



BOOK REVIEWS

*John Williams**

NOT A SUBURBAN BOY: ANDREW INGLIS CLARK AND AUSTRALIAN CONSTITUTIONAL HISTORY

AN AUSTRALIAN DEMOCRAT: THE LIFE, WORK, AND CONSEQUENCES OF ANDREW INGLIS CLARK

Marcus Haward and James Warden (Editors)

Centre for Tasmanian Historical Studies, University of Tasmania,
Tasmania, 1995

x, 282pp

ISBN 10-85901-641-2

THE Easter long weekend 1891 offered for the delegates to the Australasian Federal Convention a chance to get away from the task, the heat and each other. Some delegates used the break to make their way home or to holiday resorts.¹ One group, led by Richard Chaffey Baker of South Australia, attended the autumn racing carnival at the Australian Jockey Club at Randwick.² However, it is the voyage of the paddlewheel steamer the *Lucinda*, provided to Sir Samuel

Griffith by the Queensland Government, that has entered Australian constitutional folklore. As the story goes, Griffith invited a select group of the Convention delegates for a working holiday on the waters of Port Jackson and Broken Bay. The boating holiday was a disaster due to the arrival of a swell that caused an outbreak of sea-sickness amongst the delegates.³ It was not until the *Lucinda* reached the sanctuary of Refuge Bay that Griffith, together with Kingston and Barton, set about revising the Constitution Bill. They worked from ten in the morning until eleven at night on the Easter Saturday. Where was Andrew Inglis Clark, the Attorney-General of Tasmania, and the missing member of the official Drafting Committee? In bed, sick with influenza. It was not until the Easter Sunday that he had a chance to join his fellow Committee members. Years later Clark's recollection of the events were reported in the Hobart *Mercury*.

The Drafting Committee of the Convention went for a picnic in the pleasure yacht *Lucinda* and while enjoying themselves, they took it into their heads to tinker with the Bill and they altered all the clauses relating to the judicature. He found that he had to let it go as they had altered it, and he took leave to say, messed it.⁴

In many ways this incident is indicative of the place that Clark has had, until recently, in Australian constitutional historiography. Clark missed the boat. Even in Canberra where federation history is annotated with suburban description, 'Clark' is not to be found alongside Parkes, Kingston, Griffith, Deakin, Isaacs, Higgins, or Reid.⁵ Clark is not a suburban boy.

An Australian Democrat brings together a group of prominent Australian academics who, from various perspectives, sketch out the life and legacy of Andrew Inglis Clark. In all there are seventeen essays as well as the reproduction of two works by Clark (*Why I am a Democrat* and *The Future of the Australian Commonwealth: A Province or a Nation?*). In the absence of a biography this collection represents the most significant work produced on the life of Andrew Inglis Clark. Unlike some biographies which, in re-telling the story from grandparents to grave often lose sight of complexities of the life, this collection offers a tightly-focused analysis of its subject.

The book is structured around a number of themes. The first and most obvious is Clark's contribution to federation. Clark arrived at the 1891

Federal Convention with a complete draft constitution which served as a template for the drafting committee. In dealing with this theme a number of perspectives are advanced. Alex Castles, Marcus Haward and the late Frank Neasey (to whom the volume is dedicated) explore aspects of Clark's involvement in the federal movement. Related to this theme is Clark's constitutional and legal thought which is taken up by Alex Castles, Sir Guy Green and the encyclopaedic James Thomson.

A second major theme focuses upon the philosophical and ideological underpinnings of this most complex of characters. Alex McLaren (Clark's grand-nephew), offers us a picture of the family's Scottish background and its religious convictions. Clark's religious radicalism is an issue that is given extensive coverage by Richard Ely. Michael Roe, John Williamson, Michael Denholm and James Warden all assess Clark's ideological groundings. What emerges is a picture of a prominent reformer and, by the standards of the time, a radical thinker.

A final theme that the work covers relates to Clark's concern for electoral reform. The Hare-Clark system, which bears the name of Thomas Hare and Clark, remains one of the most conspicuous reminders of this concern.⁶ The evolution, operation and legacy of this system are investigated by Scott Bennett, Malcolm Mackerras and Richard Herr respectively.

Whilst it is not possible in this review to give a detailed response to the numerous arguments put forward in this volume, I would like to take up a number of issues raised by various authors. The first relates to the impact that American constitutionalism had on Clark and the subsequent importance that it played in his draft Constitution. It is clear that Clark was obsessed with everything American. As Herbert Nicholls noted: "To him America was good; its people were good; and its Constitution was as good as the nobly rhetorical preamble to the Declaration of Independence."⁷ Clark travelled to America, corresponded with Americans (including Justice Oliver Wendell Holmes Jr), and had American papers and legal texts sent to him. Indeed, in a letter to Edmund Barton written while holidaying in Tasmania, BR Wise stated that: "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 results of the shifting (sic) may be usefully felt when we have to discuss the Bill in detail."⁸ Yet what was the depth of Clark's understanding of the American system which he so espoused? Both Alex Castles and James Thomson take up this question.

Alex Castles, in re-telling the story of a famous telegram between Barton and Clark during the 1898 Melbourne Convention, casts doubts on the assumption that many of the prominent framers of the Constitution, like Barton, Isaacs and Higgins, had a substantial understanding of American constitutional law.⁹ In Clark's first draft of 1891 he included particular clauses to overcome the defects in the powers of the United States Supreme Court which became apparent in light of the famous case of *Marbury v Madison*.¹⁰ When the Convention in 1898 set about dismantling the provisions at Isaacs' behest, Clark (no doubt in a high state of agitation) dispatched a telegram to the Convention explaining his motives for their original inclusion. The reply he received from Barton is a telling admission. Barton said that: "None of us 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."¹¹ This incident no doubt lends credence to Castles' claim that Clark had a superior knowledge of the working of the American Constitution to that of his more famous contemporaries. This of course does not speak to the depth of Clark's knowledge, but only to the fact that he was better informed than his fellow framers. Castles hints at his own doubts of Clark's appreciation of the operation of the Supreme Court and its role in the centralisation of power in the United States. This, he argues, stems from Clark's understanding of post-Civil War America. He states that:

In Clark's case, he may have had his own special version of this which may have been more roseate than some. Nevertheless, it was a viewpoint, myopic as it may have been at times, which also found expression in the United States.¹²

In his article James Thomson, like Castles, also questions the strength of Clark's knowledge of American constitutional law.¹³ Thomson tests Clark's understanding of American constitutional law by focusing on his advocacy of an American-style federation for Australia. He argues that by extolling American federalism on the grounds that it preserved a decentralised state Clark misread American constitutionalism. In particular Thomson notes Clark's contradictory support of the judgments of Chief Justice Marshall which have generally been said to have centralised power in the United States. Further, Thomson points to the fact that constitutional development in America since 1937 "has diametrically opposed Clark's view of American federalism"¹⁴ and this was also the case in Australia by 1920 with the High Court's decision in the *Engineers' case*.¹⁵ Thomson asks: "Is Clark responsible for the

prevailing situation in Australian constitutional law of Commonwealth legislative dominance?"¹⁶

There are a number of responses to Thomson's argument. Firstly, did Clark advocate the type of decentralised federation which Thomson suggests? I would argue that he did not.¹⁷ However, this is not to suggest that Clark would have welcomed the centralism that is today evident in Australian and American federalism. I would point to a number of issues to support this argument. First, as is noted by Haward,¹⁸ Clark resisted the description that States would have 'rights'; rather he preferred to suggest that there were States' 'interests' to be considered in the allocation of powers between the federal and state jurisdictions. As Neasey points out, Clark was not an extreme "states-righter"¹⁹ and appreciated the need to have a stable central government. Such a view was no doubt informed, as Haward and Castles have indicated, by a particular reading of the causes of the American Civil War.

Secondly, like Thomson I would also point to Clark's embracing of the jurisprudence of Chief Justice Marshall as indicating that Clark believed in a strong central government. However, to do so is not to suggest that Clark endorsed "the prevailing situation in Australian constitutional law of Commonwealth legislative dominance". If we look at *Pedder v D'Emden*²⁰ we find that Clark J (in dissent) applied Marshall CJ's decision in *McCulloch v Maryland*²¹ and held that the state could not impose a duty on the income of a federal employee.²² Clark's view was later endorsed by the High Court on appeal in *D'Emden v Pedder*²³ when it established the doctrine of implied immunities. A somewhat more frank insight of Clark's view of federalism can be gleaned from a letter he wrote to Alfred Deakin, the then Attorney-General for the Commonwealth. In it he expresses his mind on a decision of the Victorian Supreme Court that sanctioned a state tax on the income of a federal customs officer. Clearly Clark did not endorse a notion of federalism that weakened the capacity of the centre to perform its functions. Clark wrote to Deakin on 4 March 1903:

Since I came home I have read Madden's judgment on Wollaston's case²⁴ and felt so much irritated that I could not rest until I had relieved myself by writing a criticism of it. a'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. With kind remembrance to Barton and O'Connor.²⁵

Clark was a federalist. He no doubt endorsed the direction of the three founding members of the High Court in their embrace of the implied immunities and reserve powers doctrine. It was the dismantling of these doctrines after 1920 that increased the centralist tendencies in Australian federalism, not the actions of Clark who died in 1907. Thus insomuch as Clark can be held accountable for the centralist tendencies in Australia, he is not alone amongst the framers in their inability to tell the future.

One last response to Thomson's engaging thesis about Clark's part in the centralisation of Australian federalism may be left to Clark himself. Whilst I would speculate that Clark would have been surprised by the direction in Australian federalism after 1920, he nonetheless would have appreciated the need for change. As he noted in his 1901 *Studies in Australian Constitutional Law*, the Constitution was not framed to serve "temporary and restricted purposes". Rather,

the social conditions and the political exigencies of the succeeding generations of every civilised and progressive community will inevitably produce new governmental problems to which the language of the Constitution must be applied, and hence it 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 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.²⁶

So what of Clark's understanding of American constitutionalism? The question offers endless room for intriguing speculation. Clearly Clark eclipsed the majority of the framers whose standard text on all things American was the much revered three volume work by Bryce, *The American Commonwealth*.²⁷ Castles' argument in relaying the story of the Barton-Clark telegram indicates that Clark stood a pace ahead on the issue of American constitutional law than the most learned lawyers in the

country. As Castles and Thomson indicate, Clark's vision of America may have been at times partial, perhaps even simplistic. However, one is left to marvel at how an individual at a far end of the earth at a time before the communication revolution could approach the status of expert in the constitution of a country he only visited three times in his life.²⁸

A second theme that is of interest in this volume is the philosophical placement of Clark in Australia's intellectual motif. Contemporaries of Clark, such as Alfred Deakin, noted that his "sympathies" were republican.²⁹ The *Hobart Mercury*, perhaps for want of a better term of abuse, denounced Clark as an "ultra-republican" if not a "communist".³⁰ However, those authors who address themselves to Clark's intellectual foundations in this volume present us with more than just a portrait of a remarkable individual. It is the life in context that offers the greatest insights into Clark.

To understand Clark's federalism, nationalism, religious liberalism and ultimately his republicanism there is a need to appreciate Tasmania in the later part of the nineteenth century.³¹ Indeed, it is the 'spirit of place' that unifies what at first blush would appear to be contradictory aspects of Clark's character. For instance, Tasmania's convict heritage offers explanation for much of Clark's intellectual proclivities. The Clark family had a small, but honourable, part in Tasmania's anti-transportation movement and as such they were aware of the writings of John West and his nationalist objectives. The theme of Clark's nationalism is taken up by Roe, Ely, Haward and Williamson who all note that his intellectual inheritance is in accord with that of West. The interplay between Clark's nationalism and his embrace of federation again finds some of its foundation in Tasmania's convict past. As Roe notes: "For Clark and other Tasmanians, one appeal of federation was its promise to bury convictism."³² It thus comes as no surprise that for Clark and other young Tasmanians of his generation, the work of Guiseppe Mazzini offered inspiration for reform and unification.³³

Clark's religious radicalism is a subject that Ely in particular has addressed. Again he offers us an insight into the religious tolerance of the time that no doubt fostered the formation of alternative religious beliefs to which Clark was a party. Ely notes that:

the relative plenitude of local tolerance of religious individuality stemmed to a significant degree from the fact that in the 1830s and 1840s Van Diemen's land was

Britain's most remote penal gulag. Why so? Given the considerable difficulties of carcereal invigilation over such a great distance, one managerial outcome had to matter to Britain far above all others: the *conduct* of convicts and former convicts. What they thought or felt was of no concern *as such* to the British government, provided that from such thoughts and feelings issued fair productivity, average decorousness, and tolerable respect for life and property.³⁴

James Warden's article takes up Clark's republicanism. In particular he highlights that Clark's adoption of the Jeffersonian republic stands in stark contrast to the utilitarian assumptions of Tasmania's convict past. As he states:

Van Diemen's Land, unlike the United States, was not brought forth on ideals of life, liberty and the pursuit of happiness but instead on the proposition that life was nasty, poor, solitary, brutish and short.³⁵

Thus Clark's advocacy of republicanism and particularly his belief in natural rights are best understood when considered against the history of his island home. It is factors like the particular intellectual climate in Tasmania at the time, the consequences of the convict past and the 'tyranny and amenity of distance' that fashioned Clark's philosophical and intellectual position.

The last issue that I wish to address is the relative absence of Clark from our constitutional history. Why is it that Clark, until recently, has remained the forgotten framer? Part of the answer can be found by inverting the question. Who are the remembered framers? They are, as Roe notes in citing LF Crisp's account of the *Federation Fathers*, "the victors".³⁶ In early constitutional historiography it was Deakin³⁷ and Wise³⁸ who were able to construct a history that praised what Crisp called the "Ultra" federalists. Clark, however, could not be described as an "Ultra" federalist. After 1898 his concern over the financial settlement for Tasmania meant that he abstained from taking any further part in the federalist movement. Years later he wrote to Deakin regarding the likelihood that Tasmania would not be compensated for its loss of tariff duties. He stated that: "it will be regarded in Tasmania as a political breach of faith, and I sincerely hope that neither you individually, nor the Barton Ministry collectively will be found making it".³⁹

Deakin's description of Clark's role in the framing of the constitution, like that of Barton, is down played. According to Deakin they had "some hand in the drafting, though even Clark's share was small".⁴⁰ Wise, in many respects a Clark supporter, dismissed him as an "extreme States-Righter".⁴¹ Clark however, was a good federalist, but not a zealot.

Another reason for Clark's absence from the history of federation, and one not unrelated to the first, was that in the theatre that was the constitutional conventions Clark would not have shone. Deakin described him as being: "Small, spare, nervous, active, jealous and suspicious in disposition, somewhat awkward in manner and ungraceful in speech."⁴² Both Clark and Kingston, according to Castles lacked the 'polish' and eloquence that would have put them in the class of Deakin or Reid.⁴³

Unlike his contemporaries Clark failed to cultivate the national profile. As Neasey points out, Clark's absence from subsequent federal conventions, his withdrawal from active support of the Constitution Bill and failure to secure a place on the High Court all obscured him from history's gaze.

In Clark's Tasmanian heritage, so crucial in understanding his intellectual and philosophical development, I would suggest another explanation as to why he was not recognised in Australian federation history. As Neasey noted in relation to Clark:

Deakin was a large colony representative, inclined to look down his nose a little at small colony men battling hard to reach a constitutional basis which would preserve the identity and local autonomy of their colonies - to an unnecessary and unreasonable degree in the view of many Victorian and New South Wales representatives.⁴⁴

An Australian Democrat, like the recently published *A Woman's Constitution?*, makes a significant contribution to uncovering the labours of the forgotten framers of the Australian Constitution.⁴⁵ As for Clark, there can be no greater praise (or lament?) than to note that he "was a man ahead of his time".⁴⁶

- * B A (Hons) (Tas), LL B (UNSW), Ph D Candidate, Law Program RSSH, Australian National University.
- 1 La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, Melbourne 1972) p64.
- 2 Castles, "The Voyage of the 'Lucinda' and the Drafting of the Australian Constitution in 1891" (1991) 65(5) *ALJ* 277.
- 3 La Nauze, *The Making of the Australian Constitution* p65.
- 4 Clark's statement to the Tasmanian House of Assembly during the debate on the Commonwealth Bill, Hobart *Mercury*, 17 August 1897: quoted in Reynolds, "A I Clark's American Sympathies and His Influences on Australian Federation" (1958) 32 *ALJ* 62 at 66.
- 5 There is however an Inglis Place in the suburb of Latham.
- 6 For a recent discussion of the development of Australia's electoral system, and Clark's contribution to it, see *McGinty v Western Australia* (1996) 134 ALR 289 at 377-378 per Gummow J.
- 7 Nicholls, "The Struggle for Tasmania" in Wise, *Making of the Australian Commonwealth, 1889-1901: A Stage in the Growth of the Empire* (Longmans, Green & Co, London 1913) p351.
- 8 Wise to Barton, 13 January 1893, Barton Papers, MS 51/1/190, Australian National Library, Canberra.
- 9 Castles, "Andrew Inglis Clark and the American Constitutional System" in Haward & Warden (eds), *An Australian Democrat: The Life, Work, and Consequences of Andrew Inglis Clark* Ch 3.
- 10 (1803) 5 US (1 Cranch) 137.
- 11 Castles, "Andrew Inglis Clark and the American Constitutional System" in Haward & Warden (eds), *An Australian Democrat* p16.
- 12 At p17.
- 13 Thomson, "Andrew Inglis Clark and Australian Constitutional Law" in Haward & Warden (eds), *An Australian Democrat* p60.
- 14 At p63.
- 15 *Amalgamated Society of Engineers v Adelaide Steamship Co* (1920) 28 CLR 129.
- 16 Thomson, "Andrew Inglis Clark and Australian Constitutional Law" in Haward & Warden (eds), *An Australian Democrat* p63.
- 17 To be fair to Thomson he does canvass this possibility but indicates that there is stronger evidence for the view that Clark misread American constitutionalism.
- 18 Haward, "Andrew Inglis Clark and Australian Federalism" in Haward & Warden (eds), *An Australian Democrat* Ch 6.
- 19 Neasey, "Andrew Inglis Clark Senior and Australian Federation" (1969) 15(2) *AJPH* 1 at 11.
- 20 (1903) 2 TLR 146.
- 21 (1819) 4 Wheat 316.
- 22 For an account of Clark's judicial career see Ely (ed), *Carrel Inglis Clark: The Supreme Court of Tasmania: Its First Century 1824-1924* (University of Tasmania Law Press, Hobart 1995) pp159-164.
- 23 (1904) 1 CLR 91.

- 24 (1902) 28 VLR 357.
- 25 Clark to Deakin, 4 March 1903, Deakin Papers, MS 1540/1/850, Australian National Library, Canberra.
- 26 Clark, *Studies in Australian Constitutional Law* (Charles F Maxwell, Melbourne 1901) pp21-22. Clark's view that the Constitution was to be construed as a "living force" has been endorsed by Deane J in *Theophanous v Herald & Weekly Times* (1994) 182 CLR 104 at 171-172.
- 27 Bryce, *The American Commonwealth* (Macmillan, London 1888). See La Nauze, *The Making of the Australian Constitution* pp18-19 for an account of the degree that many delegates relied on Bryce.
- 28 Clark visited America only twice before Federation in 1890 and 1897-1898. He returned for his third visit in 1902-1903.
- 29 Deakin, *The Federal Story: The Inner History of the Federal Cause* (Robertson & Mullens, Melbourne 1944) p30.
- 30 Reynolds, "Andrew Inglis Clark" in Nairn, Serle & Ward (eds), *Australian Dictionary of Biography* (Melbourne University Press, Melbourne 1966) p399.
- 31 For a discussion of Clark's republicanism see Williams, "'With Eyes Open': Andrew Inglis Clark and our Republican Tradition" (1995) 23 *Fed L Rev* 149.
- 32 Roe, "The Federation Divide Among Australia's Liberal Idealists: Contexts for Clark" in Haward & Warden (eds), *An Australian Democrat* p90.
- 33 Williamson, "Andrew Inglis Clark - Liberal and Nationalist" in Haward & Warden (eds), *An Australian Democrat* p126.
- 34 Ely, "The Tyranny and Amenity of Distance: The Religious Liberalism of Andrew Inglis Clark" in Haward & Warden (eds), *An Australian Democrat* p110-111. Emphasis original.
- 35 Warden, "Calculating Happiness: Andrew Inglis Clark and Thomas Jefferson in Pursuit of the Republic" in Haward & Warden (eds), *An Australian Democrat* p134.
- 36 Crisp, *Federation Fathers* (Melbourne University Press, Melbourne 1990) pp2-4.
- 37 Deakin, *The Federal Story* and Deakin, *Federated Australia: Selections from Letters to the Morning Post, 1900-1910* (Melbourne University Press, Melbourne 1968).
- 38 Wise, *Making of the Australian Commonwealth, 1889-1901* (Longman's Green & Co, London 1913).
- 39 Clark to Deakin, 3 June 1901, Deakin Papers ANL MS 1540/14/60.
- 40 Deakin, *The Federal Story* p47.
- 41 Wise, *The Making of the Australian Commonwealth* p95.
- 42 Deakin, *The Federal Story* p30.
- 43 Castles, "Two Colonial Democrats: Clark and Kingston and the Draft Constitution of 1891" in Haward & Warden (eds), *An Australian Democrat* p20.
- 44 Neasey, "Andrew Inglis Clark Senior and Australian Federation" (1969) 15(2) *AJPH* 1 at 3.
- 45 Irving (ed), *A Woman's Constitution?: Gender and History in the Australian Commonwealth* (Hale & Iremonger, Sydney 1996).
- 46 Sir Gerard Brennan, "Foreward" in Haward & Warden (eds), *An Australian Democrat* pix.

