# The Strange Case of Privileges and Immunities*

*William Buss*

The flyer advertising this talk said I was currently 'working on a book on the American influence in the making of the Australian Constitution,' but that sounds a little bit like a lobby group trying to get the Australians to do what would be in the American interest. In fact, what I am really talking about is the framers of the Australian Constitution. When they got to the job of making a constitution, they looked around to see what was available to help them. They took a hard look at the American Constitution and it proved to be very influential—but influential in a lot of different ways. One was providing a sort of model for them to follow as they did, for example, in the case of Chapter III dealing with the judiciary. If you pick up Chapter III in the Australian Constitution and Article III of the American Constitution, you would see that there are places where you could put one set of words over the other and, except for words like the 'United States' and the 'Commonwealth,' the language would be exactly the same. So there is a real positive modelling, in this case, on the American Constitution.

At the other extreme there are a number of places where the look at the American Constitution told the Australian framers, 'we don't want to do that'. For example, when the Australian framers looked at what the Americans had done with family law and what it had caused, they said that is a 'scandalous' result and we are going to stay as far away from that as we can. So there are warnings as well as good advice.

Then there are these funny in-between cases and that is where we get to the strange case of privileges and immunities. Starting with 'privileges and immunities' itself, I need to insist that you just take on faith what I am going to say: 'Privileges and immunities' is a traditional phrase used long back into English history; it is, at the same time, very vague and yet pretty specific. It is vague in the sense that exactly which rights and freedoms are part of privileges and immunities is always something that has to be discussed and worked out. But, on the other hand, it is repeatedly clear that it is talking about fundamental rights. 'Privileges and immunities' means *fundamental rights*. Now, identifying those fundamental rights is not always easy, but that basic fundamental rights idea is something that I want you to accept as I go along.

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Talking about fundamental rights leads to the Bill of Rights in the American Constitution, and it is important for me to start with the constitution which the Americans ratified in 1788. Notice that is several years after the end of the American Revolutionary War because right after they won independence, the Americans did not have our current constitution; they had a thing called the Articles of Confederation, which was pretty awful. The people we think of as the American patriots and constitutional framers—like George Washington, Alexander Hamilton and James Madison—said we have got to do something about this and what they did was make the American Constitution ratified in 1788. That constitution did not have any Bill of Rights. It was only later that it was added, in 1791. What happened is that in the constitutional ratification conventions in the 13 American states, the people made it pretty clear that they wanted a Bill of Rights. So, when James Madison went to the first Congress, he initiated what turned out to be the first eight amendments of the American Constitution which are commonly called the Bill of Rights.

There are two things we have to notice about those rights: first, a Privileges and Immunities clause was not included; second, the Bill of Rights applied only to the national government. So, for example, freedom of speech, one of the rights that was included in those eight amendments, was only a guarantee against things that the national government might do to interfere with the freedom of speech. It did not restrict state or local government at all.

But, then, Article IV, s 2 of that 1788 Constitution says,

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

Here we have a Privileges and Immunities clause, but notice it is a *state* Privileges and Immunities clause. What it is really saying is that, in the United States, if you are a citizen of one state and you travel into another state, you are entitled to these fundamental rights, or fundamental privileges and immunities, if the state provides them to its own citizens. So there is a state privileges and immunities concept that is based on non-state citizens being entitled to the fundamental rights that the state gives to its own citizens.

The first 70 years under the American Constitution were often bogged down in arguments about slavery and race, and one of the big questions was whether black people—and not just slaves, but free black people—were citizens entitled to these privileges and immunities. The Supreme Court gave an answer in the *Dred Scott* case, which was *Dred Scott v. Sandford* of 1857, probably the most infamous case in the history of American constitutional law. The Supreme Court's answer was No; black

people were always understood not to be fit to be citizens and indeed the Chief Justice said, in effect, it is unthinkable that black people would have these fundamental rights.

Let me just read a partial quote from Chief Justice Roger B. Taney's *Dred Scott* opinion describing the fundamental rights of people, including black people, if they had citizenship rights to privileges and immunities. They would be able to move freely to another state, Taney said, and 'to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation' and they would have 'full liberty of speech in public and in private upon all subjects … to hold public meetings upon political affairs, and to keep and bear arms wherever they went'.[1] So, he said, these are the kinds of things that it is inconceivable that the framers of the American Constitution would have wanted black people to have. That is not a very happy message from the highest court in the United States, and it helped to bring about the American Civil War.

The 14th Amendment came along in the United States after the Civil War and the first sentence of the 14th Amendment makes it clear that 'all persons born … in the United States, … [of whatever race] are citizens of the United States and of the state wherein they reside.' So that was good news.

Then, in the 14th Amendment, we have a second Privileges and Immunities clause. This is a Privileges and Immunities clause that seems to make up for the gap that was created by the original Bill of Rights. Remember I said the Bill of Rights was only applicable to the national government? But the 14th Amendment says '*No State* shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.' That certainly sounds as though whatever is included in 'privileges and immunities' is protected from interference by state governments. Now I will give you another one of those statements where I am telling you to accept something on faith: The consensus of American scholars today is that the Privileges and Immunities clause in the 14th Amendment was clearly intended to include the Bill of Rights of the first eight amendments.

That happy news lasted only as long as it took to get to the case called the *Slaughter-House Cases* (1873), a case with an all-too suggestive name. The *Slaughter-House Cases* held that the 14th Amendment Privileges and Immunities clause did not make state governments abide by the fundamental rights in the Bill of Rights. All it did was make applicable to the states certain rights which were already in the Constitution. The dissenting opinion in the *Slaughter-House Cases* said that is crazy; if that is all it does, then the 14th Amendment Privileges and Immunities clause has done nothing. It

[1] *Dred Scott v. Sandford*, 60 U.S. 393 at 417.

is a dead letter; it adds nothing to the Constitution. That has been the understanding in the United States ever since. The *Slaughter-House Cases*, in effect, read the 14th Amendment Privileges and Immunities clause out of the Constitution.

I want to emphasise the significance of that conclusion about the *Slaughter-House Cases*. It may be a little bit technical-sounding, perhaps, to say these fundamental rights only apply to the national government. But what it meant then, and for a long time after, is that the fundamental rights of black citizens were left to the protection of the states; and the states, particularly in the south in the United States, were not protecting them. So, for a very long period there was discrimination, lynching, murders that were un-remedied, a very unhappy result. It would be a little bit strong to say that the *Slaughter-House Cases* decision did this damage all by itself; but it certainly played a very significant role.

So, ending on that unhappy note, I am going to turn to Australia, starting with Andrew Inglis Clark, who brought a full constitution to the 1891 Australasian Federal Convention. Accompanying that draft of a constitution ready to go for Australia, he wrote a memorandum that said his draft was expressly based on the Constitution of the United States of America. What does that have to do with the Privileges and Immunities clause? Well, it turns out, nothing at first because Clark did not include the two American Privileges and Immunities clauses. In fact, he did not include even one Privileges and Immunities clause. And that is the way things stayed for a while.

The drafting committee, of which Sir Samuel Griffith was the chair, met before Easter in 1891 and began editing Clark's draft. Then, over the Easter weekend, Griffith took the drafting committee on a working voyage on a steamship called the *Lucinda*, which Griffith (as Premier of Queensland at that time) brought to the convention in Sydney. The most significant drafting of the 1891 convention took place on the *Lucinda* on Easter Saturday, 1891, almost exactly 121 years ago today. This occurred on what Professor John La Nauze called the beautiful Hawkesbury River, which I think is the same river that Kate Grenville calls 'the secret river' in her novel by that name. When they sailed out of the Hawkesbury River on Easter Sunday, to return to Sydney, there was still no Privileges and Immunities clause in the draft of the Australian Constitution that then existed.

Now the next thing that happened is slightly controversial but I have to go back a step. Andrew Inglis Clark was a member of the 1891 drafting committee but he did not make the cruise to the Hawkesbury River. He was sick in bed with the flu. So, as the story goes, when the *Lucinda* came back into the harbour in Sydney, they picked up Clark and at that point he added a Privileges and Immunities clause. It is a great story.


QGSY *Lucinda* at Farm Cove, 2004, by Don Braben (1937–). Courtesy of Don Braben, FASMA.

Here is a painting that was done of the event a few years ago. At the time the picture was painted no one knew where this happened, so they did some consultation with people who might have had some idea and they finally concluded that the most likely place was where the Sydney Opera House is now. So the painting is supposed to be of that location. I think the picture is intended to show Inglis Clark being rowed out to the *Lucinda*.

One final problem is that Clark himself, in anything I have ever read, never claimed that he was the author of the 1891 Privileges and Immunities clause. I think everyone who writes about this assumes that he was, and it is hard not to assume that he was the one because it is hard to imagine who else it would have been. But, in any event, at that point there was a Privileges and Immunities clause in the draft of the Australian Constitution. Remember, now, we have Clark who was very aware of the American Constitution and we have these two Privileges and Immunities clauses in the American Constitution. Which one did Clark put in the 1891 draft on the *Lucinda*? Well, most people say it is a mixture of the two and indeed when you look at it carefully it is a little bit unclear which of the two it was. But if the Australian Constitution that was drafted at that time had been approved, that clause would have been in there; but, as you probably know, in 1891 the proposed constitution was not adopted and the Australian Constitution was put on the back burner for a while.

In 1897 and 1898 the constitution came back into the picture and was finally approved in 1898 by the framers and became a British statute in 1900. But an interesting thing happened along the way to approval. In 1891 no one had raised any questions about, let us call it, 'Clark's clause'; but in 1897 *Clark* raised a question about Clark's clause. That is, he was not a member of the Australasian Federal Convention in 1897–98 but he was very active and in touch with the convention and he had a new proposal, another Privileges and Immunities proposal, and he basically said that the 1891 proposal is not very good. He did not say it was 'my proposal'; he just said that it was not very good. Then there was a big debate in the Australian constitutional convention. In that debate, the clause that Clark then preferred—that is the one he wrote in 1897—was voted down; and then finally the one that he arguably had written in 1891 but repudiated in 1897 was voted down. So at that point there was no Privileges and Immunities clause in the Australian Constitution.

A short time later, Josiah Symon, the chair of the Judiciary Committee, introduced another Privileges and Immunities clause and this one, Symon said expressly, is exactly in words of Article IV of the American Constitution. That proposal was subjected to further extensive debate, and it was finally approved (and is section 117 in the Australian Constitution); but only after they took out the 'privileges and immunities' words and simply said a state could not discriminate against a non-state resident. So is it a Privileges and Immunities clause, without 'privileges and immunities' language? Some of you are familiar with the great constitutional treatise by John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth*, published in 1900, before the Constitution even became official. Quick and Garran take an interesting view on this. They say, of course it is unthinkable that all discrimination against out-of-state residents would be prohibited; it is only those things involving 'privileges and immunities' to which non-residents are entitled to equal access. Quick and Garran specifically quoted an American Supreme Court Justice who, in the case from which they were quoting, was interpreting the 'privileges and immunities' language in Article IV of the American Constitution.

One more thing from Quick and Garran. They also said there is this other Privileges and Immunities clause in the American Constitution and that is in the 14th Amendment. We don't have one in our Constitution; but don't worry because it does not make any difference. Quick and Garran said that ever since the *Slaughter-House Cases* the American 14th Amendment Privileges and Immunities clause does not mean anything. And so, Quick and Garran concluded, we are just as good as they are; we have nothing like the 14th Amendment in the Australian Constitution, but the Americans have nothing either even though they have some 'privileges and immunities' words in there.

I want to mention one last thing about Clark, as a way of capturing the difficulty, sometimes, in understanding what is happening when you have one group of people looking at someone else's constitution and then advocating something related for their own constitution. Remember, Clark was the advocate of 'privileges and immunities' provisions and they were voted down. He thought that was a terrible result because he thought what the Americans had done was so wonderful. But he then also wrote a treatise in 1901, and in his treatise he praised the *Slaughter-House Cases*. I have never been able to understand why he praised the case that, in the United States, undermined the clause he advocated. So there is a mystery at the end of the Clark connection to privileges and immunities in the United States.

Unfortunately, there is no mystery about the fact that the racial factor was intertwined with privileges and immunities in Australia, just as it was in the United States. For example, John Quick (that is the same Quick who was the co-author of the treatise) when he was talking as a convention delegate explained the rejection of the Privileges and Immunities clauses:

> We have already eliminated interstate citizenship upon the ground that it might interfere with the right of each state to impose disabilities and disqualifications upon certain races.[2]

In other words, we do not want anything in our Constitution that will prevent the states from discriminating on the basis of race.

In a statement by Henry Bournes Higgins, which he made right before the convention approved the non-discrimination clause that became s 117 of the Australian Constitution, he explained discrimination that was and was not acceptable: 'We want a discrimination based on colour'.[3] That is, it is OK to discriminate on the basis of race as long as you do not discriminate on the basis of state residence.

William Trenwith, the only Labor representative at the convention, made it clear that the framers of the Australian Constitution not only shared but were influenced by their American predecessors in linking race and privileges and immunities: 'The Americans made a mistake by declaring that the negroes should be citizens',[4] so we do not want to go down that road. Trenwith was saying concisely what was said a lot in the course of 45 pages of the convention transcript: The Americans did not really provide racial equality, and they were misguided in trying to do so.

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[2] Australasian Federal Convention, 2 March 1898, www.aph.gov.au/About_Parliament/Senate/Research_and_Education/Records_of_the_Australasian_Federal_Conventions_of_the_1890s, p. 1767.

[3] Australasian Federal Convention, 3 March 1898, p. 1801.

[4] Australasian Federal Convention, 3 March 1898, p. 1792.

But all of that was over 100 years ago; is it the end of racism in the United States and Australia? Well, we all know, not quite. We do not have at all the same racial climate now that we had at the end of the nineteenth century, but we have not quite got to the perfect racially neutral time. The Americans have partly improved their situation by finding another provision in the Constitution that did protect blacks against discrimination and did incorporate the Bill of Rights so that now it does apply to the states and local government as well as to the federal government. The Australians have reached a better world, if you will, not through a Bill of Rights—not through anything in the Australian Constitution that is binding on the government, state or national—but through statutes, common law and international treaties.

Finally, is a Bill of Rights worthwhile? I am not going to tell you who is right and who is wrong. I will simply say that the question whether there should be a Bill of Rights in Australia is one that continues to be debated and a national Bill of Rights is always rejected when it is proposed. There is even a view that 'Australian Exceptionalism' is the way to describe the fact that Australia is the only one of the English-speaking democracies (compared to Canada, New Zealand, the United Kingdom, South Africa, and the United States) which does not have anything like a national Bill of Rights. At least at this time that is the way things are. Perhaps it should be remembered that those nineteenth century decisions that provided the foundation for Australian Exceptionalism were heavily influenced by racial considerations.

**Question** — While you say that Australia, unlike Canada, New Zealand and the UK, does not have a Bill of Rights, we do have a High Court that has not been backward in finding all sorts of implied rights in our Constitution. Do those other jurisdictions have a body like our High Court that has been so active in that field?

**William Buss** — Yes, although the differences are, as you have pointed out, that in none of the other countries that I listed have they achieved what I will call 'enlightened' views about individual rights through some of the imaginative things that your court has done. It is even a little misleading to say that there are no Bill of Rights provisions in the Australia Constitution. There is a religious provision which is very much like the religion provisions in the American Constitution. There is of course section 117, which is this offshoot of Article IV, which is kind of an individual rights provision. But on the other hand, the Australian High Court has teased a great deal of Bill of Rights type protection, for example, out of Chapter III. That is, the

notion that there are certain things that I call the rule of law that require fairness in judicial proceedings. You can read the requirements of Chapter III, directing how the courts operate, as a source of certain kinds of individual rights.

The court has also found a so-called implied right of political communication, which is sort of like the First Amendment but more limited. Canada and the United States haven't had to do that because they have the stuff there in writing. I think that it is clear that in all countries if there is a court which has any kind of judicial review, that court is going to have difficult decisions to make that affect individual rights and of course it is always claiming it relies on interpreting the Constitution. It is not quite a dictionary exercise figuring out what words mean; it is trying to make sense out of a constitution as a whole. So even though I said 'yes' to your question, that there are activist courts, it goes up and down. I think a lot of people would say in the United States right now the court is too activist in a non-individual rights direction.

**Question** — One of the interesting things that is happening in regard to our Constitution at the moment is the issue about the recognition of Aboriginal or Indigenous Australians in the preamble. What are your thoughts on that?

**William Buss** — Let me say two things. The first is that I do not know the narrow specifics of that conversation and discussion so I do not really have a view on that. I know the history of the treatment of Aborigines in Australia which I guess is comparable to the treatment of racial minorities in the United States. It seems to me that to the extent that it would be helpful to include a declaration that probably would not have legally binding effect in the sense of deciding cases, it would be a declaration of the purpose and attitude of the country, and I would be in favour of that. You might call it a symbolic act, but I think symbolic acts can be very important.

**Question** — In your view as a relative outsider, and we are all outsiders apart from our first Australians, how do we improve relations with our first Australians?

**William Buss** — I really think I should probably not try to answer that. Let me put it this way: if I were an Australian citizen I would want to do that and only have to figure out how to do it. Gestures and symbols are important but then there are very real practical problems as well in dealing with them, that is, figuring out ways not just to say we like you or wish things were better but to make them so. At the time of your convention you had two racial problems. One was with Aborigines and I think that the framers were probably not primarily worried about Aborigines because they thought they were dying out. But they also had a problem with Chinese and other racial minorities who were thought to be taking work from Australians, so you have got different kinds of problems there.

In the United States we have racial problems that are all related to slavery and attitudes about slavery and the inheritance of that. We also have a problem with American Indians who come closer to being in the position of Aboriginal people in Australia. That is, people who are here, people whose land, let us say, was taken over—there was not a friendly negotiation by any means that resulted in all that happened. So we have all those problems in the United States and I think it is fair to say we have not solved the question of the best way to deal with native Americans or American Indians and all I can say is we have to keep trying.

**Comment** — I think it is one of those uncomfortable things about both of our histories. Certainly in the case of the Australian Constitution it was an overtly racist document. It did provide for discrimination and I think it is something that we find difficult to come to terms with now and to rationalise it and hence the need to keep trying.

**William Buss** — I wrote a quote down that I decided I did not have time to read because I was running out of time. I think we are rightly concerned about the treatment of racial minorities in the past and now and how we can do better. I think it is easy in both the United States and Australia to be moral judges of our framers and I think one has to be careful about that. I think that without approving or discounting some horrible things that people did, that they were different times and it does not mean that the Australian Constitution is a bad constitution because there were some bad motives in some parts of it. The quote that I was going to read is from Gordon Wood from his book *The Idea of Americans: Reflections on the Birth of the United States*. Gordon Wood is probably the leading American historian on the American Revolution and immediate post-revolution period. He says: 'yet despite his repugnant views on race Thomas Jefferson still has something to say to us Americans today'. So my feeling is that one somehow has to have room for both this serious criticism and also the big picture about other things that people did.

**Question** — Would you like to make some sort of comment on the development framing of the US Constitution in relation to the history of Great Britain? It always seems that people I meet in the States seem to assume that parliamentary tradition started in the United States after the United States was formed whereas many, if not all, of the traditions actually had some sort of antecedents in British tradition.

**William Buss** — Well I am not sure I have much of a useful comment because I totally agree with your statement and I guess I would add that the American framers, most of them, were quite aware of that and really thought that the United Kingdom had the best government in the world. They wanted to do it just a little bit better. It was not at all a case of disavowing. It would be a case, I think it is fair to say, of

exaggerated notions of wrongdoing to them by the British. A lot of Britons at the time wondered how we could think we were being so badly treated by the British yet have slaves. It is not just that we exaggerated our own harsh treatment and taxation without representation and so on, but we were engaged really right up to the time of the American Revolution in a very intellectual dispute with the government of England and the basic dispute was whether sovereignty has to be totally unitary or whether a divided sovereignty was possible.

Many Americans who became revolutionaries in the end thought pretty much right up to 1775 and 1776 that this was a problem that we would be able to work out if only the British would concede that we had a certain level of independence. Now, I have never been clear about whether the British in their treatment of Australians profited from their experience with the Americans, where arguably they were too stubborn. We were stubborn of course too. I have read a lot of things that suggest, for example, in connection with the transportation [of convicts] policy that the British were pushing transportation on the Australians long after very many Australians were strongly opposed to that and it is understandable why they would be. And the British finally did back down. So I do not know whether they learned or whether just in the nature of things when you are a world power with a world empire it is inevitable that you are going to think of yourself first and your colonial outpost second.

**Question** — Which of the two constitutions, the American or Australian one, do you believe serves the country better? It could be perhaps too hard to compare. Secondly, is there anything that you feel particularly strongly about that you think ought to be changed in Australia?

**William Buss** — Well, first of all, let me just repeat, yes it is too difficult to answer that question. I do not think that Australia *ought* to have a Bill of Rights but I guess if I could transplant my views and then imagine that I am here, I probably would be on the side of the people who advocate a Bill of Rights. Do I think that is more important than everything else? No, but for example I know that there are some very active efforts right now being made to change the Constitution in connection with the treatment of Aboriginal people and that seems to me to be quite an important thing. As you probably know, the one amendment to the Australian Constitution that was overwhelmingly passed by the Australian people was the one that deleted the exception for the Aboriginal race in the treatment of people of another race. When the High Court got around to interpreting the amended clause, they concluded that the power to legislate for 'people of any race for whom it is deemed necessary to make special laws' does not necessarily mean 'special laws' in an affirmative way. Maybe it is a correct decision but it seems to me most unfortunate if that is the correct reading of the Constitution.

**Question** — At the time of the revolution it was not just people from England and the United Kingdom who became the United States, you also had Scandinavians, French, Spanish and Prussians. What influence did the non-English settlers have on the formation of the Constitution?

**William Buss** — I am embarrassed to say that I have no idea. The one thing that we do know, and I am sure you know, is that militarily speaking we got an incredible amount of help from the French. We probably would not have been able to succeed in the war without it. That did not have too much to do with there being French people in the United States, the British and the Americans together having just defeated the French in the war over the control of Canada. I do not know the answer to your question about what role these other ethnic groups or national groups might have had.

**Question** — Could you comment on the general unwillingness of both the United States Supreme Court and the Australian High Court to draw on international human rights instruments in cases that involve human rights issues? You will be aware that in Australia we have had one former judge, Justice Michael Kirby, who regularly drew on international human rights instruments to throw light on provisions in our Constitution where he found ambiguity or uncertainty. The other members of the court have generally rejected that approach and in the United States most of the judges with the exception of one case involving treatment of a minor, have been almost derogatory about the concept of drawing on international human rights instruments. It seems ironic that two countries which have generally high human rights standards will not draw on those international instruments.

**William Buss** — First of all let me start with Australia and with Justice Kirby. I am aware of Justice Kirby's position on this and I certainly agree with your statement that he was on one side of the spectrum in terms of his willingness to read into legislation an interpretation that would be more favourable rather than less favourable to individual rights because of Australia's treaty obligations. Now turning to the United States, we are an embarrassment. I think there are two things here. One is what we do with international treaties and I do not think we are particularly sensitive and responsive in doing that, certainly in my opinion less so than the Australian court. But I think far worse is the American head-in-the-sand unwillingness to look at what other countries, including Australia, are doing on any particular issue. There is a very slow movement in the direction of being more responsive to that but so far it is one or two justices. In fact I saw Justice Sandra O'Connor give a lecture [at ANU in Canberra] after she had retired from the Court and talked very strongly about the wrongheadedness of the American Supreme Court. No one suggests that they should be bound by the law and the interpretation of Australia or any other country in the world, but look at the reasoning and the arguments and ask yourself whether you

cannot learn something from that. I think that the United States has a long way to go on that effort.