the participants, had persuaded them to follow the US form of federalism. It is quite likely, therefore, that a good deal of the Australian Constitution would have looked like a good deal of the American Constitution, whether or not Clark had provided a draft with much of its wording taken from the American. At Clark's urging, at the same time, the Conference had rejected the Canadian form of federalism (on the ground that it was too centralist). Still, in non-federal respects, they knew that Canada had exactly the institutional features they were looking for: responsible government under the British Crown, with a bicameral parliamentary arrangement that accommodated a federal system. So, it is also not surprising that, at the 1891 Convention, many of Canada's non-federal provisions were copied: notably, those governing the role of the Governor-General, certain institutional features of the Houses of Parliament, and many of the heads of power of the Canadian House of Commons.

But there is more than numerical tallies to take into account in assessing Clark's contribution to the 1891 constitution bill, and through that to the Constitution. Other members of the 1891 Convention also played a major part. Charles Cameron Kingston (as Dr Bannon has reminded us) also wrote a draft constitution in 1891 for consideration by the Convention, and some of its provisions found their way into the Constitution. We should note, in particular, the industrial arbitration power (section 51(xxxv)), which found no counterpart in the US or Canadian constitutions, but in Australia's Constitution was to underpin the great 'Australian settlement' between capital and labour that stood as a central pillar of Australian politics for much of the twentieth century, helping secure workers' rights and industrial stability.

Many other members of the Convention also proposed provisions that were to prove important in the Constitution. Notably, Sir Samuel Griffith, Chair of the 1891 Convention's drafting committee, wrote significant parts of the constitution bill, and his skill as a draftsman was critical in capturing the ideas of the Convention in legally functional words. But, of course, if one is persuaded by my claim about



Commonwealth of Australia Constitution Act 1900 [original public record copy] (1900). Gifted by the House of Commons, United Kingdom, to the Australian Government and people. Courtesy of Parliament House Gift Collection, Department of Parliamentary Services, Canberra, ACT

8 John M. Williams, *The Australian Constitution: A Documentary History*, Melbourne University Press, Carlton, Vic., 2005, p. 67.

1891, Griffith's words cannot be regarded as the words of *the* Constitution, any more than Clark's. In any case, what Alfred Deakin described as Griffith's 'terse, clear style' did not altogether survive into the Constitution itself, although Griffith's input was invaluable, and 'the arrangement of the provisions, the major themes, and the relations between the parts [of the Constitution], retain much of his imprint'.⁹ But this is influence, not authorship.

Of these three men, Kingston, I suggest, has the greater claim to the title of 'architect'. Apart from anything else, Kingston was a key player in both Conventions (and in the critical negotiations with the British Government in 1900 prior to the passage of the Constitution Bill by the imperial parliament). Griffith and Clark were not. Critically, they were absent from the second Convention. Poor old Griffith had no choice; he would undoubtedly have been elected to that Convention, had elections been held in his colony. But Queensland literally could not get its Act together, and remained unrepresented. In Tasmania, Clark, too, would certainly have been elected. Unlike in Queensland, Tasmania held elections for the Convention, but Clark was not a candidate. Why not?

It seems inconceivable that Clark, the ardent Americanist, who knew about and admired the Philadelphia Convention of 1787, could have failed to appreciate the chance this second Convention offered to be part of history. It is routinely said that Clark had scheduled a trip to the US in 1897 and this prevented his taking part. This simply is not convincing. Clark had been to the US before. He could not possibly have thought travelling more important than the chance of writing the Constitution. He could have changed his plans, postponed his trip. Furthermore, he had plenty of time to do so. Elections for the Convention, which took place in March 1897, had been anticipated for more than a year (the relevant Tasmanian Enabling Act was passed in January 1896). Everyone who hoped to take part would have been on the alert well before the event. In any case, Clark was not overseas at the relevant time; 'he participated actively in the Tasmanian Parliament's consideration of the Adelaide [session of the second Convention] draft Bill, and he participated in the Melbourne Debates from outside the Convention in 1898'.¹⁰

It is further said that Clark's appointment in 1898 as a Justice of the Supreme Court of Tasmania prevented his participation in the Convention. This, too, does not add up. Even if Clark had been tipped off the year before his appointment was announced, it could not have affected his decision regarding the second Convention. None of the candidates and none of the elected delegates knew when they started that the Convention would continue into 1898. Indeed, the official commitment was to have two sessions, and for these to be no more than 120 days apart (accordingly, the second session could not have started in 1898, if the first session was to begin, as planned, and as happened, in the first half of 1897).

According to the Enabling Acts, a new draft Constitution Bill was to be written at the first session; the recess that followed would give the colonial parliaments the opportunity to consider the bill and make suggestions for amendment. These suggestions would then be debated at the second session. The Convention thus began its work confident of winding up before the end of the year. No one knew until almost the last minute that they would have to reconvene after the second session. Unexpectedly, however, the number of proposed amendments was very large, and, since the Victorian delegates had to return to their colony for a general election, time ran out for debating them. A third session

9 Helen Irving, 'Framers of the Constitution', in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia*, Oxford University Press, South Melbourne, 2001, p. 285.

10 William G. Buss, 'Andrew Inglis Clark's draft constitution, Chapter III of the *Australian Constitution*, and the assist from Article III of the Constitution of the United States', *Melbourne University Law Review*, vol. 33, no. 3, 2009, p. 721.

was scheduled. At a pinch—although no pinch was needed—Clark could still have taken part in the two 1897 sessions, been surprised or wearied or frustrated (as they all were), by the need for a third, and then been replaced by another Tasmanian (there was no rule against this—four of the Western Australian delegates were replaced between sessions).

Still, it has to be accepted that, until that *Eureka!* moment when some lucky researcher stumbles across a letter ('Rosebank, Hobart, February, 1897. Dear X, I have decided not to stand for election to the Convention because ...') no one can say for sure why he acted, or failed to act, as he did. The Tasmanian delegation does not seem to have known either; it is understood that they even promised to hold a place open for him at the Convention, were he to change his mind. My own guess is based on nothing more scientific than a long-distance psychological assessment. In a work published long after both men's deaths (so it cannot have influenced Clark's opinion), Alfred Deakin described Clark as, among other things, 'nervous, active, jealous and suspicious in disposition'.¹¹ There is evidence to support this character sketch. In at least one source (a poem), Clark revealed an extraordinary capacity for bitterness and deeply felt resentment. Deakin, unnamed but readily identifiable, was his target. The poem, written post-Convention, accuses Deakin of untrustworthiness: 'Of broken faith—so cunningly devised/That none could safely say that he had lied' (and of 'pos[ing] as a patriot' and finding happiness in 'floods of talk that simpletons believe', and more). Richard Ely has concluded that it is a response to Deakin's failure, as Commonwealth Attorney-General in 1903, to keep his promise (it seems he made one) to appoint Clark to the newly created High Court.¹²

Reading backwards to 1897, I guess that Clark, who was also known to be unhappy that his proposals for the 1891 constitution bill were not followed as closely as he had hoped, was temperamentally unwilling to expose himself to a similarly frustrating experience, and just did not want to do it. He pulled the plug, or took his bat and ball, and went home. I am happy for this to be refuted. But is it such a terrible thing to suggest? Must Clark's reasons necessarily have been outside his control or external to his own choice? Cannot he simply have declined to be part of the show? Surely we can accept that Clark was a human being, a man who perhaps could not bear the idea of working again with men he did not care for, and with no certainty of a reasonable outcome or, indeed, of any outcome at all. Clark was certainly unhappy with the actual outcome. Unlike Griffith—also absent from the second Convention—he opposed the final Constitution Bill. He ended the decade, in this respect, not as a 'Founding Father', but as an 'anti-father'. He may very well have rejected the title of 'primary architect' of the Constitution himself.

Did Clark propose a bill of rights for the Constitution?

In assessing Clark's contribution, special attention is needed to one additional claim. It concerns a provision that did not end up in the Constitution. Clark, it is said, proposed or even urged that Australia's Constitution should include a bill of rights. This claim has several dimensions. It is stated as a fact, and it is also used to bolster twenty-first century claims that the framers of the Constitution were neglectful, perhaps even contemptuous of entrenched rights, and that—had they only listened to Clark—Australia would not now be alone in the democratic world (or, so it is lamented) without a bill of rights.

11 Alfred Deakin, *The Federal Story: The Inner History of the Federal Cause 1880–1900*, Melbourne University Press, Parkville, Vic., 1963, p. 32. He also considered him to be a 'sound lawyer, keen, logical and acute'.

12 Richard Ely, 'The poetry of Inglis Clark', in Richard Ely (ed.), *A Living Force: Andrew Inglis Clark and the Ideal of Commonwealth*, Centre for Tasmanian Historical Studies, University of Tasmania, Hobart, 2001, p. 185.

Let us focus a little more closely on what Clark sought to do. Clark's draft constitution did not include a bill of rights, and nor did it include much in the way of provisions that might be recognised as counterparts to provisions of the US Bill of Rights. However, the 1891 constitution bill—'most likely' due to Clark¹³—did include a provision that resembled a *section* of the US Constitution's 14th Amendment, and, subsequently, Clark was to urge the second Convention to retain and expand it. That provision, as it stood in 1891, included a prohibition on any state's abridging any 'privilege' or 'immunity' of citizens from other states,¹⁴ or denying the 'equal protection of the laws' to any person within the state's jurisdiction.

This sounds very significant (although the 14th Amendment is not a bill of rights) and it may well have proven to be in the long run, had the provision been adopted. But, the Constitution's framers cannot have known this, because, at the time they were working, US case law would have given them relatively little guidance. Indeed, the whole idea of proposing a bill of rights (whether based on the first ten Amendments, or the 14th Amendment, or both) had a very different context from the one we know today.

If we imagine Australians contemplating a US-style bill of rights in the late nineteenth century (as we must), we need to work with the available jurisprudence. The US provisions, at that time, had only rarely been drawn upon to protect what we would recognise as rights today. Indeed, there was relatively little rights jurisprudence to speak of in nineteenth-century America. The Bill of Rights applied only to Congress—to federal laws—and none of its individual rights was 'incorporated' against the states (via Supreme Court interpretation) until well into the twentieth century. Numerous laws that breached or denied or overlooked the rights that we now believe to be protected by the US Bill of Rights went unchallenged in the nineteenth century. There was, indeed, very little to give Australians the idea that such a bill in their own Constitution would have been superior to the legislative or common-law protections of rights with which they were familiar. In any case, Clark did not propose a bill of rights. As noted, he proposed a version of a section of the 14th Amendment.

What, then, was the status of 14th Amendment jurisprudence at the end of the nineteenth century? The 14th Amendment applied only to state laws; it was not until the 1950s that 'reverse incorporation' was implied by the Supreme Court and 'equal protection of the laws' came also to bind Congress. Certainly, a guarantee of 'due process' could be found in the Fifth Amendment (which applied to federal laws), but, again, in the nineteenth century, there was almost no 'due process' jurisprudence. However, when it began to flourish soon after Australia's federation—in the so-called 'Lochner era'¹⁵—it was wielded by the Supreme Court for more than three decades to strike down the sort of laws that protected, among other things, the progressive working conditions that were flourishing in Australia at that time. The framers of Australia's Constitution cannot have known this, either, but (when claims are made that they thwarted Clark's vision of a rights-bearing constitution) it is worth considering that such laws might not have survived, had Australians followed the US with a 'due process' provision in their Constitution.

13 John M. Williams, 'Race, citizenship and the formation of the Australian Constitution: Andrew Inglis Clark and the "14th Amendment"', *Australian Journal of Politics and History*, vol. 42, no. 1, January 1996, p. 11; J.A. La Nauze, *The Making of the Australian Constitution*, Melbourne University Press, Carlton, Vic., 1972, p. 230.

14 Section 117 of the Constitution which prohibits states from discriminating against residents of other states, on the ground of residency, is the end result of this proposal.

15 Following *Lochner v. New York* 198 US 45 (1905).

In the recess between the first two sessions of the 1897–98 Federal Conventions, Clark (as Tasmanian Attorney-General) was to propose an expanded version of the ‘14th Amendment,’ adding ‘due process’. However, although the Tasmanian Parliament forwarded it to the Convention as a proposed amendment to the Constitution Bill (as it stood in mid-1897), it was not included in the Constitution. The version of the 14th Amendment that found its way from the 1891 constitution bill into the Constitution Bill, up until the final Convention session in 1898 (when it was removed), included only ‘privileges and immunities’ and ‘equal protection’. To sound like a broken record, there was relatively little jurisprudence for either of these clauses in the US in the nineteenth century, and indeed, some of the few cases to be found would not commend themselves to today’s advocates of constitutional rights. I am thinking, for example, of the unsuccessful claim by American suffragists that the denial of the right to vote for women breached the guarantee of ‘privileges and immunities’ of citizenship. This claim, made more than once in the second half of the nineteenth century, was breezily dismissed by the Supreme Court, and American women had to wait until 1920 to achieve what Australian women had gained without a constitutional guarantee, almost two decades earlier—the federal right to vote. Now, none of this is Clark’s fault. But it does put into perspective what he proposed with his section of the 14th Amendment, and what he would have expected it to do. And it also puts into perspective, I think, the claim that his vision was recognisably modern (in a twenty-first century sense), and that he was, in this respect, a prophet whose words fell on deaf or stubborn ears.

Was Clark nevertheless a ‘Founding Father’?

We should not, I respond, use the language of ‘fathers’. This goes to my most significant protest. Even if the 1891 constitution bill had been adopted by the colonial parliaments and enacted by the imperial parliament and had become *the Constitution*, the elevation of its framers as ‘Fathers’ or ‘Founding Fathers’ should be resisted. There are many reasons, not the least being that it is a type of linguistic barbarism to speak of fathers giving birth. (I know you will object that ‘fathers’ is metaphorical. But, I invite you to think about this metaphor and whether it is really what we imagine it to be, nothing more than a universal, economical shorthand for ‘important people’. If it is only that, why not call these important people ‘mothers’? After all, that fits better with the metaphor of giving birth, doesn’t it?)

Mercifully, ‘Father’ is used relatively rarely in the scholarly literature about Clark, so perhaps I do not need to spend too much time rebutting the title. Let us keep it that way. The more significant problem, at least for my protest, is the uncritical veneration of any historical individual or collection of individuals. Veneration of persons leads to veneration of their work (this has happened very strikingly in the US). We lose sight of the collective, contextual effort; we draw a veil over the human-ness of the persons involved, and the work itself becomes all the harder to change. Constitutions written by ‘Founding Fathers’ are accorded a type of sacred authority, as if coming from the hands of inimitable, supernatural persons. By implication, no one today is capable of achieving what these persons achieved. No one should damage their unsurpassable handiwork.

I do not suggest that the men—and women!—who brought about federation should be forgotten or swallowed up in the crowd of history. They are certainly worthy of recognition, gratitude, and not a little awe. But they were human beings, not gods, and nor were they ‘fathers’ who—in an extraordinary, agamogenetic act—managed to give birth.

Conclusion—Clark does deserve recognition

What, then, was Clark's contribution to the Constitution, for which admiration is justified and for which he should be remembered? Sir Henry Parkes, Premier of New South Wales, had instigated the 1890 Conference, but Clark effectively took it over. He dominated the debate, and his insistence that Australia should follow the United States, rather than Canada, in its form of federalism, triumphed (so much so that, having started out by suggesting that an Australian constitution should be modelled on the Canadian, Parkes concluded by claiming, indignantly, that he had never proposed such a thing).

Clark suggested that Australia should copy the US Constitution because he wanted to preserve states' rights, and he admired America's way of doing this. Clark, we note, had not actually visited America before the 1890 Conference; his first visit was to come later that year (one breathes an anachronistic sigh of relief, to know that it lived up to his expectations!). He returned home, ready to commit his enthusiasms to paper at the 1891 Convention. But to what, finally, did he commit?

Clark's attachment to states' rights and the American model extended to equal state representation in the Senate, regardless of population. This arrangement, combined with the almost co-equal powers given to the Australian Senate and the House of Representatives, were the major targets of criticism of the Constitution Bill during the referendum campaigns that followed the bill's completion. The 'anti-Billites' protested that the Constitution was undemocratic. They were unsuccessful, but they had a point. One need not reject the design of the Senate to note that its representational disproportions would never have survived the democratic standards of even the early decades of the twentieth century, let alone today.¹⁶ For good, or ill, Clark persuaded the colonial leaders to accept the American model as their own. In this way, he left his most significant stamp on Australia's history.

Secondly—and let me be more positive on this point—Clark was original in one particular respect that deserves to be better known. He proposed that what he wanted to call the Supreme Court of Australia (which, in the Constitution, became the High Court of Australia) should serve as the final court of appeal for Australian law. The Judicial Committee of the Privy Council was, in Clark's proposed provision, to be deprived of this power of appeal. Ultimately, the provision turned up in the Constitution Bill, albeit a little watered down on the insistence of Britain, but with the important principle retained. In the bulk of constitutional matters, the High Court was always to have the final say. Furthermore, the Commonwealth Parliament was empowered to pass laws closing off appeals to the Privy Council in any remaining matter, a power that it exercised, step by step, over the decades. That Australia has long controlled its own laws is due, in no small part, to Clark's vision.

In this respect, although I resist the language of 'fathers', I will be more than happy to accept what others have cogently proposed: Clark's status as one of the visionaries (if not architects) of the Australian republic, when—as ultimately it must—it finally comes about.

16 At least the Constitution included direct election of the senators, something the 1891 constitution bill did not: in the latter, again, the 1891 bill followed the US Constitution, which did not provide for elected senators until the passage of the 17th Amendment in 1913.

Andrew Inglis Clark: Our Constitution and His Influence

John Williams*

Introduction

When Ronald Williams objected in 2010 to the provision of ‘chaplaincy services’ to his four primary school aged children I doubt he knew that Andrew Inglis Clark would be called in aid of his constitutional argument. *Williams v. Commonwealth*¹ or *School Chaplains Case*, as it is now known, involved not only the politically contentious issue of state funding of religious instruction, but the more fundamental question of the limits of the Commonwealth’s executive power. As Cheryl Saunders noted, the case is the latest in a series of High Court decisions that review the authority of the Commonwealth’s executive power by reference to the ‘text and structure of the written Constitution’.²

The Chief Justice Robert French commenced his 2012 judgment in *Williams* with the following comments:

In 1901, one of the principal architects of the Commonwealth Constitution, Andrew Inglis Clark, said of what he called ‘a truly federal government’:

‘Its essential and distinctive feature is the preservation of the separate existence and corporate life of each of the component States of the Commonwealth, concurrently with the enforcement of all federal laws uniformly in every State as effectually and as unrestrictedly as if the federal government alone possessed legislative and executive power within the territory of each State.’³

Citing Inglis Clark’s *Studies in Australian Constitutional Law*⁴ the Chief Justice considered the drafting history of the executive’s power and the current capacity of government to enter into agreements to provide services within the federal structure. He concluded that:

The Executive has become what has been described as ‘the parliamentary wing of a political party’ which ‘though it does not always control the Senate ... nevertheless dominates the Parliament and directs most exercises of the legislative power.’ However firmly established that system may be, it has not resulted in any constitutional inflation of the scope of executive power, which must still be understood by reference to the ‘truly federal government’ of which Inglis Clark wrote in 1901 and which, along with responsible government, is central to the Constitution.⁵

The purpose of this foray into contemporary constitutional adjudication is to underscore the continued relevance of Andrew Inglis Clark, his draft Constitution and constitutional writings, in our understanding of the fundamental document of Australia’s governance.

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1 *Williams v. Commonwealth* (2012) 248 CLR 156.

2 Cheryl Saunders, ‘The scope of the executive power’, *Papers on Parliament*, vol. 59, April 2013, p. 25.

3 *Williams v. Commonwealth* (2012) 248 CLR 156, 178.

4 A. Inglis Clark, *Studies in Australian Constitutional Law*, Charles F. Maxwell, Melbourne, 1901, pp. 12–13.

5 *Williams v. Commonwealth* (2012) 248 CLR 156, 205–6 (references omitted).

This paper will briefly outline the structure of Andrew Inglis Clark's draft Constitution prepared in advance of the 1891 Convention, its theoretical and practical importance and his ongoing contribution to Australia's constitutional deliberations. It will also attempt to address the question of Inglis Clark's place in Australian constitutional history. Before launching into an account of the constitutional issues it is worth pausing to note some biographical details of this remarkable Tasmanian.

Background

Writing to his intellectual hero Oliver Wendell Holmes Jr in October 1901 Inglis Clark noted that:

I often wish that Australia was as near to California as Massachusetts is to England. I should then see Boston every three or four years, and would probably be preparing now for a journey there early next year. But I must bow to the geographical configuration of the earth and all its consequences and wait in patience until my time to cross the Pacific Ocean again arrives.⁶

While Inglis Clark may have keenly felt the distance from what he perceived to be an intellectual centre, there can be little doubt that he conquered the divide as he engaged with literary and legal trends. The intellectual influences on Inglis Clark were many and in his youth he tested and forged a progressive outlook on social, political and legal issues.

Born in Hobart on 24 February 1848 he was the youngest son of the local engineer Andrew Russell Clark and his wife Ann, née Inglis. After training to join the family business Inglis Clark turned his attention to the study of law.⁷ As his biographers note there is little known about his early education.⁸ The Hobart *Mercury* outlined Inglis Clark's background as part of its discussion of the 1888 Federal Council. Highlighting that he was the 'first native-born' to sit in the Federal Council, it further stated that:

Mr A.I. Clark is one of the many prominent public men who were educated by the Rev. R.D. Poulett-Harris at the High School, Hobart, now Christ's College, where he studied for the A.A. [Associate Arts] degree with a view of adopting the legal profession. An illness which attacked him just prior to the period of his examination caused his removal from school and an interruption in his studies. For the next six years he was engaged in his father's workshops and office, but he never gave up his original intention or his love of study, and was then articled to Mr. Justice Adams, who held the office of Solicitor-General. After serving his articles in Mr. Adams' office he was admitted to practice as a barrister and solicitor in January, 1877. Prior to this he had gained some reputation as a scholar and a clever debater, and within a very short time of his admission was looked upon as a rising man, particularly as he took a lively interest in political questions.⁹

Inglis Clark's entry into politics was not without comment from *The Mercury*. Having been admitted as a lawyer for less than 18 months, Inglis Clark did not have a significant public profile. Notwithstanding that fact *The Mercury* was quick to peddle its conclusions on the man. With the support of the colourful Thomas Reibey, the Leader of the Opposition, Inglis Clark embarked on convincing the electors of Norfolk Plains to put him into the Assembly. The election for the seat came with the retirement on C.H. Bromby. After speculating whether Bromby's resignation had been conveyed to the responsible minister by the Governor, *The Mercury* cautioned the electors that:

6 Clark to Holmes, 26 October 1901, Oliver Wendell Holmes Jr Papers, Harvard Law School Library, Hollis 13193511, General correspondence, file drawers: box 15, folder 12.
7 H. Reynolds, 'Clark, Andrew Inglis (1848–1907)', *Australian Dictionary of Biography*, vol. 3, Melbourne University Press, Carlton, Vic., 1969, pp. 399–401.
8 F.M. Neasey and L.J. Neasey, *Andrew Inglis Clark*, University of Tasmania Law Press, [Hobart], 2001, p. 19.
9 *The Mercury* (Hobart), 16 January 1888, p. 3.

In connection with this vacancy it is understood that Mr. A. I. Clark, barrister, will be a candidate as the nominee of Mr. Reibey. Mr. Clark is a rising young lawyer—very young, some 17 months standing, and is credited with holding such very extreme ultra-republican, if not revolutionary, ideas that we should hardly think he will prove acceptable to the electors of Norfolk Plains. And how he should have found favour with Mr. Reibey is one of the inconsistencies of public men in Tasmania . . . Now he stands sponsor for a candidate who is maligned if his views would not fit him for a place among Communists. It seems a case of the lion and the lamb lying down together.¹⁰

Inglis Clark responded to the claims of *The Mercury* at a public meeting in Longford the next week. Addressing a ‘moderately filled’ Assembly Room, but welcomed with ‘considerable applause’, Inglis Clark rejected the report that he was a ‘nominee of Mr Reibey’ and that he held ‘extreme revolutionary views, and was one who would find his proper place in a band of Communists’.¹¹ Such ideological revelations, he said, were ‘new both to him and his friends’. In his address Inglis Clark outlined some of his basic philosophy regarding government, including his commitment to law reform. He said that he:

believed in the theory of Government which was propounded by the late A. Lincoln—‘Government of the people, for the people, and by the people’. Government moreover should not be for the benefit of any particular class, and that idea would not correspond with the opinion held by Communists.¹²

After a long address, and following questions, Inglis Clark resumed his seat to ‘loud and prolonged applause’. His candidacy presumably was well received as he was elected unopposed. While successful in his first election he did not have an uninterrupted parliamentary career and would have a lengthy period out of parliament.¹³

Inglis Clark became the Attorney-General in 1887 and held the office until October 1897. This was an exciting time for the reform-minded Tasmanian. As Stefan Petrow has outlined he had an ambitious legislative program introducing into parliament 228 bills on a range of subjects.¹⁴ In summing up his significance Petrow concluded that Inglis Clark was ‘foremost among the nineteenth-century Tasmanian politicians who sought to break the conservative and propertied stranglehold on that colony’s politics, and work towards a vision of an independent and progressive federated Australia’.¹⁵

Undoubtedly Inglis Clark was a republican by inclination¹⁶ and inspired by the United States of America and its constitutional system. ‘A country’, to which Alfred Deakin said, ‘in spirit he belonged, whose Constitution he revered and whose great men he idolized’.¹⁷ Inglis Clark’s connection with America was established during trips there and correspondence with some of its leading intellectuals including Oliver Wendell Holmes Jr.

10 *The Mercury* (Hobart), 15 July 1878, p. 2.

11 *The Mercury* (Hobart), 27 July 1878, p. 3.

12 *ibid.*

13 See discussion of the five years out of Parliament in Neasey and Neasey, *op. cit.*, pp. 60–8.

14 Stefan Petrow, ‘Clark as Attorney-General’, in Richard Ely (ed.), *A Living Force: Andrew Inglis Clark and the Ideal of Commonwealth*, Centre for Tasmanian Historical Studies, University of Tasmania, Hobart, 2001, p. 47 and see Appendix pp. 68–70.

15 *ibid.*, p. 67.

16 John M. Williams, ‘“With eyes open”: Andrew Inglis Clark and our republican tradition’, *Federal Law Review*, vol. 23, 1995, p. 149.

17 Alfred Deakin, *The Federal Story: The Inner History of the Federal Cause, 1880–1900*, Robertson & Mullens, Melbourne, 1944, p. 30.

Inglis Clark would leave politics at the end of 1897 and on 1 June 1898 was appointed to the Supreme Court of Tasmania. He was considered for the High Court in 1903 and again in 1906. He was overlooked, in part because of the decision of the Commonwealth Parliament to reduce the size of the original court from five to three, and because of the politics of judicial appointment. Inglis Clark expressed his bitter disappointment to Thomas Bavin in 1906. He said:

I have seen that the House of Representatives has passed the new Judiciary Bill with a provision for the appointment of two additional judges of the High Court. At one time I would have believed that the enactment of such a law with Deakin for Prime Minister of the Commonwealth meant the representation of Tasmania in the composition of the enlarged Court. But I have an impression now that all federal positions have become the subject of political bargaining between the several parties and sections represented in the federal parliament. I am very sorry to come to this conclusion, but I must confess that I have become disillusioned about the higher and more patriotic level of political life and conduct which I expected to see under federation. If I were free to ventilate my opinions in the press I would deplore the prospect of making the seats on the Bench of the High Court the rewards for political services ...¹⁸

The 1906 appointments were Isaac Isaacs and H.B. Higgins. Australia would not have the benefit of Inglis Clark's views on the Constitution as a member of the High Court. However, he was an early author on the meaning of the Constitution, and it is these views that have been cited with approval by the High Court and legal scholars in recent times. It is this that has raised his status amongst the framers.

Australian federation

While Inglis Clark made a significant contribution to Tasmanian politics and law it is his role on the national stage, and in particular the federal movement, for which he is largely remembered. Inglis Clark was a firm believer in the federation of the Australian colonies. However, this was not to be a union at any price. He was, for instance, determined that Tasmania should not subject itself to any financial disadvantage. Thus the question of the Commonwealth takeover of the debts of the states was for Inglis Clark an essential component in the granting of exclusive control of custom and excise duties. It was his dissatisfaction with the ultimate fiscal arrangements that caused him to qualify his support for the final Constitution Bill.¹⁹

It is worth considering briefly some of Inglis Clark's contributions to the federal meetings. At the Melbourne 1890 national conference, called to discuss whether the time was indeed 'ripe' to advance the federation of the colonies, Inglis Clark played a significant role in directing the discussion as to the type of federal model. Unlike many delegates Inglis Clark was willing to engage in detailed discussion as to the merits of the Canadian and American federal systems. He quickly nailed his colours to the American alternative. As he told delegates:

The question of the Canadian Constitution has been several times mentioned in the course of our proceedings, and its difference from that of the United States has been somewhat touched upon. On this point I would say that I think it would be well were each of us to state more or less precisely what kind of confederation we would individually advocate, and also what kind of confederation each colony represented by us would respectively

18 Clark to Bavin, 26 July 1906, Sir Thomas Bavin Papers, National Library of Australia, MS 560/3/43.

19 F. Neasey, 'Clark and federation after 1891', in Ely, op. cit., pp. 258–9.

be satisfied with. For my part I would prefer the lines of the American Union to those of the Dominion of Canada. In fact, I regard the Dominion of Canada as an instance of amalgamation rather than of federation, and I am convinced that the different Australian Colonies do not want absolute amalgamation. What they want is federation in the true sense of the word.²⁰

Lest it be thought that Inglis Clark was a constitutional technocrat it is important to acknowledge that he, like many of the framers, highlighted the sentimental aspects of the federal movement. As one of the few 'native-born', Inglis Clark was inspired by the development of a national sentiment that drove the union of the colonies. In doing so he inevitably pointed to similar independence and autonomy in Italy and the United States. Reflecting on those developments he said that:

It is political autonomy which we are now asking for Australia as a whole. We have political autonomy in the several colonies, but we have come to the conclusion, I believe, upon the sentimental side of the question, that the several colonies are not large enough in their territory and population to produce that national life which we believe can be produced upon the wider field of a United Australia. We are asking now for the political autonomy of a United Australia, in order that that national life, which we believe will exist under those conditions, may be produced and may bear the best fruits. I believe this national life can exist without political independence, and without political autonomy, as a germ, or even as more than a germ. But it will never be satisfied, it will never do that which it ought to do, until it obtains political autonomy.²¹

Thus with Inglis Clark there is a combination of the sentimental and the technical. He, like many of the framers, had to negotiate the difficult terrain of maintaining the inspiration behind the union, while distilling to a written form the details of an agreement. By necessity the details obscure the sentimental.

The decision to hold a second Constitutional Convention in Sydney in 1891 prompted Inglis Clark to make his major contribution to the process of drafting the Constitution. He arrived again prepared to advance the American approach to federalism and the judicature. Prior to the Convention he had circulated a draft constitution bill and memorandum to the Tasmanian delegates, as well as to Sir Henry Parkes,²² George Higinbotham,²³ Edmund Barton²⁴ and perhaps others he knew for their consideration.²⁵ Inglis Clark had opened up communications with Barton two years before over the need for New South Wales to have greater involvement in the Federal Council. Writing in 1889 he shrewdly determined that Barton would be critical to the federal movement:

You will remember that I told you how Parkes treated me in reference to the question [of NSW involvement in the Federal Council] and you will therefore immediately understand why I do not open communication with him upon it. But I presume that his day of authority and obstruction will come to an end like that of other Ministers, and as I have no doubt that you will then be in a position to effectually assist the cause of Australasian federation ...²⁶

20 *Official Record of the Proceedings and Debates of the Australasian Federation Conference*, Melbourne, 12 February 1890, Government Printer, Melbourne, 1890, p. 33.

21 *ibid.*, p. 36.

22 Parkes to Clark, 18 February 1891, Sir Henry Parkes papers, Mitchell Library, A879 vol. 29, p. 143.

23 Higinbotham to Clark, 8 March 1891, A.I. Clark papers, University of Tasmania Library—Special and Rare Materials Collection, C4/C206.

24 Clark to Barton, 12 February 1891, Sir Edmund Barton Papers, Mitchell Library, Q 342.901BB.

25 J.A. La Nauze, *The Making of the Australian Constitution*, Melbourne University Press, Carlton, Vic., 1972, p. 24.

26 Clark to Barton, 19 June 1889, Sir Edmund Barton Papers, National Library of Australia, MS 51/1/147.

Parkes' response to receiving Inglis Clark's draft Constitution in 1890 would have confirmed many of the Tasmanian's fears about his engagement in the process. Parkes wrote:

I am really much obliged by your courtesy in sending me your draft Constitution Bill. I fear I cannot find time to look at it just now, and I must confess I have some dread of literary Constitutions.²⁷

In Inglis Clark the federal movement not only had a scholar of constitutional law but also an individual deeply committed to the creation of the nation. In the next section of this paper I will briefly consider some features of his Constitution.

The 1891 draft Constitution

The influence Inglis Clark has had on the drafting of the Australian Constitution is multifaceted. It covers both the content and the structure of the current Constitution as well as its interpretation. Beyond this it is interesting to review the constitutional phrases or areas on regulation that he added or omitted when drafting his Constitution.

Inglis Clark's draft Constitution Bill has been the subject of much academic consideration and its influence over the ultimate structure of the Australian Constitution has been confirmed.²⁸ As F.M. Neasey has demonstrated only eight of Inglis Clark's ninety-six clauses failed to find their way into the final Australian Constitution, a testimony to his influence on the process.²⁹ Two initial points may be made about Inglis Clark's draft Constitution.

First, it is clear that it was heavily influenced by the American Constitution. As is well known, Inglis Clark was arguably the leading Australian expert on American jurisprudence at the time of federation. Writing to Barton during a visit to Tasmania in 1893 Bernhard Wise could give firsthand testimony to Inglis Clark's study of the American Constitution. As he said:

For the last three weeks we've been at a farm house half way up Mt Wellington where I have a shelf full of Clark's American constitutional literature. I hope the result of the shifting may be usefully felt when we have to discuss the Bill in detail.³⁰

It should be remembered that the question of whether the American design or the Canadian template was to be the preferred approach was not settled as the delegates assembled in Sydney in 1891. By advancing the American Constitution in the form of his draft Constitution Inglis Clark was making a bold attempt to shape the agenda of the Convention. Undoubtedly, following his lead Inglis Clark's Constitution was influential.

A second point can be made about the basic content and style of his Constitution. It is easy to point to the document and dismiss it as a mere 'cut and paste' from known provisions. While there is some

27 Parkes to Clark, 18 February 1891, Parkes papers, A879 vol. 29, p. 143.

28 John Reynolds, 'A.I. Clark's American sympathies and his influence on Australian federation', *Australian Law Journal*, vol. 32, July 1958, pp. 62–75; F.M. Neasey, 'Andrew Inglis Clark senior and Australian federation', *Australian Journal of Politics and History*, vol. 15, no. 2, 1969; James Thomson, 'Andrew Inglis Clark and Australian constitutional law', in Ely, op. cit., pp. 59–81; A.C. Castles, 'Andrew Inglis Clark and the American constitutional system', in Marcus Haward and James Warden (eds), *An Australian Democrat: The Life, Work and Consequences of Andrew Inglis Clark*, Centre for Tasmanian Historical Studies, University of Tasmania, Hobart, 1995, pp. 15–18; and Williams, '“With eyes open”', op. cit.

29 Neasey, 'Andrew Inglis Clark and Australian federation', op. cit. pp. 7–8.

30 Wise to Barton, 13 January 1893, Barton Papers, National Library of Australia, MS 51/1/190.

validity in such observations it does tend to overlook the fact that there are very few variations to be added once the basic structure is agreed. So for instance, there was always going to be parts dealing with the executive, the parliament and the judiciary in any Australian constitution. The fact that Inglis Clark modelled his on the American Constitution is no surprise once that basic decision was made. Issues of the respective legislative powers, the role of the states, the power of amendment and financial questions were the detail of the debate that the framers were about to address in 1891. Moreover, a basic jurisprudential point which Inglis Clark would have been aware of was the fact that in importing the language of the United States Constitution the jurisprudence of the Supreme Court would follow. In the preface to the second edition of his *Studies in Australian Constitutional Law*, Inglis Clark made the point that:

When the first edition of this book was published there were not any decisions of the High Court of Australia in existence; and decisions of the American Courts upon particular questions that had arisen under the Constitution of the United States could not be quoted as more authoritative than enunciations of doctrines and principles which appeared to the author to be equally applicable to the interpretation and exposition of particular provisions and features of the Constitution of Australia.³¹

Inglis Clark proceeds to note happily that the High Court had now ‘authoritatively declared’ that the principles of the United States Supreme Court ‘are equally applicable to the interpretation of the Constitution of the Commonwealth of Australia’.

In terms of style there can be little argument that Inglis Clark’s Constitution is not as crisp or clean as Kingston’s 1891 draft Constitution. This is not so much a reflection on Inglis Clark, but an acknowledgement of the talents of Charles Kingston and Sir Samuel Griffith as drafters. They were direct and economical with words. The same cannot always be said of Inglis Clark.

With these preliminary observations I would now wish to turn to the Inglis Clark Constitution.³² The draft 1891 Constitution Bill is divided into seven parts with 96 clauses. It was a combination of his own drafting, and adaptations of the British North America Act of 1867 and 1871 as well as the United States Constitution. Obviously the temptation to review *all* 96 clauses must be resisted for this publication. There are some clauses, and omissions, that can be highlighted in this brief survey.

In terms of the basic structure Inglis Clark divided the Constitution into the following parts: i.—Preliminary; ii.—Formation of the Federal Dominion of Australasia; iii.—Federal Executive Power; iv.—Federal Parliament; v.—Federal Judicatory; vi.—Provincial Constitutions and vii.—Miscellaneous.

The new union would be known as the ‘Federal Dominion of Australasia’ reflecting its constitutional status and arguably keeping open the prospect of New Zealand joining the other Australian colonies (and the ‘Province of South Australia’).

In terms of the Federal Parliament there are some basic things to note. Each province would have six senators ‘who shall be chosen by the Houses of the Parliament of the Province for a term of Nine years’ (clause 18). The fact that they were not elected by the people reflected the timing of the federation movement. After 1895, with the election of the next convention, the appointment of senators would

31 A. Inglis Clark, *Studies in Australian Constitutional Law*, Charles F. Maxwell, Melbourne, 1905, Preface.

32 Inglis Clark’s draft Constitution is reproduced in John M. Williams, *The Australian Constitution: A Documentary History*, Melbourne University Press, Carlton, Vic., 2005.

be removed as the democratic sentiment was rising. Senators would, after the first sitting, be divided into three classes who would, by rotation, retire every three years. The House of Representatives would have terms of three years (clause 29) with the initial parliament having 158 members (clause 30).

The Federal Parliament would have legislative power to deal with the array of issues that would confront the new nation (clause 45). As well as those familiar issues of taxation, defence and weights and measures the parliament would have power:

- viii. To define and punish Piracies and Felonies on the high seas, and offences against the Laws of Nations:
- xix. To provide for the enforcement of Criminal Process beyond the limits of the Province in which it is issued, and the extradition of offenders, including deserters of wives and children, and deserters from the Imperial Naval and Military Forces:

While some of these matters might have been covered by other powers (such as defence) these examples demonstrate the details incorporated into Inglis Clark's draft Constitution.

Exclusive to the Federal Parliament was the capacity to make laws for the seat of government so long as such area was 'not exceeding Ten miles square' (clause 45(XXIX)). The size of the future capital—consistent with the Washington model—would have been much smaller if Inglis Clark had been followed on this point.

The contribution for which Inglis Clark is best remembered is the judicial clauses. This was especially the case after the 1891 Drafting Committee removed the constitutional entrenchment. For Inglis Clark the 'Judicial power of the Federal Dominion of Australasia shall be vested in one Supreme Court ...' (clause 59). As with today's High Court, the 'Supreme Court' would have both an original jurisdiction and an appellant jurisdiction.

In terms of trial by jury Inglis Clark provided in clause 65 that:

The trial of all crimes cognisable by any Court established under the authority of this Act shall be by Jury, and every such trial shall be held in the Province where the crime has been committed, and when not committed within any Province the trial shall be held at such place or places as the Federal Parliament may by law direct.

The revision by future drafters of the phrase 'all crimes cognisable by any Court' to merely a guarantee for 'trial on indictment' would diminish the section of much of its operation.³³ As Chief Justice Barwick would later note when discussing the final section 80, 'What might have been thought to be a great constitutional guarantee has been discovered to be a mere procedural provision'.³⁴

As discussed Inglis Clark dedicated a part of his draft to the 'provincial constitutions'. This would be stripped out during the revision process in 1891. Of interest is his democratic approach to the selection of the Governor. Under Inglis Clark's model (clause 67):

33 *R v. Federal Court of Bankruptcy; ex p. Lowenstein* (1938) 59 CLR 556; *Spratt v. Hermes* (1965) 114 CLR 226; *Zarb v. Kennedy* (1968) 121 CLR 283; *Li Chia Hsing v. Rankin* (1978) 141 CLR 182.

34 *Spratt v. Hermes* (1965) 114 CLR 226, 244.

In each Province of the Federal Dominion of Australasia there shall be a Governor, who shall be chosen by the Houses of the Parliament of the Province for a period of Six years.

Keeping with Inglis Clark's views on religious tolerance he would have extended the prohibition on the regulation of religion to the states. In clause 81 he states that: 'No Province shall make any law prohibiting the free exercise of any religion'.

Similarly in the First Schedule to his Constitution he made provision only for an Oath of Allegiance. Rather than calling on any deity Inglis Clark merely required that:

I, *A.B.*, do swear that I will be faithful and bear true Allegiance to Her Majesty Queen VICTORIA, Her Heirs and Successors, according to Law.

Similarly the Preamble of Inglis Clark's draft Constitution did not call upon the 'blessing of Almighty God'. Mindful of his concerns for the financial situation of the colonies he included clause 83 that stated that: 'The Federal Dominion shall be liable for the debts and liabilities of each Colony existing at the date of the federation'.

There are many counterfactual questions to be asked with respect to Inglis Clark's Constitution. Perhaps the most intriguing would be the amending provision. Australia has famously been described by Geoffrey Sawer as constitutionally speaking to be a 'frozen continent'.³⁵ The record of unsuccessful constitutional amendment has informed this description. The amending provision suggested by Inglis Clark was in clause 93. It required that:

This Act may at any time be amended by the Federal Parliament, but no amendment made by the Federal Parliament shall have any force or effect until it has been confirmed by the Parliaments of not less than two-thirds of the Provinces included in the Federal Dominion of Australasia at the time such Amendment is made.

Undoubtedly this formula for constitutional amendment lacks the democratic authority of section 128 which requires the electors to endorse any proposed change. However, it is arguable that many technical amendments to the Constitution may have fared better under Inglis Clark's amending provision. However, other more fundamental changes—such as becoming a republic—would obviously require the direct involvement of the people to have legitimacy.

There are two additional areas of Inglis Clark's constitutional deliberations that warrant discussion given their ongoing interest. The first relates to the attempt to include an amendment to provide greater protection of rights in the Constitution. As I have written elsewhere Inglis Clark's belief in rights protection prompted him to suggest a version of the 14th Amendment.³⁶ This was moved through the Tasmanian Parliament to be considered by the 1898 Convention. It read:

The citizens of each state, and all other persons owing allegiance to the Queen and residing in any territory of the Commonwealth, shall be citizens of the Commonwealth, and shall be entitled to all the privileges and immunities of citizens of the Commonwealth in the several states; and a state shall not make or enforce any law abridging any privilege or

35 G. Sawer, *Australian Federalism in the Courts*, Melbourne University Press, [Melbourne, 1967], p. 208.

36 Williams, ' "With eyes open" ', op. cit. and John M. Williams, 'Race, citizenship and the formation of the Australian Constitution: Andrew Inglis Clark and the "14th Amendment" ', *Australian Journal of Politics and History*, vol. 42, no. 1, January 1996.

immunity of citizens of the Commonwealth, nor shall a state deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of its laws.³⁷

Inglis Clark explained his interest in the provision in an accompanying memorandum that he circulated amongst some delegates to the 1898 Convention. He wrote to Wise to further emphasise the need to include the proposed amendment in the final Constitution. As he stated:

I have been consulting some additional authorities upon the scope and utility of the 14th amendment of the Constitution of the United States and they have confirmed me in my opinion as to the desirability of adopting the whole of the amendment which was carried on my motion in our House of Assembly. If the Constitution of the Commonwealth does not provide for a national citizenship and for equality of privilege and immunities for every citizen in each of the States the door will be left open for a large amount of discriminatory legislation which the 2nd section of Article IV and the 14th Amendment of the Constitution of the United States have conjointly frustrated in some of the American States.³⁸

Undoubtedly as a disciple of the rule of the law, Inglis Clark would have joined with E.P. Thomson in describing its role as an ‘unqualified human good’.³⁹ One can only speculate what he would have done with this section if he had been appointed to the High Court of Australia in 1903.

A second significant issue that Inglis Clark considered was the so-called ‘rivers question’. As is well known the 1890s constitutional conventions debated at length the question of the control of interstate rivers. This pitted the South Australian delegation against its upstream colleagues. It has been estimated that a fifth of the Melbourne 1898 Convention was devoted to attempting to solve the seemingly insoluble question.⁴⁰ In his 1891 draft Constitution Inglis Clark had not considered the question of the control of the Murray River. This is to be contrasted with Charles Cameron Kingston who, as a South Australian, was well aware of the issue. Kingston would have given the Federal Parliament the capacity: ‘To fix the right of any colonies with reference to the user of the water of any river or stream’.⁴¹

Inglis Clark watched the debate over interstate rivers from afar having decided not to be a delegate to the 1897–98 conventions. From Tasmania he made a number of interventions dispatching legal opinions on the matter. The critical question for Inglis Clark was the effect of federation. Prior to federation the upstream and downstream colonies had detached legal relations. An upstream colony could enforce its right to water at the cost of its downstream neighbour. However, for Inglis Clark the federation of the colonies under the Constitution would change this situation. As he stated:

Under the Constitution of the Commonwealth all the federated colonies will be constituent parts of the same nation, and any act on the part of the Legislature or citizens of one

37 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 8 February 1898, Legal Books, Sydney, 1986, vol. 4, p. 667.

38 Clark to Wise, 13 February 1898, B.R. Wise Papers, National Library of Australia, MS 1708.

39 As Thompson famously declared: ‘But the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power’s all-intrusive claims, seems to me to be an unqualified human good’. E.P. Thompson, *Whigs and Hunters: The Origins of the Black Act*, Allen Lane, London, 1975, p. 266.

40 N. Kelly, ‘A bridge? The troubled history of inter-state water resources and constitutional limitations on state water use’, *University of New South Wales Law Journal*, vol. 30, no. 3, 2007, p. 644. For a discussing of recent issues relating to section 100 and the river question see John M. Williams and Adam Webster, ‘Section 100 and state water rights’, *Public Law Review*, vol. 21, no. 4, 2010.

41 John M. Williams, *The Australian Constitution*, op. cit., p. 130.

State which would be a ground for national complaint on the part of another State, and of ultimate war if the two States were separate and independent nations, would be a violation of the Constitution of the Commonwealth, and would therefore be a matter for redress by the Supreme Court of the Commonwealth.⁴²

So for Inglis Clark the price of the union for all colonies was that they lost their right to unilateral actions that would impair the continued existence of another state. Of note is how Inglis Clark approached the problem by recourse to fundamental principles of federalism. Moreover, Inglis Clark saw the establishment of the High Court as essential to the resolution of any interstate dispute as to access to the resources of the Murray River. As to the content of the right that the High Court might apply Inglis Clark settled upon the common law riparian rights. As he stated:

The riparian rights of the owners of land abutting on the River Murray in the colony of South Australia are rights of property in South Australia, and if those rights shall be infringed by any private person or any public body professing to act under colour of the authority of an Act of the Legislature of New South Wales, when both colonies are constituent parts of the Commonwealth of Australia, the citizen of South Australia whose riparian right has been violated will have a remedy in the federal courts of the Commonwealth, either for damages or for a writ of injunction to restrain the continuance of the injury, or for both.⁴³

In his 1901 *Studies in Australian Constitutional Law* Inglis Clark dedicated a chapter to the ‘Federal Control of the Rivers of the Commonwealth’.⁴⁴ While focusing on the navigability of the interstate rivers he again restated his view as to the capacity of the Commonwealth to regulate the rivers. Following the United States precedent he concluded that the Constitution was not so restrictive so as to allow one state to exercise its unrestrained rights against the residents of *all* the states.

The ongoing concern about the allocation of water within the Murray–Darling Basin is something that, without a comprehensive agreement between the states and irrigators, will find its way into the High Court. Inglis Clark will no doubt again be consulted.

Inglis Clark’s legacy: Asking the right question

Inglis Clark’s place in Australian federation and constitutional history has been mixed over the century. Arguably his reputation suffered, like many of those who attended the 1890s conventions, by not publishing an account of his role in the venture. As Fin Crisp has observed a number of federation figures did not obtain the notoriety they deserved because the early federation historians, such as Deakin, Robert Garran and Wise, systematically diminished the role of those who were other than the ‘ultra-federalists’.⁴⁵ Inglis Clark remained greatly concerned that the Constitution did not provide enough support for the economic viability of the smaller colonies. He was thus placed amongst the doubters.

However, his reputation as a significant figure in Australian federation history has largely been revived by the diligent work of mainly Tasmanian historians and constitutional lawyers.⁴⁶ J.A. La Nauze, in 1972 was able to include Inglis Clark and Samuel Griffith as ‘honorary members of the second Convention’.⁴⁷

42 Andrew Inglis Clark, *Notes on the Proposal to Provide the Constitution of the Commonwealth of Australia for the Regulation of the Use of the Waters of the Murray River and its Tributaries*, 1 February 1898, reproduced in John M. Williams, *The Australian Constitution*, op. cit., p. 844.

43 *ibid.*, pp. 844–5.

44 Clark, *Studies in Australian Constitutional Law* (1901), op. cit., pp. 103–17.

45 L.F. Crisp, *Federation Fathers*, Melbourne University Press, Carlton, Vic., 1990, pp. 2–5.

46 In particular the work of Richard Ely, Marcus Howard, Frank and Lawrence Neasey, Henry Reynolds and James Warden.

47 La Nauze, op. cit., p. 276.

The recent interest in Inglis Clark stems from his relevance to contemporary debates. His perceived republican sympathies and discussion of constitutional interpretative methods has meant that his scholarship can be analysed in ways that are directly relevant to Australia. When Justice Deane famously described Inglis Clark as ‘the primary architect of our Constitution’ it was in the context of a sophisticated debate about how the Australian Constitution should be interpreted to meet the challenges of modern Australia. Justice Deane’s pronouncement was not within the pages of a learned historical journal, rather it was the *Commonwealth Law Reports* and in a judgment that turned on the interpretation of the Constitution. He was advancing his jurisprudential approach to the Constitution. As he stated:

The present legitimacy of the Constitution as the compact and highest law of our nation lies exclusively in the original adoption (by referenda) and subsequent maintenance (by acquiescence) of its provisions by the people. While they remain unaltered, it is the duty of the courts to observe and apply those provisions, including the implications which are legitimately to be drawn from their express terms or from the fundamental doctrines which they incorporate and implement ... Moreover, to construe the Constitution on the basis that the dead hands of those who framed it reached from their graves to negate or constrict the natural implications of its express provisions or fundamental doctrines would deprive what was intended to be a living instrument of its vitality and its adaptability to serve succeeding generations. Indeed, those errors of such a dead hands theory of construction were made plain by Inglis Clark in explaining why the Constitution was ‘to be construed as having reference to varying circumstances and events’.⁴⁸

Justice Deane reached back to Inglis Clark because his scholarship was relevant to a contemporary question. Similarly Justice Kirby, who was no friend of constitutional interpretation based on the original intentions of the framers, likewise could embrace Inglis Clark. For Justice Kirby, Inglis Clark offered an insight into how changes in meaning can be explained. As he concluded:

When an old line of authority is overturned, this may sometimes be explained not by reference to an error in the perception of the Justices who propounded that authority at the time of its invention and first applications, but rather by the fact that the eyes of new generations of Australians inevitably see the unchanged language in a different light. The words remain the same. The meaning and content of the words take colour from the circumstances in which the words must be understood and to which they must be applied.⁴⁹

Thus Inglis Clark’s relevance is not as some long since dead framer, but as an important standard bearer in a fundamental debate about how our Constitution is to be interpreted. This question is as relevant now as it was when Inglis Clark first considered it in 1901.

Whether Inglis Clark was a significant framer in the 1890s is really asking the wrong question. While understanding the man and his influence on the drafting of the Constitution after 1891 is an interesting academic exercise it only provides a limited account to why he is important for contemporary Australians. The issue that places Inglis Clark at the forefront of the framers of the Constitution is his continued relevance to our understanding of the fundamental document of the polity.

48 *Theophanous v. Herald & Weekly Time Ltd* (1993) 182 CLR 102, 171 (Deane J).

49 Michael Kirby, ‘Constitutional interpretation and original intent: a form of ancestor worship?’, *Melbourne University Law Review*, vol. 24, no. 1, 2000, pp. 11–12.

Conclusion

How then do we understand Inglis Clark and his legacy? There is always a temptation to succumb to absolutes when reflecting on the life. Complexity is overlooked in favour of strong conclusions. Undoubtedly Inglis Clark was not without his limitations.

Yet today his legacy is assured. It is found in the ongoing interest in his desire for a dynamic federation. It is to be found in his scholarship that speaks to new generations of lawyers and historians. Inglis Clark was an individual who sought to improve the communities within which he lived and imagined a new country that was his own. In a draft essay entitled 'Machinery and Ideals in Politics' Inglis Clark stated that:

We do not habitually recognise the existence of any connection between things which are usually described as mechanical and those which we designate as ideal.⁵⁰

We are fortunate that Inglis Clark strove to implement in very practical ways his ideals.

50 Andrew Inglis Clark, 'Machinery and ideals in politics', Clark Papers, University of Tasmania Library—Special and Rare Materials Collection, C4/F24.

Panel Discussion

CHAIR (Ms JACOBS) — We are now up to the question-and-answer session. I know that we want it to be free-flowing and spontaneous, so I hope that you all have those questions prepared.

QUESTION — On the agenda in the forthcoming parliament will be the recognition of Indigenous Australians in the Constitution. There have been lots of clues about the early thought, and particularly from Inglis Clark, about those things in that last discussion about citizens and equality of rights. We do understand at that time the Aboriginal people weren't being contemplated as part of the citizenry of Australia, but are there any clues or directions in any of that earlier thinking that perhaps was left out that might provide some direction for the debate that is ahead of us?

Prof. WILLIAMS — The debate was premised on the notion that this was a dying people, and there was very little to be said in the Convention. In fact, in 1890 the New Zealand delegates were saying that they had sort of solved the problem, and I do not think they were looking at it in a positive light either. So it really does not get much of a mention. The whole race power is a very late entry into the constitutional lines. Samuel Griffith pushes it reasonably heavily there for a while.

In the 14th Amendment, they are mainly concerned about what Isaac Isaacs described as 'undesirable races'. So Inglis Clark had to respond heavily to Isaacs in his 14th Amendment debate when he was putting it forward. Isaacs is saying, 'If we put this in, we will have to treat subjects of the Queen'—who, of course, as we know, may not have been like ourselves at that stage. Subjects of the Queen was used to describe Chinamen—

Prof. LAKE — And Indians.

Prof. WILLIAMS — Indians—Hindus get a hard run too. Inglis Clark responds to that by saying, 'Look, we could draft some amendments to this if we needed to', but he was not convinced we needed to. It is really interesting to see Isaacs in this debate. He cites the US cases saying that laundry licences could not be stopped from being given to Chinese if you have the 14th Amendment. So, I think, no to the question on Indigenous questions, but Inglis Clark was not, I think, overly convinced about the argument. But, if it had to be dealt with, he felt there was a way around it. But the real concern was, of course, he wanted not subjects; he wanted citizenship.

QUESTION — If that 14th Amendment had become operative, what would have been the consequences of the kind of legislation that has just been passed in Queensland as far as the bikers are concerned? They seem, certainly to me, to be second-class citizens of a different kind.

Prof. WILLIAMS — It is very interesting in this country how we have got our rights. It has really been by a judicial process, apart from the legislative processes, as we know. The High Court in many ways has had to turn itself inside out with its idea of the separation of powers. It has been giving us those things—the so-called Kable doctrine, where what courts can do and what you can make courts do as it infringes their separation of powers. That is how we have got to most of the legislation about bikers being struck down, because they have somehow—the state legislatures—tried to cloak the whole activity by giving it to a court, and the courts have said, 'Look, this is not our role; we are not going to do this'.

The 14th Amendment, if it got in, because of its due process nature saying that you cannot pass a law that removes due process: to be heard, all the *ex parte* events—activities being given without even

your presence known, orders made to tear down and seize without you being there—they would be real problems. So we have slightly got to that way, but not through an express statement. It is by an implication about how judicial power can be exercised.

CHAIR — I wonder too about how we can make judgements on Clark's own intentions for the Constitution and this whole notion of interpretative law. Was that a notion that was prominent among lawmakers at the time—that we would have black-letter law or an interpretive vision?

Prof. WILLIAMS — Not really. There was an emergence with Oliver Wendell Holmes. He wrote a book called *The Common Law*, where he tried to unpack the idea that there is judicial choice and how you make a choice. So, for instance, that is where I think Inglis Clark comes in. Look, there is a wonderful irony here with a man who says, 'How do you interpret the Constitution?' What does he say? 'Don't ask me'. He says, 'Don't ask those who gave it; the Constitution is in your presence and your problem'. So let us take, just as an example, the word marriage—for no particular reason. What does the word marriage mean? Well, in 1901 we are pretty clear what the word marriage meant. It was a union between a man and a woman, and that is, I assume, what the framers meant; we could find legislation that was influencing them. That is what it would be.

Today, that word may mean a union of two people. We do not know what the answer is. The Constitution has one word—'marriage'—that's it. The High Court is going to have to turn its mind to what that word means today and, in coming to that, they could ask what the framers thought in 1901 or they could say, 'Has that word moved with the times?' I am pretty sure I know what Andrew Inglis Clark would say.

Prof. LAKE — Can I say something? *The Common Law*, which I talked about in my paper this morning, was so important to Andrew Inglis Clark and it was precisely that understanding that it was a living force, that law had to adapt to current circumstances. What is really interesting about the intellectual exchange is that not only does Andrew Inglis Clark seize on Wendell Holmes' classic textbook, as he calls it, *The Common Law*, but when H.B. Higgins goes to the United States a couple of decades later he is received as a celebrity because he has become a leader in developing a 'new province for law and order', in framing a jurisprudence, as they said, to meet the industrial needs of the time. It is that emphasis on meeting the industrial and social needs of the time that led US jurists to acclaim Higgins' work as so innovative and so important. We need to locate Australian jurisprudence historically within that larger debate.

Prof. WILLIAMS — The jurisprudence was crushed in a sense by Owen Dixon's intellectual prominence during the 1940s and 50s. There was just nowhere else: you were either with Dixon or you were not, and that was it. The re-emergence of Clark—and this is why he has emerged—is because a number of High Court judges have found Clark as a way of giving some tools towards how to interpret the Constitution.

Prof. LAKE — I thought your point towards the end was fantastic, that Clark's significance was as a theorist of the Constitution, as a theorist of constitutional law, rather than as part of a fairly arid debate about national founders.

Dr BANNON — I will just add something quickly apropos appointments to the High Court. This is a very interesting discussion. What would Clark have been like as a High Court judge? He was obviously very fitted and skilled and qualified to do it. He was duded twice, and so was Sir John Downer.

Just to briefly sketch, the concept of the High Court was that there were to be five places. Remember, in Charles Kingston's draft Constitution he kept emphasising that there would be five drawn from the five states, but there were six with Western Australia. But Western Australia's judiciary was regarded as not developed enough or mature to provide a judge and there were no great jurists from there. So you have five and each of the colonies could have been represented in that first federal court—and they were on a promise. Downer was certainly on a promise from Edmund Barton, his great mate, the Prime Minister at the time: 'You will be on'. Isaacs thought that he was going to get there but he did not realise how much he annoyed Barton. Then the Act was changed to reduce the numbers from five to three, and suddenly there was a problem. Two had to miss out. Downer was assured by Barton—'that's all right, you're safe; we'll get rid of Isaacs'. And Clark—'you'll be okay too'. So both of them confidently expected to be appointed.

Then Barton decided he was a bit tired of being Prime Minister and wanted to get out, so he became one of the appointees. Barton, Griffith and Richard O'Connor—two New South Welshmen—became it. Downer would not speak to Barton for another five or six years and boycotted receptions of the High Court in Adelaide through that period. Clark may have sulked but he did not do anything. In 1905 they decided, 'Yes, we've got to increase the court by two more places. We probably have to have a Victorian on so Isaacs might get his opportunity'. But there was also Clark and Downer who have been waiting in the wings. Deakin could not really stand Downer and he did not get on with Clark. Downer thought Alfred Deakin had promised him but he did not and in the end Downer missed out.

But Clark had definitely been promised by Deakin. So there is the second casualty. Clark never spoke to Deakin again after being duded in this way. We were robbed of two very interesting judges, both of whom had been involved in detailed drafting of the Constitution. How that five-person bench would have interpreted through the next decade is a very interesting discussion but it would have been very much more fruitful in terms of this 'realist' approach, I suspect.

CHAIR — I want to sneak in another question on the notion of what kind of vision of the law Clark had. Let me throw to you, as a South Australian, the question of the New South Wales view of federation, which I think Rosemary read in Helen's paper, and perhaps the Victorian one, too. How significant is it, when we are thinking about these questions, that Clark was Tasmanian? How much did that influence his view of law?

Dr BANNON — It is very important. You just have to go 100 kilometres outside Sydney or Melbourne or the Canberra axis and you have a very different view of what the federation of Australia is, and it is not fanciful. We keep voting no in referendums in large part because the outer states—and the further you are away from Canberra, the bigger the no vote is—are suspicious of things emanating from and generating from here. An embracive approach to referendums might in fact produce different results. So the concept of the federation that Clark had, that Kingston and others had, was very different. It was interesting that with that court, as I have just illustrated—two New South Welshman and a Queenslander—we were never in the fight. The next two were both Victorians—forget about the peripheral states. South Australia to this day, 2013, has had some great jurists but never one member of the High Court of Australia. What a scandal.

QUESTION — It seems from what has been said today that, because we cannot predict the future with great confidence, at least Clark among the founders and possibly others thought that legislators should be able to adjust to the times and that people should be able to adjust to the times, but this has been very difficult with referendums being declined every now and again. One wonders whether Jefferson's idea that a constitution should last for 20 years or less might have been right.

CHAIR — I find very interesting the notion that Clark was recognisably modern. I wonder, too, whether that was the same thing as being recognisably American, what kind of shared territory there was there.

Dr LAING — I think Helen's paper was suggesting that it is a mistake to put a modern framework over Clark's views and that really what we are doing is a wish fulfilment: we think he was a great supporter of human rights and if only everyone else had listened to the way he wanted to do it we would have had a bill of rights in the Constitution. I think she was casting doubt on that.

Prof. LAKE — I think it is an odd conception in this context, 'modern'. What we were talking about before was that there was a receptiveness to a certain approach to law and interpreting the Constitution that made Andrew Inglis Clark responsive to Oliver Wendell Holmes' approach, but that that in turn developed in Australia in a quite innovative way, that we have also completely forgotten. The esteem in which H.B. Higgins was held in the United States was quite amazing, but we have no memory of that. I think we are talking about different approaches to law. Owen Dixon comes much later, but he was not modern in that sense.

Prof. WILLIAMS — The High Court does not come into operation until 1903, so there are a number of years where the state Supreme Courts are interpreting the Constitution and you will be surprised to find out that they interpret to their advantage and not the Commonwealth's. So states put taxes on their wages and the state Supreme Courts say, 'That's great, fine, you can tax them, no problem'. Inglis Clark does not believe that because he believes there is a central role and a capacity of the Commonwealth. He writes a letter to another judge. One of these cases comes down and the Victorian Supreme Court essentially knocks down some Commonwealth legislation. Inglis Clark is fuming about this and he writes to Deakin:

Since I came home I have read Madden's judgment on Wollaston's case and felt so much irritated that I could not rest until I had relieved myself by writing a criticism of it. à Beckett's judgment is a sober and respectable performance which deserves attention, although I believe that he has arrived at a wrong conclusion. Madden's production is full of false history, bad political science, bad political economy, bad logic and bad law.¹

Now what is interesting about that list is you would not expect a judge to say that a judgment is bad in history, bad in politics, bad in economy, logic and then finally get to law. This is the legal realist. This is the man who sees the law in its broader context. Again, it is coming back to a laboured point, but I think it is very interesting to see how Clark is not the black-letter lawyer, which central casting would suggest he should be.

Prof. LAKE — If I could just add to that. I talked probably more in my paper than others about Clark and race and racial exclusion, and Clark shared that with most radical progressives of the time. So that was very modern too, but it is not modern to our eyes or to our sensibilities. We think it is completely reactionary. To go back to the point about race and the Constitution, Clark, Deakin and Higgins were very much believers in the idea that to have an egalitarian radical democracy you had to exclude other races and castes.

CHAIR — That is simply the social default of the time. It is a cultural precept that is now completely obliterated.

¹ Clark to Deakin, 4 March 1903, Deakin papers, National Library of Australia, MS 1540/1/850.

Dr HEADON — I want to move off in a direction that picks up on what John was talking about in his talk on the podium. It seems to be the elephant in the room that was raised in the earlier question—that is, the straight reality of constitutional change, the impasse whereby of 44 referenda only eight have passed. So we have talked today about ideal republicanism, we have talked about enlightened citizenry, we have talked about the notion that the Constitution should be a living force, which necessarily means an enlightened citizenry and/or politicians that are responding. But in fact we have at this moment the opposite. I am interested in what the distinguished panellists think. How do we react to this terrible elephant in the room?

CHAIR — It is a terrific question, David, because what you are implying is that the vast majority of Australians are not very interested in an active Constitution at all. They could not be less interested in an active Constitution.

Dr HEADON — Seemingly so. And it is not just that we say the average Australian. You would be naming a number of politicians who have made comments that seem to be equally unenlightened. What do we do?

CHAIR — As you say, the overwhelming number of referenda have been defeated and some of them very heavily indeed.

Dr BANNON — Why is that seen as necessarily not the will of the people? On the contrary, I do not think people are uninterested in referenda; they are just very suspicious of changes emanating from a unilateral decision through the national parliament and if in doubt, they vote ‘no’. But they are also valuing their Constitution. Whether it is in the right way—because they have rejected some very sensible questions—one doesn’t know. But there is a value seen in the Constitution so you have to be very careful about changing it. But if there is some real national cause that people are taken on, such as the 1967 Aboriginal referendum, they will vote overwhelmingly ‘yes’. So it is not as if they are being stupid, this is a choice Australian people are making.

Prof. REYNOLDS — There is a fundamental point, John, that when the Constitution was framed, there were not political parties in the sense that we know them today. As we know, if you have got a referendum and the political parties take different sides, as they almost certainly do for political reasons, even though they might have supported the thing in the past the opposition will oppose it because the government is proposing it. Now if that is the situation then it is almost impossible to get a majority of voters in a majority of states. The party system is what has made passing things very difficult because there are very few occasions when all sides will support the one issue as they did in 1967. So it does seem to me that there is a problem. If you ever taught the Constitution, as I have done, and gone through it, there is a great deal which simply no longer really has any relevance and there are enormously important things that are not there. It really is a document that should be profoundly changed. But how that is done, I think, is almost impossible to suggest.

CHAIR — I think this is a particularly interesting discussion to be having as we face the prospect of a Senate re-election in Western Australia with a ballot likely to be the size of that table cloth and the questions about what an exercise of full-blown democracy actually achieves in terms of our national progress.

QUESTION — I was just wondering what reaction Andrew Inglis Clark had to the ideas of Henry George, given that some of the things that he promoted were definitely on the Georgetist platform.

Prof. REYNOLDS — Henry George did not have a particularly large influence in Tasmania, although he was discussed. But he was certainly very interested in taxation. One of the most important areas where he tried to bring about significant reform was indeed taxation. And in particular he wanted to make sure that tax was on the unimproved value of land, so you did not end up taxing the small farmer or the orchardist who was improving things; you taxed the pastoralist who was not doing much with the land. Clark was very aware of the importance of class and taxation, but I would not have thought he was a Henry George disciple by any means. But he certainly saw tax on land as being a very important way to both raise revenue and bring about social change.

Dr HEADON — We are aware that it is sort of the generalisation that it was progress and poverty of 1879 that, one way or another, stayed in the heads of enough of the key politicians that the national capital would have leasehold title rather than freehold title.

CHAIR — Which was the very reason why Queanbeyan didn't join in, because they didn't want to give up their freehold.

Dr HEADON — Yes, yes. And the high point probably for George was the trip in 1890 when he came here and played to packed houses, but then you get a quite sharp diminishing. But since we are in Canberra and since I mentioned ever so briefly Walter and Marion Griffin this morning, I think a number of people in this room are aware that (notwithstanding that the Henry George tide had well and truly gone out by around about the time of federation), when Walter Burley Griffin came here in 1913, he came as a convinced single taxer. The two most significant lectures he ever delivered in Australia from the time he arrived all the way through to 1935, were the two lectures that he delivered to the Henry George society in Melbourne, especially the one in 1915, when the troops had only just arrived at Anzac.

QUESTION — It was my impression that Professor Irving raised the notion that the very absence of a bill of rights in some ways perhaps might have actually allowed for the emancipation and the furthering of rights of certain groups. For instance, the women's movement was mentioned. I am interested if the panel in general felt that was the position she was trying to advocate and whether they agreed with her, and also whether they might be able to expand on what examples of that could be, or what it could mean in real or concrete terms.

CHAIR — My sense that what Helen was suggesting was that the presence of a bill of rights in the US did nothing in particular to advance the cause of women's suffrage, that we go back to the cultural and social precepts of the time and what people's understanding of suffrage and citizenship was—but Rosemary?

Dr LAING — The other part of that observation, with which I concur, is that we could achieve votes for women in federal elections by ordinary legislation without a bill of rights. You didn't need a bill of rights to get to that point. Is it frightening the horses to have a bill of rights? I don't know.

Dr BANNON — Well, indeed, I think we should be grateful we did not have a bill of rights because I am not quite sure what they would have put in it. But I suspect one of the first things that would have gone in, because of one of the first pieces of legislation passed, would have been the White Australia policy. We would have found that entrenched in the Constitution and extracting ourselves from that—and it took a bloody long time—would have been very much more difficult.

CHAIR — And the definition of citizenship, presumably, might have constituted part of the bill of rights, and who knows what that might have included at that point.

Prof. LAKE — One of the points Helen mentioned, which is worth mentioning again, to go back to Higgins and industrial relations, is that the Australian colonies and states were far more advanced in legislating for a minimum wage and maximum hours and that these things were always knocked back by the courts in the United States—the *Lochner* era, as she referred to it. So, yes, there is a lot of evidence that you can do things through legislation that you can't necessarily do by giving power to a supreme court.

Prof. WILLIAMS — Though the industrial one is the other example of judicialisation of a lawless area. O'Connor and Higgins, as we know, were the first and second presidents of the industrial court, which are High Court judges. So the new province of law and order as an idea of imposing a judicial solution into—

Prof. LAKE — Into that province.

CHAIR — And the interesting point made too about the separation of powers, which is just integral to that argument. It is interesting to see the resistance of the Queensland judiciary at this very moment—the growing opposition.

QUESTION — Dr Bannon, you mentioned the Sydney, Canberra and Melbourne triangle and that outside that, everyone votes 'no' in referenda. Well, it wasn't until 1977 that the good citizens of Canberra even had the right to vote in a referendum on altering the Constitution. Can I ask the panel: what role did Andrew Inglis Clark make in the drafting of section 125? Or was that something after his time?

Prof. WILLIAMS — No, he was all over section 125. Section 125, as you know, is the capital. In his draft he would have changed Canberra immeasurably, because he said it could only be 10 miles square. He literally picked up the US one and dumped it in there, so it would have been a much smaller capital, essentially the parliamentary triangle.

CHAIR — 'Inside the Beltway', so to speak. David, do you have comments?

Dr HEADON — Well, only thank heavens for King O'Malley's motion in July of 1901, suggesting 1,000 square miles because of the speculation—the brutal speculation—that took place in the US.

Dr BANNON — We might add that it is only a constitutional fix that has it so close to Sydney and based in New South Wales. I mean, there are many more logical places in relation to the fulcrum around which Australia revolves.

Prof. WILLIAMS — Inglis Clark says 'to exercise exclusive legislation in all cases whatsoever, over such but not exceeding 10 miles square that may be ceded to be the seat of government'.

QUESTION — I wanted to go back to the 14th Amendment and Indigenous Australians. Maybe I am wrong on this but the 14th Amendment grew out of the Civil War and the reconstruction period and the interpretation that had been given before the Civil War by the Supreme Court that slaves were not citizens. The adoption of the citizenship clause immediately gave them some sort of standing. Whatever else they were lacking, they had that. Now, had we had the citizenship part of the 14th

Amendment that may well have, depending on interpretation, had an effect on Aborigines. If they had been formally defined as citizens at that point, because of their having been born here and so on, then that might have changed some of the discourse, at least a bit later, not perhaps quite in 1901 but would have presented a possibility of working around that. Or am I too idealistic about that?

CHAIR — Well, I would imagine that the argument that we have made already that Indigenous people would be quite deliberately excluded is the more likely possibility. But, Henry Reynolds, would you like to comment on that? Would it have done any good?

Prof. REYNOLDS — Well, it is very hard to know. There are numerous critical things but one is that quite clearly the view was that the Aborigines were a dying race. This was not just a popular view; it was the view of most men of science, and that literally there was no future. Andrew Inglis Clark in particular, I am sure, was convinced that Truganini was indeed the last Aborigine. He may well have been aware of that community in Bass Strait but, as far as I know, he never said anything about it. Most Tasmanians did not even know it was there at this time. So it is not surprising that there was almost no discussion whatsoever and of course what it meant was that Aborigines were left to the states and the states had a wide variety of ways of dealing with the situation. In a funny sort of way in the colonial period the myth was that at least in theory they were the same as everyone else because they were British subjects.

Clearly, that began to change when the colonies began legislating. In particular Victoria first, but in a way the real pattern began to be set in 1897 when Queensland legislated for the protection and control of Aborigines and the other states and territories followed in the next 20 years or so, which created a situation where indeed they literally had almost no rights at all. What they might have simply exercised could be taken away by state governments, and that continued to be the case right up until living memory, certainly in my living memory.

CHAIR — I think that it is very easy for us to conflate radical politics at the turn of the century with radical politics today of any kind. They are not at all the same thing. If we think of people who were adherents of what they saw as modern scientific thought—that was phrenology, that was eugenics—all kinds of things that were on the outer extremes.

QUESTION — One of the features of Andrew Inglis Clark's draft that was very much US influenced was that the Senate was created as the states' house and given strong powers to match that role. How do you think the power granted to the Senate, the house of review, would have been different had it been contemplated that the Senate would end up as a party house instead of a state house the way it is now?

Dr LAING — Well, of course, as a parliamentary officer I am not going to say anything too radical, but I would remind you that domination by parties was not something that was unforeseen in the 1890s. We have got Deakin taunting Inglis Clark about the state of the US Congress. We have got John Macrossan who is a Queensland delegate to the 1891 Convention who actually dies during the Convention. It was Macrossan who pointed out that: let us not fool ourselves that senators will vote along state lines; that they will belong to political parties and political parties will come to dominate the process. So I do not think that they were unaware. They did not know about modern political parties as we know them, but they all had alignments and allegiances, so I think that proto-political parties were certainly well in operation in all the colonial parliaments. I do not think that it would have surprised them too much to understand that of course there would be divisions within states about, you know, the free traders voting against protectionists, for example, and state lines would not

necessarily determine voting. But I think that what is underestimated is—and this is probably a bit of a hobbyhorse of mine—the way that the Senate does operate as a state and territory house to this day. There are many issues of great concern within states and territories that unite people across party lines. There are many issues that get an airing in the Senate because they are state issues and the Senate is the place to air those issues. I think that there was too much emphasis on voting—

CHAIR — Can I just interject. Rosemary, I just want to put to you that political parties were much more fluid entities in those days. People swapped sides much more easily. They changed their positions. We look at the origins of the modern Liberal Party, for instance, which comes from a number of different sources, and that fairly rigid cohesion of a two-party system is something with which I think they could not possibly have conjured.

Dr LAING — Well, they could see it in America.

Prof. LAKE — The Labor Party had already been formed by the turn of the century.

Dr LAING — Don't forget the layout of a parliamentary chamber. You've got government; you've got opposition.

Prof. LAKE — Yes, and free trade and protection were quite—

Dr BANNON — I just think, as Rosemary said, there was a prediction that party would be a factor. Just how big a factor was perhaps unknown. But there was one other element to this, which is the equal representation power. And the fact is, within the respective party caucuses, the smaller states have a much bigger voice because of the Senate's existence. If Tasmania has got the minimum five-seat guarantee in the House of Representatives, it has also got exactly the same number of senators—12. On a proportionate basis, they would not be there. So that has been a factor throughout federation, particularly since proportional representation, each state polity produces, some of them, very peculiar results. But they are what they are: different compositions of the Senate. There is Nick Xenophon in South Australia, probably an outstanding example, not repeatable in other polities. He is something peculiarly South Australian. And so one can look at other minor parties that do better in some states—such as the Greens—and not so well in others. There is this kind of fluidity in the Senate that represents small states and, I think, has preserved the principles of the founding fathers.

Prof. LAKE — Equality of representation is clearly one of Clark's Americanist legacies. But as a Victorian I can fully understand why Higgins opposed that completely as being undemocratic. It is so fundamentally undemocratic that—

Dr BANNON — Not in a federation.

Prof. LAKE — Well, you know—

Dr BANNON — In a unitary state, yes.

Prof. LAKE — All I am saying is it is debatable and it was perfectly understandable why that was a matter of fierce debate about whether you would have Tasmania having the same number of representatives in the Senate as New South Wales, and I think it is still a matter of debate. Secondly, on proportional representation, this is ironic as well, because it is also one of Clark's legacies, and again as a Victorian I am not sure what he would have thought about the Motoring Enthusiast Party—you

know, the person they got up, who now seems to have disappeared. In other words, how proportional representation has played out surely was quite unforeseen and is very undemocratic. But I guess John Bannon would think this is healthy democracy expressing itself.

Dr LAING — And it is not necessarily proportional representation; it is the type of proportional representation that you have when you number all of the boxes on the Senate ballot paper.

CHAIR — And can I just add: will no one remember that you are standing in a city of 350,000 people with two senators? Something of a sore point for many citizens of Canberra, I think.

Prof. REYNOLDS — We are aware of that. I remember the whole point of proportional representation. I mean, there were two things: that it gave you an accurate representation of the will of the people, but the other fundamental thing was that it gave minorities the ability to not be crushed by majorities. That was absolutely central to the whole idea of proportional representation.

Prof. LAKE — You get 0.05 per cent of the vote and win a seat.

Prof. REYNOLDS — Yes, well—

QUESTION — Ever since the Second World War there have been very intelligent people in Australia—very educated, including professors of law—who have said that we now have a Constitution which is frozen, which is archaic and which has to change, but it is just almost impossible. I would say that it is better that we start talking about rewriting the entire Constitution. The word ‘rewriting’ somehow is avoided in Australia, but it is the sovereign people, surely, who have the right to rewrite their Constitution.

Prof. WILLIAMS — Given that we cannot change a comma in the thing I do not think we are going to have much chance changing the whole thing! Where would you start? In some ways the framers did have a degree of intergenerational generosity. There is a capacity to make policy decisions that are not subject to the Constitution. You can have different policies on health—they change with the government. And that is the way it should be, there is no doubt about that.

There have been workarounds; that is the way we have solved a lot of these issues. The Commonwealth does agreements with the states—usually tied grants. But there have been ways to work with these. Where would you start? Obviously, the environment is an issue that is not mentioned in the Constitution. And Indigenous recognition is something that is going to come up—hopefully, in the life of this next parliament—which I expect may have a chance of changing.

A fully-fledged rewriting assumes that we are a sovereign people—and I am glad you raised that—but whilst our Constitution is in fact an Act of a foreign parliament, we are not a sovereign people. If you wanted to know what the republic was all about, it was about saying that our Constitution is ours. It still is an Act of the British Parliament. One of the Acts that went immediately before our Constitution was a dog Act. After it there were things about mining and railways. If you look at the notice sheet for the day the Australian Constitution was going through, it was just a normal day in parliament. ‘Oh, we’ve got the Australian Constitution. Well, no, we’ll put that one through as well’. So rewriting our Constitution as a sovereign people is a great idea, and one of those steps is actually making it a sovereign document of our own.

CHAIR — Quick comment from you, Henry?

Prof. REYNOLDS — I said earlier that if you teach it and you go through it there is so much in it that is now virtually redundant, but there is also so much about the system which is not in the Constitution. These politicians who had all run their colonial parliaments just assumed so many things that continued but are not mentioned in the Constitution. There is also the extraordinary position of the authority of the Governor-General. It clearly needs to be drastically rewritten—not that I expect it will happen in my lifetime.

QUESTION — I would like to invite David Headon to respond to the following comment. I think it is worth drawing attention to the fact that the Australian Capital Territory uses the Hare–Clark system for the Legislative Assembly, and that was confirmed by referendum. And it is also worth pointing out that in the ACT there is no representative of the Crown, so it could be seen as a republican form of government. It seems to me that the ACT, at the territory and local level, has the greatest influence of Inglis Clark than any other jurisdiction in Australia. I invite you to comment on that.

Dr HEADON — Yes, certainly this is no field of expertise of mine. There are others who are much better qualified than me to talk, even though we are talking about the ACT. But essentially I agree with that. If there were to be an emergence of independently minded politicians, I think the future of the ACT over the next 10 and 20 years could be a very interesting one.

CHAIR — I think one of the other consequences that we would face if the rest of the nation were to adopt Hare–Clark would be minority government forever more. That is the reality of what takes place.

QUESTION — This follows up on the question about rewriting the Constitution. One of the price tags, of course, of rewriting it would be that we would then have a new constitution that potentially would have bugs in it. I would like to get a feel for what it was like the first time in 1901. Did our Constitution have lots of bugs in it? Or did it basically work as soon as it was booted up? Did we have to spend a few years building a few institutions like the High Court? Or is it possible that we simply only got it to work by ignoring most of it?

Prof. WILLIAMS — I am just buffering up as I try and work up an answer! Look, there were some amendments early on, and we were quite successful in the first decade. There were two amendments, and another one or two nearly got up as well, so there was much more appetite for changing things.

The first 20 years were pretty steady as you go, although many of the debates that were going on in federation just kept going on in the High Court, to be honest. Higgins never gave up, and ultimately in 1920, the Engineers' Case radically changed the way the interpretation was. I think it was an easier start. Western Australia had a five-year tax holiday, effectively, on excise, so their reluctance was assuaged by a bit of money.

One of the wonderful moments, I think, of this whole federation question when it happened is that wonderful image of the inauguration of the Commonwealth. You have all seen the slow footage: everyone walks up—it's the black and white, it's the Salvos who did the work. What is not seen is a commentary that came from Robert Garran, who we all know well here, when he picked up the letters patent and he picked up the draft Constitution and all the ministers' commissions. He put them in a bag and took them home. The whole archive of the Commonwealth of Australia was taken home by the one public servant we had!

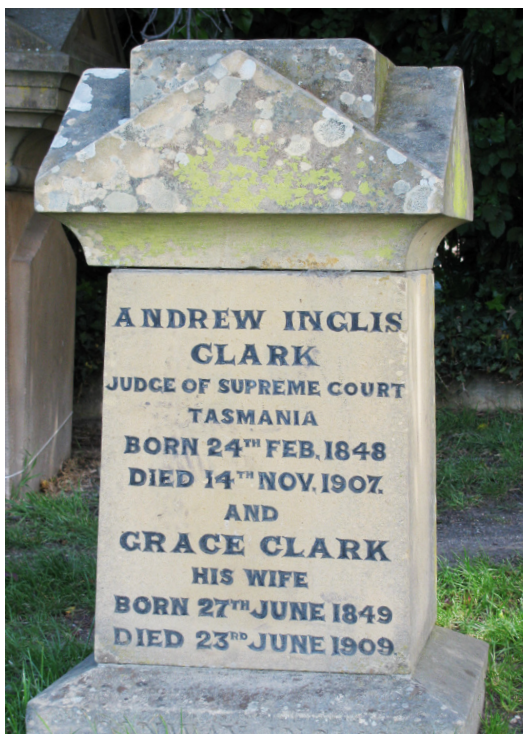
So the Commonwealth only existed on paper—that is the point I am trying to make, and it took a while to get underway.

CHAIR — I think the gist of that is leave it to the lawyers and the public servants. Rosemary, a final comment from you?

Dr LAING — A quick comment, and that is that many of the institutions that the Constitution set up were familiar. I talk about chapter I: the legislature. Well, it was just an upper and a lower house—a lot like people were used to working with in the colonies. They had the first elections, everyone turned up in Melbourne on 9 May 1901 and off we went, just like we usually do. So there was that element of familiarity and continuity in some of the important institutions of state, and I expect that the governors of the colonies, the Governor-General and executive government had that similar kind of continuity.

The High Court was new and it really had to wait for legislation in 1903 to establish that. But in terms of the basic institutions of government, they were familiar.

CHAIR — Ladies and gentlemen, I think we have had a quite impassioned discussion and I am certainly being given the wind-up signal. We could probably all talk another half hour or so. But for all of our impassioned argument about his significance, the reality is that Andrew Inglis Clark's grave lies almost



Photograph courtesy of James Warden

forgotten among a small tangle of headstones, and his name is certainly little known to most Australians outside circles such as these. I suppose it might be possible to argue that Clark's legacy is a notion where by and large we have a substantial and mostly well-warranted trust in the foundations and the mechanics of our government. That is something which we are very used to in this nation, but which perhaps we should consider more fully.

As we move through the second decade of the twenty-first century perhaps we should consider that our constitutional heritage does contain many different strands—many of those illustrated by the discussions we have heard today. We are sometimes apt to forget that it includes radical new thought and it includes high political passion and a vision for Australia, and that should not be obscured by the sometimes duller reaches of constitutional argument. I do not think we have plumbed many dull reaches today. It has been a fascinating discussion, and for that I would like to thank all of you. But most particularly, please join me in thanking our panellists.

It is a striking feature of Australia's historical consciousness that it lacks a general recognition of those who were instrumental in the federation movement which brought the Australian nation into existence. As John Bannon wrote in his biography of Sir John Downer:

In other nations such as the United States it is a *sine qua non* that those chiefly responsible for the birth and constitutional shape of the polity are recognised and commemorated. This has been less so in Australia, partly through a healthy reticence to overtly celebrate our nationalism, except on the sporting field, coupled with a less commendable failure to acknowledge the extraordinary achievement of Australian Federation.¹

That is perhaps because the process leading to federation was, as Quick and Garran commented, 'tedious, and perhaps dangerous, but ... providential'.² It gave time for what they called 'the gradual but sure development of the national spirit in the great colonies of Queensland and Western Australia' and 'prevented the establishment of a Commonwealth of Australia with half the continent of Australia left, for a time, outside'.³

The magnitude of the achievement of federation and the qualities of those who brought it about are not easily brought to life for contemporary Australians. The existence of Commonwealth and state governments in one nation is, for many, a given which does not stimulate inquiry into its origins. Conferences such as the one you have had today, identifying leaders in the federation movement, and examining their life, and works and legacies, provide a basis upon which a greater awareness of their part in Australian history may be more widely disseminated.

At a recent event, organised by the Faculty of Law at the University of Western Australia, I spoke to lawyers and community members in Mandurah, a regional town to the south of Perth, about the work and contribution to the federation movement of Sir John Forrest, the Premier of Western Australia who led the Western Australian delegation to the National Conventions. I was greatly encouraged to hear from a teacher at one of the local schools that she had organised her class into a simulated convention to debate the pros and cons of federation and then to take a vote on whether Western Australia should join. I think they may have decided not to.

Education about the federation process and its leading lights at a variety of levels, including, perhaps, popular dramatisation of aspects of it, would enhance a greater awareness of the importance of the achievement and the workings of the federation today. Many of the characters who participated in the federation movement were people who were inherently interesting. It would be hard to imagine a more colourful character than Charles Cameron Kingston who at one stage became Premier while still on a good behaviour bond for having challenged another leading South Australian to a duel.⁴ So too,

* Conference dinner speech delivered by The Hon. Robert French AC, Chief Justice of the High Court of Australia on 8 November 2013.

1 John Bannon, *Supreme Federalist: The Political Life of Sir John Downer*, Wakefield Press, Kent Town, SA, 2009, p. vii.

2 John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth*, Angus and Robertson, Sydney, 1901, p. 251.

3 *ibid.*

4 John Playford, 'Kingston, Charles Cameron (1850–1908)', *Australian Dictionary of Biography*, vol. 9, Melbourne University Press, Carlton South, Vic., 1983, p. 602.

Sir Josiah Symon ‘a leading barrister, eloquent in formal contexts, acute and alert in debate, vindictive and scarifying in controversy’.⁵

The particular focus of interest today has been Andrew Inglis Clark whose role as a leader in the drafting of the Australian Constitution has sometimes been insufficiently acknowledged.

You will no doubt all be familiar with his personal history. It is an interesting aspect of that history that Clark’s early management of his family’s firm apparently contributed to an interest in federation as a way of overcoming intercolonial tariff rivalry. It is another interesting feature of his personal history that the intensity of his republican and liberal sentiments was evident from his earliest days in politics. Indeed, when he first stood for the electorate of Norfolk Plains in 1878, the Hobart *Mercury* called him a ‘very extreme ultra-republican’, and a person of ‘revolutionary ideas’ and said that his proper place was among ‘Communists’. Regional parochialism was apparent in the *Launceston Examiner’s* denunciation of him at the time of that election as ‘a mere fledgeling’ and a ‘stranger’ from Hobart.⁶ Notwithstanding, Clark was elected unopposed and became a member of the opposition.

The intensity of his work ethic was marked from the time he took office as Attorney-General in 1882 under Philip Fysh as Premier. He initiated 150 ministerial bills, apparently only one less than Sir Henry Parkes during his whole career. Professor Reynolds in his entry relating to Clark in the *Australian Dictionary of Biography* has pointed to the progressive and humanitarian legislation which he introduced—the Master and Servant Amendment Act, the legalisation of trade unions, laws preventing cruelty to animals, reform of the laws relating to lunacy and the custody of children. He had a commitment to manhood suffrage and was ultimately successful in extending the franchise in 1896.

Clark was a poet and had a poetic spirit. His book *Studies in Australian Constitutional Law*, written in 1901, reveals the presence of that spirit, not least in the well-known passage in which, writing of the interpretation of the Constitution he said:

[I]t must be read and construed, not as containing a declaration of the will and intentions of men long since dead, and who cannot have anticipated the problems that would arise for solution by future generations, but as declaring the will and intentions of the present inheritors and possessors of sovereign power, who maintain the Constitution and have the power to alter it, and who are in the immediate presence of the problems to be solved. It is they who enforce the provisions of the Constitution and make a living force of that which would otherwise be a silent and lifeless document.⁷

His poetry reflected his political values. Dr Richard Ely from the University of Melbourne, who has written about his poetry, said of him:

In any ‘genuine democracy’, he declared, three factors must be found. First, an elected legislature representative of all opinions; second, recognition that the composition of all majorities be transitory; and third, that fundamental laws protect the natural rights of the individual from the majority of the hour. In the poems which read as if intended to be shared with friends, a closely similar set of values is expressed.⁸

5 J.A. La Nauze, *The Making of the Australian Constitution*, Melbourne University Press, Carlton, Vic., 1972, p. 102.

6 *The Mercury* (Hobart), 15 July 1878, p. 2; *Launceston Examiner*, 20 July 1878, p. 2; H. Reynolds, ‘Clark, Andrew Inglis (1848–1907)’, *Australian Dictionary of Biography*, vol. 3, Melbourne University Press, Carlton, Vic., 1969, p. 399.

7 A. Inglis Clark, *Studies in Australian Constitutional Law*, Charles F. Maxwell, Melbourne, 1901, p. 21.

8 Richard Ely, ‘The poetry of Inglis Clark’, in Richard Ely (ed.), *A Living Force: Andrew Inglis Clark and the Ideal of Commonwealth*, Centre of Tasmanian Historical Studies, University of Tasmania, Hobart, 2001, p. 204.

A poem of Clark's setting out his vision is reproduced in Ely's article:

A vision of a people set free
From the bonds and the toys of the past
Never bending the head or the knee

To the shadows of the rank and caste.
A people whose flag shall be void
Of all traces of sceptre or crown
The flag of a people too proud.

Australia one and undivided
Let that vision seen afar
Mark with light the path provided
By it as thy guiding star.⁹

Clark's poetic talents could also be used for rather sharper polemical purposes. He had been appointed a puisne judge of the Supreme Court of Tasmania in 1898. He was given reason to expect that he would be appointed to the first High Court bench, but that expectation was thwarted when parliament cut the number of judges from five to three. He was embittered by that outcome and directed his anger in poetic form at Alfred Deakin:

... clothed in bold yet unctuous disgrace
Of broken faith—so cunningly devised
That none could safely say that he had lied.¹⁰

Clark's poetic effusions were not unusual for the time. Sir Henry Parkes was given to writing verse and quoting verse in his speeches. Sir Samuel Griffith translated the *Divine Comedy* according to principles of literal translation in the original metre—an approach which yielded some odd results.¹¹ Indeed, verse was a frequent form of discourse in the context of the federation movement. The opponents of federation, particularly those who contributed to the radical journal *Tocsin*, used verse as a weapon. Their utterances, both prosaic and poetical, often focused upon the threat posed on the Australian national judiciary. Three verses from a poem called 'The Federal Plot', published on 5 May 1898, give a flavour of their poetic polemics. In conspiratorial speech, which was attributed to the proponents of federation, the versifier wrote:

You've made them choose our minions
To mutilate their rights;
Surrender all they fled for
In Armageddon fights.

In new vice-regal velvet you've wrapped a Caesar's paw
You've perched upon their future
The vultures of the law.

Heed not the ghosts of 'Judas'
That dog you while you live,
For coroneted women and judge-ship fair we give.

9 *ibid.*, p. 199.

10 *ibid.*, p. 185.

11 'The Divina Commedia of Dante Alighieri, translated by Sir W Griffith', *The Bookfellow: The Australasian Review and Journal of the Australasian Book Trade*, no. 4, 1 March 1912, pp. 76–7.

It takes little imagination to identify the metaphor which refers to the High Court. As one of the vultures of the law foreshadowed in that verse, I can say that we have much to be grateful to Inglis Clark for his contribution to the formulation of the judicial power and a national judiciary.

Eighty eight years after the historic decision of the Supreme Court of the United States in *Marbury v. Madison*,¹² Inglis Clark, as Attorney-General of the Colony of Tasmania, was preparing his draft Constitution. He believed in natural rights. He was a republican. He was a great admirer of the democracy of the United States. In explaining ‘Why I Am a Democrat’, he claimed in his own words ‘for every individual in a community the right to share in the distribution of the power by the exercise of which the makers and executors of the laws are appointed’.¹³ He had read and could quote long passages from the works of Hamilton, Madison, Jefferson, Webster, Clay and Sumner. He had travelled to the United States and met Oliver Wendell Holmes, with whom he became friends and established a lifelong correspondence. He was a believer in judicial control of official power:

The supremacy of the judiciary, whether it exists under a federal or a unitary constitution, finds its ultimate logical foundation in the conception of the supremacy of law as distinguished from the possession and exercise of governmental power.¹⁴

Clark admired the Supreme Court of the United States as a model of judicial supremacy. It could, in his words, ‘restrain and annul whatever folly or the ignorance or the anger of a majority of Congress or of the people may at any time attempt to do in contravention of any personal or political right or privilege the Constitution has guaranteed’.¹⁵ He explained his vision of a proposed federal judiciary at the 1891 Constitutional Convention. He sought a distinct federal judiciary, which would allow the state judiciaries to remain in existence under their own governments. He looked to a complete system of federal courts distinct from what he called the provincial courts. He proposed distinctive functions for the Australian High Court, which were not conferred on the Supreme Court of the United States. He said:

I hope that in addition to a separate federal system of courts we shall have a court of appeal, as the resolution contemplates. That will be an innovation, and a wholesome innovation, upon the American system. The American Supreme Court cannot hear appeals from the supreme courts of the various states except in matters of federal law. I hope our Supreme Court will take the place of the Privy Council, and hear appeals upon all questions of law.¹⁶

It is an important consequence of that innovation that we can say that there is one common law of Australia.¹⁷ This may not be what Clark had intended. Indeed Callinan J in dissent in *Lipohar v. The Queen*¹⁸ invoked Clark’s writing for the contrary proposition.

12 5 US 1 Cranch 137 (1803).

13 Andrew Inglis Clark, ‘Why I am a democrat’, in Ely, op. cit., p. 32.

14 Andrew Inglis Clark, ‘The supremacy of the judiciary under the Constitution of the United States and under the Constitution of the Commonwealth of Australia’, *Harvard Law Review*, vol. 17, no. 1, November 1903, p. 18.

15 Andrew Inglis Clark, ‘The Constitution of the United States of America’ (1897) quoted in John M. Williams, ‘“With eyes open”: Andrew Inglis Clark and our republican tradition’, *Federal Law Review*, vol. 23, 1995, p. 164.

16 *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 11 March 1891, Legal Books, Sydney, 1986, vol. 1, p. 253.

17 *Lipohar v. The Queen* (2000) 200 CLR 485.

18 (2000) 200 CLR 485, 578–79 [245].

The influence of the United States Constitution on Clark's draft of Chapter III was also reflected in his use of the term 'cases' or 'controversies' to characterise the categories of federal jurisdiction. This was later replaced with 'matters', but its ancestry has been recognised repeatedly in the High Court.¹⁹ His strong democratic and republican zeal was reflected in his lobbying for the jurisdiction and position of the High Court of Australia.

One of his more important legacies, which has been described as a 'basic guarantee of the rule of law', is s. 75(v) of the Constitution.²⁰ Because of his concern about the deficiency in the original jurisdiction of the United States Supreme Court which was exposed in *Marbury v. Madison*, he included in his draft Constitution for the 1891 Convention a clause conferring original jurisdiction of the High Court of Australia designed to avoid that deficiency. The jurisdiction was to be conferred 'in all cases ... in which a Writ of Mandamus or Prohibition shall be sought against a Minister of the Crown for the Federal Dominion of Australasia ...'²¹ His clause was accepted by the 1891 Convention with the substitution of the words 'an officer of the Commonwealth' for 'a Minister of the Crown for the Federal Dominion of Australasia'.

Surprisingly, at a Convention session in Melbourne in 1898, at which Clark could not be present, his proposed provision was dropped. Those who moved its exclusion had apparently not read *Marbury v. Madison* and misapprehended what was in the US Constitution. The primary opposition to the provision seems to have come from Isaac Isaacs. He said:

I think I am safe in saying that the power is not expressly given in the United States Constitution, but undoubtedly the court exercises it.²²

He was not safe in saying that. He suggested that the proposed provision might have the effect that if an injunction were asked for in the High Court, the court might ask why the words 'mandamus or prohibition' had been inserted in the clause.²³ His argument seems to have been that specific reference to mandamus and prohibition might by implication have excluded other remedies. Henry Higgins also spoke on the provision and said:

This provision was in the Bill of 1891, and I thought it was taken from the American Constitution.²⁴

Clark, who was in Hobart, was informed of what had happened and sent a telegram to another leading delegate, Edmund Barton, who became the first Prime Minister and later a Justice of the High Court of Australia. He reminded Barton of the decision in *Marbury v. Madison*. Barton, who may well have been embarrassed by the errors that led to the omission of the provision, wrote back to Clark:

I have to thank you further for your telegram as to the striking out of the power given to the High Court to deal with cases of mandamus & prohibition against officers of the Commonwealth. None of us here had read the case mentioned by you of *Marbury v. Madison* or if seen it had been forgotten—It seems however to be a leading case. I have given notice to restore the words on the reconsideration of the clause.²⁵

19 See for example *Collins v. Charles Marshall Pty Ltd* (1955) 92 CLR 529, 544; *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372, 388–389 (Gleeson CJ); *Truth About Motorways Pty Ltd v. Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591, 610 (Gaudron J).

20 Murray Gleeson, *The Rule of Law and the Constitution*, ABC Books, Sydney, 2000, p. 67.

21 John M. Williams, *The Australian Constitution: A Documentary History*, Melbourne University Press, Carlton, Vic., 2005, p. 106.

22 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, Legal Books, Sydney, 1986, vol. 4, p. 321.

23 *ibid.*

24 *ibid.*

25 La Nauze, *op. cit.*, p. 234.

At the continuation of the Melbourne Convention in March 1898, Barton moved the reinsertion of a subsection conferring upon the High Court of Australia original jurisdiction in matters '[i]n which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth'.²⁶ He said:

It will be remembered that in the former committee this sub-section was left out. Now, I have come to the conclusion that it was scarcely wise of us to leave it out.²⁷

Barton posed the question whether without an express authority given in the Constitution to entertain such cases, the High Court could grant a writ of mandamus or prohibition or an injunction against an officer of the Commonwealth. He referred to *Marbury v. Madison* and quoted from the judgment. Nowhere in his speech, as recorded in the Convention debates, was Clark given credit for the intervention that led to the restoration of the clause. Perhaps everybody remembered that Clark had proposed it in the first place. Barton acknowledged that absent the inclusion of the provision it might be held in Australia that the courts should not exercise the power and that even a statute giving them the power would not be of any effect. He then said:

... I think that, as a matter of safety, it would be well to insert these words.²⁸

Another delegate, Josiah Symon, said: 'They cannot do any harm'.²⁹ Barton responded in terms which in the light of history may be seen as masterly understatement: 'They cannot do harm, and may protect us from a great evil'.³⁰

There was some opposition to the reinsertion of the provision on the basis that it might give the High Court a power to exercise control over the executive. Isaacs, who had originally moved that the provision be dropped, was unrepentant in his opposition, but appears to have misapprehended the position in the United States under which mandamus could be issued in the exercise of the appellate jurisdiction of the Supreme Court. Concluding debate, Barton summed up the purpose of the provision:

The object of it is to make sure that where a person has a right to ask for any of these writs he shall be enabled to go at once to the High Court, instead of having his process filtered through two or more courts ... This provision is applicable to those three special classes of cases in which public officers can be dealt with, and in which it is necessary that they should be dealt with, so that the High Court may exercise its function of protecting the subject against any violation of the Constitution, or of any law made under the Constitution.³¹

Following his speech the amendment was accepted.

The purpose of s. 75(v) was described by Sir Owen Dixon in *Bank of New South Wales v. Commonwealth* as being to 'make it constitutionally certain that there would be a jurisdiction capable of restraining officers of the Commonwealth from exceeding Federal power'.³² In *Bodruddaza v. Minister for Immigration*

26 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, Legal Books, Sydney, 1986, vol. 5, p. 1875.

27 *ibid.*

28 *ibid.*, p. 1876.

29 *ibid.*

30 *ibid.*

31 *ibid.*, p. 1885.

32 (1948) 76 CLR 1, 363.

and *Multicultural Affairs*³³ the judges elaborated upon what Dixon J had said linking the purpose of s. 75(v) to the essential character of the judicial power. The object of preventing officers of the Commonwealth from exceeding federal power was not to be confined to the observance of constitutional limitations on the executive and legislative powers of the Commonwealth:

An essential characteristic of the judicature provided for in Ch III is that it declares and enforces the limits of the power conferred by statute upon administrative decision-makers.³⁴

Section 75(v) was seen as furthering that end through the control of ‘jurisdictional error’.

The importance of s. 75(v) as an aspect of the rule of law was underlined by an observation in the judgment of the High Court in *Plaintiff S157 v. Commonwealth*:

The reservation to this Court by the Constitution of the jurisdiction in all matters in which the named constitutional writs or an injunction are sought against an officer of the Commonwealth is a means of assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them. The centrality, and protective purpose, of the jurisdiction of this Court in that regard places significant barriers in the way of legislative attempts (by privative clauses or otherwise) to impair judicial review of administrative action. Such jurisdiction exists to maintain the federal compact by ensuring that propounded laws are constitutionally valid and ministerial or other official action lawful and within jurisdiction. In any written constitution, where there are disputes over such matters, there must be an authoritative decision-maker. Under the Constitution of the Commonwealth the ultimate decision-maker in all matters where there is a contest, is this Court. The Court must be obedient to its constitutional function. In the end, pursuant to s 75 of the Constitution, this limits the powers of the Parliament or of the Executive to avoid, or confine, judicial review.³⁵

There have been many cases over the years in which references have been made to Clark’s work and his influence on the shape of the Constitution. In the *Boilermakers’ Case*, Dixon CJ, McTiernan, Fullagar and Kitto JJ cited Clark, a man ‘entitled to speak with authority’, as evidence for ‘the contemporary view’ that the division between Chapters I, II and III ‘confirms the inference’ that judicial power may only be exercised by Chapter III courts.³⁶ In *Polyukhovich v. Commonwealth*³⁷ both Deane J and McHugh J drew upon Clark’s writing to support conflicting positions as to whether the Constitution precludes the enactment of ex post facto criminal laws.³⁸ In *Theophanous v. Herald and Weekly Times Ltd*, Deane J quoted at length from Clark’s *Studies in Australian Constitutional Law*, because ‘it is of such importance and contemporary relevance’,³⁹ and described Clark as the ‘primary architect of our Constitution’.⁴⁰ Finally, in *Sue v. Hill*, the majority cited Clark not just for his views on constitutional interpretation⁴¹ but also for his understanding of the meaning of ‘the Crown’, as found in the Preamble to the Constitution.⁴²

33 (2007) 228 CLR 651.

34 *ibid.*, 668 (footnote omitted).

35 (2003) 211 CLR 476 513–514 [104].

36 *R v. Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254, 276–78.

37 (1991) 172 CLR 501.

38 *ibid* 619 (Deane J); 720–21 (McHugh J).

39 (1994) 182 CLR 104, 171.

40 *ibid* 172.

41 (1999) 199 CLR 462, 487–88 [51].

42 *ibid* 497–99 [83]–[85].

The recent decision of the High Court in *Kirk v. Industrial Relations Commission of New Wales*⁴³ has also entrenched, as an implication from Chapter III, the supervisory jurisdiction of the state Supreme Courts over decisions of state officials. The court has also held that the states cannot abolish their Supreme Courts.⁴⁴ Those decisions, which flow from implications drawn from Chapter III, mean that the rule of law is pervasive throughout Australia in the sense that there is no exercise of official power that is not limited by law and whose limits are beyond challenge in the courts.

Clark's contribution is difficult to sum up in a few words. He was, as Richard Ely said, a remarkable man—poet, philosopher, sawmill engineer, political scientist, barrister, politician, Vice-Chancellor and judge whose influence on us throughout our system of government continues. He wanted to insert a bill of rights in the Constitution and in this he failed. However, the legacy of his work in relation to the provisions of the Constitution concerning the judiciary, the protections that have been derived expressly and by implication from Chapter III, show him to have been in his time and in this day, a true living force.

43 (2010) 239 CLR 531.

44 See *Kable v. Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 103 (Gaudron J), 111 (McHugh J), 139 (Gummow J); *Gould v. Brown* (1998) 193 CLR 346, 425 [127] (McHugh J), 446 [194] (Gummow J); *K-Generation Pty Ltd v. Liquor Licensing Court* (2009) 237 CLR 501, 543–44 [151]–[153] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ). See further *Fardon v. Attorney-General (Queensland)* (2004) 223 CLR 575; *Forge v. Australian Securities and Investments Commission* (2006) 228 CLR 45; *International Finance Trust Co Ltd v. NSW Crime Commission* (2009) 240 CLR 319; *South Australia v. Totani* (2010) 242 CLR 1; *Wainobu v. New South Wales* (2011) 243 CLR 181; *Assistant Commissioner Michael James Condon v. Pompano Pty Ltd* (2013) 87 ALJR 458.