

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

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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 The 1891 constitution bill is a fine, historical document, but it is not *the Constitution* (upper case 'C') of the Commonwealth of Australia.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.

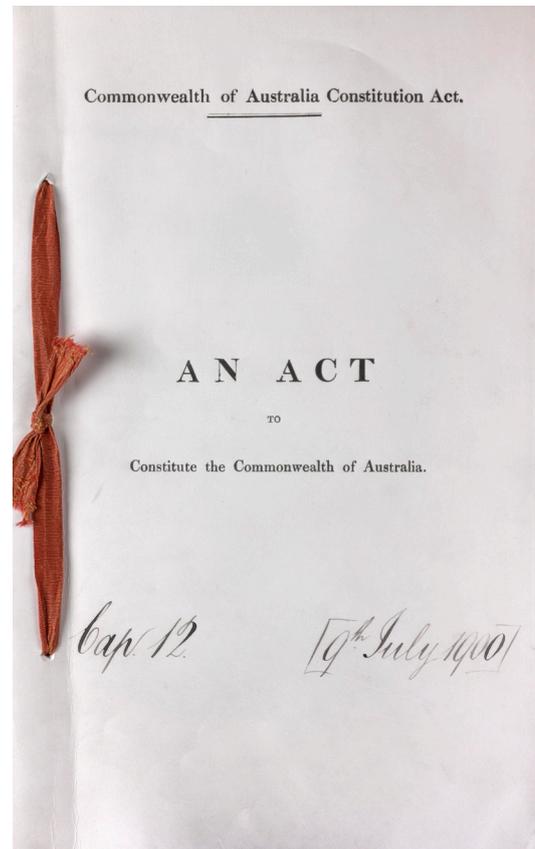
7 A small handful can also be found in the *Federal Council of Australasia Act* (Imp) of 1885, which was drafted by Sir Samuel Griffith.

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.