REVIEW ARTICLE

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FRAMING AN AUSTRALIAN CONSTITUTIONAL LAW: ANDREW INGLIS CLARK AND WILLIAM HARRISON MOORE

Studies in Australian Constitutional Law

Andrew Inglis Clark

Legal Books, Sydney 1997 (reprint of 1st edition, 1901)
xxxix (introduction to the 1997 reprint), xv, 446pp
ISBN 1863 16 104X

The Constitution of the Commonwealth of Australia

William Harrison Moore

Legal Books, Sydney 1997 (reprint of 2nd edition, 1910)
lxix (introduction to the 1997 reprint), xxviii, 782pp
ISBN 1863 16 1058

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The framers of the Australian Constitution were aware that the High Court of Australia, in the exercise of its judicial review function, would give meaning to the broad and general language of the Constitution and that its decisions, like those of the Supreme Court of the United States, would ultimately coalesce into a body of federal constitutional law.[1] In the words of Isaac Isaacs at the 1898 Melbourne Convention:

> We are taking infinite trouble to express what we mean in this Constitution; but as in America so it will be here, that the makers of the Constitution were not merely the Conventions who sat, and the states who ratified their conclusions, but the Judges of the Supreme Court.[2]

This body of judicially developed constitutional law has now grown so vast, and become so integral to our understanding of the Australian Constitution, that it is difficult to imagine thinking and writing about that document without the assistance of a stream of decided cases.

But it was without this stream of case law that Inglis Clark, founding father and Judge of the Supreme Court of Tasmania, wrote his *Studies in Australian Constitutional Law* (1901). By contrast, Professor Harrison Moore of the University of Melbourne was able to incorporate some six or seven years of High Court decision-making in *The Constitution of the Commonwealth of Australia* (2nd edition 1910), discussing such matters as the High Court's adoption of the doctrines of the immunity of instrumentalities and reserved State powers,[3] as well as early developments in relation to federal jurisdiction[4] and the scope of the Commonwealth's corporations and industrial powers.[5] Nonetheless, like Inglis Clark, he was writing about a Constitution largely undeveloped in the courts.

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1 Galligan, *Politics of the High Court: A Study of the Judicial Branch of Government in Australia* (University of Queensland Press, St Lucia 1987) ch2, esp pp48-65.

2 Quoted in above, p61.

3 Harrison Moore, *The Constitution of the Commonwealth of Australia* (Legal Books, Sydney 1997) (reprint of 2nd ed 1910) ptVII, chIII ("The Doctrine of the Immunity of Instrumentalities") and pp373-379 (reserved State powers).

4 At ptIII, chVII ("Federal Jurisdiction") and VIII ("The Appellate Jurisdiction: The King in Council and the High Court of Australia"). See also ptVIII, chII ("The Subjects of Federal Jurisdiction").

5 At pp469-473 (Commonwealth's corporations power in s51(xx)) and pp450-458 (Commonwealth's industrial power in s51(xxxv)).

Studies in Australian Constitutional Law and *The Constitution of the Commonwealth of Australia* thus set out the views of two of the leading Australian constitutional scholars of their day as to the nature and effect of the Constitution at its foundation. Original copies of each work have long been scarce, and the value of their republication with helpful introductory essays written by John Williams (Inglis Clark) and George Winterton (Harrison Moore) cannot be questioned. In particular, and as Sir Anthony Mason notes in his foreword to the Inglis Clark reprint,[6] constitutional history has attained new prominence as a factor in constitutional interpretation following the High Court's 1988 decision in *Cole v Whitfield*[7] in which the Court relaxed its self-declared ban on the use of the Convention Debates as interpretative aids.[8] Since *Cole v Whitfield*, historical argument has become commonplace in constitutional litigation and the High Court has made frequent reference to the Convention Debates and other historical materials in its reasons for judgment.[9] This not infrequently includes reference to Inglis Clark and Harrison Moore.[10]

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6 Mason, "Foreword to the 1997 Reprint" in Inglis Clark, *Studies in Australian Constitutional Law* (Legal Books, Sydney 1997) (reprint of 1st ed 1901) ppi-ii.

7 (1988) 165 CLR 360.

8 At 385 the Court said that the Convention Debates and other historical materials could be used "for the purpose of identifying the contemporary meaning of language used, the subject to which that language was directed and the nature and objectives of the movement towards federation from which the compact of the Constitution finally emerged". However, the Court insisted that the framers' subjective intentions as to the operation of a provision could not replace the meaning of the constitutional text. For the High Court's earlier position, which resulted in the virtual exclusion of the Convention Debates from the interpretative process, see *Municipal Council of Sydney v Commonwealth* (1904) 1 CLR 208 at 213-214.

9 For examples of this phenomenon, see Schoff, "The High Court and History: It Still Hasn't Found(ed) What It's Looking For" (1994) 5 *PLR* 253. Some more recent examples include *Victoria v Commonwealth* (*Industrial Relations Act Case*) (1996) 187 CLR 416 at 478-483 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ; *Ngo Ngo Ha v NSW* (*Ha*) (1997) 146 ALR 355 at 364-366 per Brennan CJ, McHugh, Gummow and Kirby JJ, at 375, 380 per Dawson, Toohey and Gaudron JJ.

10 For some examples of reference by members of the High Court to Harrison Moore's book, see Winterton, "Introduction" in Harrison Moore, *The Constitution of the Commonwealth of Australia* pxl fn175-176. For a more recent example see *Ha* (1997) 146 ALR 355 at 364 per Brennan CJ, McHugh, Gummow and Kirby JJ (reference to 2nd ed). For references by members of the High Court to the work of Inglis Clark, see Thomson, "Andrew Inglis Clark and Australian Constitutional Law" in Haward & Warden (eds), *An Australian Democrat: The Life, Work, and Consequences of Andrew Inglis Clark* (Centre for Tasmanian Historical Studies, Hobart 1995) p61 fn26. As Thomson notes (at

In considering the substantive content of the reprinted works, it is important to realise that each book is conceived on a different scale. Harrison Moore's *The Constitution of the Commonwealth of Australia* is a comprehensive and systematic textbook covering the law of the Australian Constitution, as well as aspects of colonial constitutional law, public administration and electoral law. In comparison, Inglis Clark's *Studies in Australian Constitutional Law* is less systematic in approach and more closely approximates a series of essays on selected constitutional topics than a treatise. It was perhaps with this in mind that Clark described it as "this little book" in his preface.[11] Allowance should also be made for the fact that although a second edition of Inglis Clark appeared in 1905, the reprinted books are Inglis Clark's first edition (1901) and Harrison Moore's second edition (1910). As pointed out above, the Harrison Moore reprint thus reflects the influence of early decisions of the High Court and acknowledges many of the political realities of the infant Commonwealth, such as the failure of the Senate to function as a 'States' House'.[12] By contrast, in the Inglis Clark reprint, the Senate is depicted as the protector of State interests.[13] Obviously, this is a difference of practical experience which needs to be taken into account in comparing the republished works. It follows also that if one's object was to make a full assessment of the constitutional acuity of each commentator as well as a comprehensive survey of their views, reference to the first and second editions of each work (something not attempted in this review) would be vital.

So, bearing in mind these considerations, what constitutional vision do the reprinted works present? And how do these visions compare? This review must necessarily be selective, so what follows is an exploration of the views of Inglis Clark and Harrison Moore on three major issues: federalism, constitutional protection of individual rights and the enduring

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p61), the High Court has made more frequent reference to the work of Harrison Moore than Inglis Clark.

11 Inglis Clark, *Studies in Australian Constitutional Law* pv. In Inglis Clark's view, a full survey of the law of the Australian Constitution was premature: "The time has not yet arrived for a comprehensive and elaborate commentary upon it, and all that will be attempted in this volume will be a consideration of some of its fundamental and more prominent features" (at p2).

12 Harrison Moore, *The Constitution of the Commonwealth of Australia* p613: "the Senate has entirely failed to represent the States as organized political communities, it represents them merely as electoral districts". See also pp151-153. The first edition of Harrison Moore appeared in 1902.

13 Inglis Clark, *Studies in Australian Constitutional Law* pp9-13. See also Williams, "Introduction to the 1997 Reprint" in Inglis Clark, *Studies in Australian Constitutional Law* pxi.

question of what interpretative theory should govern the reading of the Constitution. Brief reference will also be made to the separation of federal judicial power.

Unsurprisingly, Inglis Clark and Harrison Moore were in unison in emphasising the strictly federal nature of the new Constitution. Writing of decisions like *R v Barger*,[14] the *Union Label Case*[15] and *Huddart Parker & Co Pty Ltd v Moorehead*,[16] Harrison Moore maintained that a notion of reserved State powers or federal balance[17] flowed naturally from the Constitution's guarantee to each unit of the federation of "a sphere of action in which it is independent".[18] Although Moore also set out the dissenting views put forward by Isaacs J and Higgins J in rejection of a reserved powers doctrine,[19] he was unmoved by the argument, so often presented as self-evident today, that one cannot ascertain the content of a specific grant of Commonwealth legislative power by reference to the scope of the undefined residue of State authority.[20]

Inglis Clark, writing in 1901, did not outline a reserved powers doctrine in terms corresponding to that of Harrison Moore. Instead, Clark focused on an ill-defined notion of the 'police powers' of the States.[21] According to Clark, s51(i) of the Constitution granted the Commonwealth Parliament *exclusive* legislative authority over interstate and overseas trade,[22] a view which he justified by reference to the nature of the subject matter of the

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14 (1908) 6 CLR 41.

15 *Attorney-General (NSW) (Ex rel Tooth & Co Ltd) v Brewery Employees Union of NSW (Union Label Case)* (1908) 6 CLR 469.

16 (1909) 8 CLR 330.

17 The "federal balance" label is that of Professor Winterton. See Winterton, "Introduction" in Harrison Moore, *The Constitution of the Commonwealth of Australia* pxlix. Note the possible qualification adverted to here by Professor Winterton to the effect that Harrison Moore supported, at a minimum, a doctrine of federal balance.

18 Harrison Moore, *The Constitution of the Commonwealth of Australia* p373. See pp373-379, 421-422 and Winterton, "Introduction" in Harrison Moore, *The Constitution of the Commonwealth of Australia* ppxlviii-xlix.

19 Harrison Moore, *The Constitution of the Commonwealth of Australia* pp376-379 (generally) and pp511-514 (in relation to *R v Barger*).

20 For an emphatic statement of the modern approach see *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468 at 488-489 per Barwick CJ.

21 Williams, "Introduction to the 1997 Reprint" in Inglis Clark, *Studies in Australian Constitutional Law* pxvi.

22 Inglis Clark, *Studies in Australian Constitutional Law* p75. See also Williams, "Introduction to the 1997 Reprint" in Inglis Clark, *Studies in Australian Constitutional Law* ppxvii-xviii.

power,[23] s92's command that trade, commerce and intercourse among the States "shall be absolutely free"[24] and American case law dealing with the United States commerce clause.[25] Relying on the same American authorities, Clark then argued that the States nonetheless retained authority, absent overriding Commonwealth legislation,[26] to regulate trade entering their territory in certain specific situations; notably when necessary to protect "the lives, health, and property" of their people.[27] Clark devoted an entire chapter to this aspect of the 'police powers' of the States,[28] but his discussion is often difficult to follow and lacks cohesion. Whether he recognised a further category of 'police powers' representing specific topics of exclusive State legislative responsibility to which the content of grants of Commonwealth legislative power were required to conform is unclear.[29] Most of his police powers discussion would be dealt with today under the heading of freedom of interstate trade.[30]

Although Inglis Clark was heavily influenced by classical American federal jurisprudence, the first edition of his book does not discuss the doctrine of the immunity of instrumentalities. John Williams, however, notes that Clark referred to *D'Emden v Pedder*[31] and *Deakin v Webb*[32] in his second edition.[33] Harrison Moore was a proponent of the doctrine of

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23 Inglis Clark, *Studies in Australian Constitutional Law* pp75, 77.

24 At pp78-79.

25 At pp79-81.

26 At pp128-129, 143, 145.

27 At p120. See generally pp83-86 and ch7 ("The Federal Power Over Commerce and the Police Power of the States"). Harrison Moore also discussed the American authorities dealing with the police powers of the States, but took the view, accepted today, that the grant of power in s51(i) with respect to interstate trade is a *concurrent* grant of legislative power: Harrison Moore, *The Constitution of the Commonwealth of Australia* pp337-344.

28 Inglis Clark, *Studies in Australian Constitutional Law* ch7 ("The Federal Power Over Commerce and the Police Power of the States").

29 See, eg, pp143-144.

30 In relation to Harrison Moore's views on s92 of the Constitution, see Harrison Moore, *The Constitution of the Commonwealth of Australia* ptIX chV ("The Exercise of the Commerce Power: Exclusive or Concurrent; Freedom of Trade and Commerce").

31 (1904) 1 CLR 91.

32 (1904) 1 CLR 585.

33 Williams, "Introduction to the 1997 Reprint" in Inglis Clark, *Studies in Australian Constitutional Law* pix. Williams also notes that Clark applied the immunities doctrine as a judge of the Supreme Court of Tasmania in *Pedder v D'Emden* (1903) TLR 146 (at px).

the immunity of instrumentalities, dedicating a chapter to the topic.[34] Professor Winterton rightly describes Moore's overall federal vision as one of "co-ordinate" federalism, the Commonwealth and States occupying "independent spheres" of sovereign influence, neither federal partner able to control or dominate the other.[35] This was the orthodox view of the scheme of the Constitution at the time,[36] and Inglis Clark's book as a whole is consistent with it.[37] On this theme, both Clark and Moore were conscious of the relationship between State political autonomy and State financial autonomy,[38] and warned that the Commonwealth's taxation power, if not kept within appropriate bounds, could be used to subjugate the States.[39] Yet neither evinced any awareness that s96 of the Constitution, which empowers the Commonwealth to grant financial assistance to any State "on such terms and conditions as the Parliament thinks fit", could be used as a tool of Commonwealth aggrandisement. Harrison Moore simply regarded s96 as supplementing the operation of the 'Braddon clause' (s87) under which the Commonwealth was required, during the first ten years of federation, to distribute three-quarters of its revenue from customs and excise to the States. After discussing s87, Moore notes:

> the possibility of exceptional conditions in any State in the early years of the Commonwealth was met by sec. 96,

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34 Harrison Moore, *The Constitution of the Commonwealth of Australia* ptVII, chIII ("The Doctrine of the Immunity of Instrumentalities"). See, in particular, Harrison Moore's apparent support for the decision of the High Court in *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 over the decision of the Privy Council in *Webb v Outrim* [1907] AC 81 (at p428). See also Winterton, "Introduction" in Harrison Moore, *The Constitution of the Commonwealth of Australia* pxlix.

35 At pxlviii (and see the references given by Winterton to Moore at pxlviii fn220). See also Harrison Moore, *The Constitution of the Commonwealth of Australia* pp510-511.

36 See generally Zines, *The High Court and the Constitution* (Butterworths, Sydney, 4th ed 1997) ch1 ("The Struggle for Standards").

37 Inglis Clark, *Studies in Australian Constitutional Law* esp pp12-13. See also Williams, "Introduction to the 1997 Reprint" in Inglis Clark, *Studies in Australian Constitutional Law* px.

38 Inglis Clark, *Studies in Australian Constitutional Law* pp89-90 (see also Williams, "Introduction to the 1997 Reprint" in Inglis Clark, *Studies in Australian Constitutional Law* pxiv) and Harrison Moore, *The Constitution of the Commonwealth of Australia* p510.

39 Inglis Clark, *Studies in Australian Constitutional Law* pp89-90 (see also Williams, "Introduction to the 1997 Reprint" in Inglis Clark, *Studies in Australian Constitutional Law* ppxiii-xiv) and Harrison Moore, *The Constitution of the Commonwealth of Australia* pp505-506, 510-514.

> under which, during a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.[40]

John Williams notes that Inglis Clark's treatment of s96 was broadly similar.[41]

Seen in this light, the scant judgment in the *Federal Roads Case*[42] which sanctioned s96 grants to the States on conditions outside direct Commonwealth legislative competence and which, in turn, contributed to the outcome in the *Uniform Tax Cases*,[43] looks more inadequate than ever.

Clearly, the above model of Australian federalism envisaged by Inglis Clark and Harrison Moore, including the notion of 'reserved' State powers and a broad immunities doctrine, has long been overtaken by a series of political and judicial developments from which the Commonwealth has emerged as the dominant federal partner.[44] And, in the last decade, issues other than federalism - notably constitutional protection of individual rights and theories of interpretation - have been at the forefront of constitutional attention. Yet, even in relation to these issues of the late 1990s, each reprint has something to say.

One of Harrison Moore's recurring themes in *The Constitution of the Commonwealth of Australia* is that whereas the United States Constitution with its express Bill of Rights was based on "distrust" of the democratic

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40 Harrison Moore, *The Constitution of the Commonwealth of Australia* p533.

41 Williams, "Introduction to the 1997 Reprint" in Inglis Clark, *Studies in Australian Constitutional Law* ppxiv-xv. It should be noted, however, that Inglis Clark paid particular attention to the means by which the Commonwealth might fund s96 grants during the period of the operation of the Braddon clause and proposed a scheme of State financial assistance involving the transfer to the Commonwealth of a component of State debts (Inglis Clark, *Studies in Australian Constitutional Law* pp214-224).

42 *Victoria v Commonwealth (Federal Roads Case)* (1926) 38 CLR 399.

43 *South Australia v Commonwealth* (*First Uniform Tax Case*) (1942) 65 CLR 373 and *Victoria v Commonwealth* (*Second Uniform Tax Case*) (1957) 99 CLR 575.

44 See, in particular, *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (*Engineers' Case*) (1920) 28 CLR 129 and the comments of Windeyer J in *Victoria v Commonwealth* (*Payroll Tax Case*) (1971) 122 CLR 353 at 396-397. See also *First Uniform Tax Case*, *Second Uniform Tax Case* and *Commonwealth v Tasmania* (*Tasmanian Dam Case*) (1983) 158 CLR 1.

principle - "[t]o possess power was to abuse it"[45] - the Australian Constitution was distinguished by its "democratic character".[46] It followed that:

> Fervid declarations of individual right, and the protection of liberty and property against the government, are conspicuously absent from the Constitution; the individual is deemed sufficiently protected by that share in the government which the Constitution ensures him.[47]

And:

> The great underlying principle is that the rights of individuals are sufficiently secured by ensuring as far as possible to each a share, and an equal share, in political power.[48]

This view - that the Australian Constitution designates parliamentary democracy as the ultimate protector of individual rights - is deeply engrained in classical Australian constitutional theory,[49] and there can be little doubt that Harrison Moore's eloquent expression of the principle helped embed it in the minds of generations of Australian lawyers. That the Australian Constitution was not based on distrust of governments was an element in the reasoning in the *Engineers' Case*[50] and was part of the constitutional philosophy of Harrison Moore's one-time student, Sir Owen Dixon.[51] As late as 1981, its influence can be detected in the opinion of a prominent High Court judge that express constitutional prohibitions should be construed narrowly.[52]

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45 Harrison Moore, *The Constitution of the Commonwealth of Australia* p612.

46 At p78. And see also pp612-613 and Winterton, "Introduction" in Harrison Moore, *The Constitution of the Commonwealth of Australia* pxii.

47 Harrison Moore, *The Constitution of the Commonwealth of Australia* p78.

48 At p616. And see also on this general theme pp102-103, 314-315, 331-332, 342, 361 and 598.

49 Mason, "The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience" (1986) 16 *Fed L Rev* 1 at 8-11.

50 (1920) 28 CLR 129 at 151-152.

51 "Address by the Hon Sir Owen Dixon KCMG at the Annual Dinner of the American Bar Association" (1942) 16 *ALJ* 192 at 193.

52 *Attorney-General (Vic); Ex rel Black v Commonwealth* (1981) 146 CLR 559 at 614-615 per Mason J. See also Mason, "The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience" (1986) 16 *Fed L Rev* 1 at 8-11.

Of course, more recently, certain members of the High Court have seemingly abandoned this view of the Constitution's general approach to individual rights protection, notably Deane and Toohey JJ in their joint judgment in *Leeth v Commonwealth*,[53] recognising an implied constitutional guarantee of legal equality.[54] However, in its recent reaffirmation of the implied freedom of political communication, the High Court in *Lange v Australian Broadcasting Corporation*[55] described the Constitution, notably ss7 and 24, as "necessarily protect[ing] that freedom of communication between the people concerning political or government matters *which enables the people to exercise a free and informed choice as electors*"[56] - a view of the operation of the implied freedom not necessarily inconsistent with Harrison Moore's conception of democracy as the guardian of the individual.[57] Thus, as Mason CJ suggested in *Australian Capital Television Pty Ltd v Commonwealth*,[58] Harrison Moore may ultimately help underscore the legitimacy of the free speech implication.[59]

Studies in Australian Constitutional Law is silent as to the general approach of the Constitution to 'rights' protection, although Inglis Clark sings the praises of federalism and the equal representation of the States in the Senate as an anti-majoritarian device - a view which reflects his 'small State' allegiance and known republican sentiments.[60] Where Harrison Moore and Inglis Clark agree, however, is in rejecting a purely legalistic approach to constitutional construction. Although Moore was a "fervent

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53 (1992) 174 CLR 455.

54 This implied guarantee of legal equality was disavowed by a majority of the High Court in *Kruger v Commonwealth* (*Kruger*) (1997) 146 ALR 126.

55 (1997) 145 ALR 96.

56 At 106-107 (emphasis added).

57 That the implied freedom of political communication is not necessarily inconsistent with a system which regards parliamentary democracy as the protector of individual rights has been noted by a number of commentators. See, eg, Zines, "A Judicially Created Bill of Rights?" (1994) 16 *Syd LR* 166 at 177.

58 (1992) 177 CLR 106.

59 As was suggested by Mason CJ in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 139-140. And see, for an interesting twist on this use of Harrison Moore, *Kruger* (1997) 146 ALR 126 at 188-189 per Gaudron J.

60 Inglis Clark, *Studies in Australian Constitutional Law* pp10-13. See also Williams, "Introduction to the 1997 Reprint" in Inglis Clark, *Studies in Australian Constitution Law* ppx-xii, linking this to Inglis Clark's republicanism. For another expression of Clark's republicanism, see Inglis Clark, *Studies in Australian Constitutional Law* pp386-387 ("[t]he unrestricted rule of the majority of the hour is at all times a contradiction of the rational rights of the individual").

believer in the British Empire",[61] he supported the limitation placed by s74 of the Constitution on appeals from the High Court to the Privy Council in 'inter se' matters.[62] He acknowledged that such appeals might usefully shield the Australian judiciary from "the whirl of political contest".[63] But:

> this advantage may be too dearly bought, if it is at the price of a want of knowledge of all those conditions of a country - historical, social and economic - which enter into the construction of a Constitution.[64]

This particular philosophy was reflected in Moore's own writing, and one of the outstanding features of *The Constitution of the Commonwealth of Australia* is the way in which Australian constitutional law is presented in historical and political context, coupled with a rich array of comparative insights.[65]

Inglis Clark confronted theoretical questions of constitutional interpretation more directly than Moore, devoting his first substantive chapter to "The Interpretation of a Written Constitution". There Clark outlined his recently rediscovered "living force"[66] theory of constitutional construction. Clark recognised that, although the Australian Constitution derived its binding force from the Imperial Parliament, it was in fact "voluntarily adopted as an agreement by the people".[67] The idea that the people sustain a Constitution in turn infused his 'living force' vision. Clark argued that:

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61 Winterton, "Introduction" in Harrison Moore, *The Constitution of the Commonwealth of Australia* pxxvi.

62 Harrison Moore, *The Constitution of the Commonwealth of Australia* p235.

63 As above.

64 As above (and see p368). See also Galligan, *Politics of the High Court* p56 and Winterton, "Introduction" in Harrison Moore, *The Constitution of the Commonwealth of Australia* ppxiii-xiv.

65 See Winterton, "Introduction" in Harrison Moore, *The Constitution of the Commonwealth of Australia* ppxl-xli. ("Moore always had a strong appreciation for the political and economic context of constitutional law" (pxli).)

66 See *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 171 per Deane J.

67 Inglis Clark, *Studies in Australian Constitutional Law* p166 and Williams, "Introduction to the 1997 Reprint" in Inglis Clark, *Studies in Australian Constitutional Law* ppxxxii-xxxiii. Harrison Moore also recognised the "democratic origin" of the new Commonwealth. See, eg, Harrison Moore, *The Constitution of the Commonwealth of Australia* p67.

> the social conditions and the political exigencies of the succeeding generations of every civilized 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 ... 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.[68]

Although he added:

> But so long as the present possessors of sovereignty convey their commands in the language of their predecessors, that language must be interpreted by the judiciary consistently with a proper use of it as an intelligible vehicle of the conceptions and intentions of the human mind, and consistently with the historical associations from which particular words and phrases derive the whole of their meaning in juxtaposition with their context.[69]

Other passages in *Studies in Australian Constitutional Law* reinforce Clark's rejection of rigid legalism in constitutional construction.[70]

Space does not permit an examination of this 'living force' theory which was recently invoked by Deane J in *Theophanous v Herald & Weekly Times Ltd.*[71] Whether the generally more orthodox Harrison Moore was prepared to go this far in embracing a potentially dynamic mode of constitutional construction seems unlikely,[72] although Moore did acknowledge Clark's theory with a footnote.[73]

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68 Inglis Clark, *Studies in Australian Constitutional Law* p21.

69 As above. See also Williams, "Introduction to the 1997 Reprint" in Inglis Clark, *Studies in Australian Constitutional Law* ppxxxviii-xxxix.

70 See Clark's discussion of Cooley and Holmes in Inglis Clark, *Studies in Australian Constitutional Law* pp25-27 (Cooley) and pp356-357 (Holmes).

71 (1994) 182 CLR 104 at 171-173.

72 See, eg, Harrison Moore, *The Constitution of the Commonwealth of Australia* pp248-249.

73 At p373 fn1. (The reference is to Clark's second edition.)

That both Clark and Moore disavowed a purely legalistic form of constitutional construction should be borne in mind in the context of the current debate as to how the Australian Constitution should be read.[74] It is yet another reminder that there are traditions in Australian constitutional law apart from "strict and complete legalism".[75] But at the same time it raises questions as to how each author would want their views treated by future generations: as expressing enduring constitutional truths or the jurisprudence of a particular era? In all probability Clark and Moore saw their work as a mixture of both.[76] The difficult task then for contemporary constitutional lawyers is to distinguish the one category of legal proposition from the other.

Both *Studies in Australian Constitutional Law* and the *Constitution of the Commonwealth of Australia* contain much more of interest to the contemporary constitutional lawyer or legal historian than set out above. Inglis Clark's views on a federal common law[77] and on citizenship[78] are worthy of note, as is Harrison Moore's discussion of covering the field inconsistency[79] and the scope of the Commonwealth's external affairs power.[80] Of course, the contemporary relevance of much of this material is the insight it provides into the evolution of the present body of Australian law. But one area yet to be mentioned in which the Harrison Moore reprint might prove influential in the future relates to the separation of federal judicial power. Harrison Moore maintained that the Constitution incorporated a full legal separation of federal judicial power from legislative and executive power,[81] a view which was vindicated in

74 For a recent prominent contribution to this debate see Goldsworthy, "Originalism in Constitutional Interpretation" (1997) 25 *Fed L Rev* 1.

75 "Swearing in of Sir Owen Dixon as Chief Justice" (1952) 85 CLR xi at xiv. And see, eg, in relation to these various traditions, Zines, *The High Court and the Constitution* at pp424-433.

76 See Winterton, "Introduction" in Harrison Moore, *The Constitution of the Commonwealth of Australia* pl (noting that, in his later writings, Moore seemed "untroubled" by the *Engineers' Case*).

77 Inglis Clark, *Studies in Australian Constitutional Law* ch10 ("The Constitution of the Commonwealth and the Common Law").

78 At pp8-9, 96-102.

79 Harrison Moore, *The Constitution of the Commonwealth of Australia* pp409-411 (an early reference to the concept).

80 At pp460-462.

81 At pp96-97, 303. It has been pointed out, however, that Moore was less confident about this conclusion in his first edition. See Winterton, "Introduction" in Harrison Moore, *The Constitution of the Commonwealth of Australia* ppxlii-xliii and Wheeler, "Original Intent and the Doctrine of the Separation of Powers in Australia" (1996) 7 *PLR* 96 at 98.

the *Boilermakers' Case*.[82] However, Moore also suggested that implicit in the exclusive vesting of federal judicial power in the courts listed in s71 of the Constitution were prohibitions against retroactive federal criminal laws[83] and legislative abrogation of "the essentials of judicial administration", including the application to judicial proceedings of the rules of natural justice.[84] Clearly, these suggestions have a resonance in the recent emergence of certain "implied rights" from Chapter III of the Constitution,[85] although it should be pointed out that Moore was concerned to marry these thoughts with the Constitution's general commitment to "the preponderance of the Parliament".[86] Clark's discussion of the separation of federal judicial power is less extensive than that of Moore, but has been used by a member of the High Court to help support the conclusion that a retroactive federal criminal law was invalid.[87]

A full survey of both texts ultimately suggests that Harrison Moore's *The Constitution of the Commonwealth of Australia* has had a greater impact on the development of Australian law than Clark's "little book". But by framing a vision of Australian constitutional law so early in the life of the federal Commonwealth, both reprinted works made a major contribution to their area of study. Indeed, when one considers the works of Inglis Clark and Harrison Moore in conjunction with Quick and Garran's twice

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82 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 affirmed on appeal to the Privy Council in *Attorney-General (Cth) v The Queen* (1957) 95 CLR 529.

83 Harrison Moore, *The Constitution of the Commonwealth of Australia* pp315, 322-323 (also p97) and Winterton, "Introduction" in Harrison Moore, *The Constitution of the Commonwealth of Australia* pxlv.

84 Harrison Moore, *The Constitution of the Commonwealth of Australia* pp323-324 and Winterton, "Introduction" in Harrison Moore, *The Constitution of the Commonwealth of Australia* pxlv. See also Harrison Moore, *The Constitution of the Commonwealth of Australia* pp318-319 for shadows of the approach of Brennan, Deane and Dawson JJ to involuntary executive detention in *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27-29.

85 As to which, see Winterton, "The Separation of Judicial Power as an Implied Bill of Rights" in Lindell (ed), *Future Directions in Australian Constitutional Law: Essays in Honour of Professor Leslie Zines* (The Federation Press, Sydney 1994) pp185-208; Zines, *The High Court and the Constitution* pp202-212.

86 Harrison Moore, *The Constitution of the Commonwealth of Australia* pp102-104, 314-315.

87 See Inglis Clark, *Studies in Australian Constitutional Law* ch3 ("The Distribution of Governmental Powers in the Constitution of the Commonwealth") esp pp39-41 and *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 618-619 per Deane J. See also Williams, "Introduction to the 1997 Reprint" in Inglis Clark, *Studies in Australian Constitutional Law* ppxxvi-xxviii.

reprinted *Annotated Constitution of the Australian Commonwealth*,[88] it is only in relatively recent times that Australian constitutional law has enjoyed a like array of major texts. Both as an insight into the past and the future, the republished works are worthy additions to the materials available to contemporary lawyers.

88 Quick & Garran, *The Annotated Constitution of the Australian Commonwealth* (Legal Books, Sydney 1976 and 1995) (reprints of 1901 edition).