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Abstract

During the Australian Federal Conventions of the 1890's a proposal was considered to include the first section of the Fourteenth amendment to the United States Constitution in the Australian Constitution. The proposed 'Tasmanian Amendment' would have had a profound and lasting impact on the Commonwealth. This article endeavours to set out the legal history relevant to this provision, and the reasons for it being defeated at the Australian Federation conventions. Following from this, the article offers a comparative analysis of American and Australian jurisprudence on several of the provision's important aspects. The article concludes that the historical defeat of the amendment in Australia should not restrain its future consideration, and that the proposal if revitalized would be a suitable starting point for constitutional rights protection reform.

I Introduction

For over a century the question of rights, race and citizenship have been entwined as legal and political issues that have divided the national polity of Australia. The topic arose again in 2023 when the question of an Indigenous Voice was unsuccessful when put to a national referendum. Any discussion of constitutional amendment in Australia must face a simple reality: Australians rarely approve change. The recent defeat of the 2023 Voice Referendum underscores contemporary popular caution about change and the real electoral penalties that attend contested constitutional reform. A combination of fear of division, uncertainty about concrete effects, and distrust about political actors were dominant drivers of the 'No' vote, which together make broad, transformative amendments particularly hard to sell in the current climate.[1]

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1 Ian McAllister and Nicholas Biddle, 'Safety or Change? The 2023 Australian Voice Referendum' (2024) 59(2) *Australian Journal of Political Science* 141, 148.

The 2023 referendum was the most recent in a debate which has been ongoing since Federation. From the time of colonial governance in the 19th century, laws were created for the segregation and control over movement of people on the continent, prejudicing both new migrants and the traditional inhabitants of the land. One of the first laws passed by the new Commonwealth government was the *Immigration Restriction Act 1901* (Cth), which sought to maintain the British character of the new nation. The constitution of the new national government contained provision not only for the control of immigration to Australia,[2] but also power to make special laws for people of specific racial groups.[3] Additionally, the omission of constitutional citizenship left the Commonwealth with a wide authority in controlling the influx of migrants, their integration into the community and status once naturalised.[4]

While the 1898 Federation Conventions approved these constitutional provisions, they were not without debate or criticism. One framer in particular, Andrew Inglis Clark (who played a leading role in preparation of the 1891 draft) advocated that the Australian Constitution include a provision adopting the first section of the Fourteenth amendment to the US Constitution,[5] to ensure due process, constitutional citizenship and equal protection of the law. In correspondence Clark stated:[6]

> The more I consider it, the more I am persuaded that if the whole amendment is not adopted, the time will come when the omission will be deeply regretted. We cannot afford to ignore the experience of the United States during more than a century…

Without overstating Clark's foresight, one could rightly find that his prediction rang true especially given the poor history of Australian governments regarding race, citizenship and protection of essential civil rights.

The historical decision of our framers to omit a Fourteenth amendment-like clause should not be indicative of our future conduct. As is set out further below, the motivation for the omission was to preserve the power of racial discrimination to government and entrust due process and equal protection of laws to the legislature entirely. Given the radical social changes which have taken place since 1898, a conservative opposition to change grounded in historical reasons would seem to be wholly inappropriate.

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2 *Australian Constitution* s 51(xxvii).
3 Ibid s 51(xxvi).
4 Ibid s 51(xix).
5 *United States Constitution* amend XIV.
6 Letter from Clark to Wise, 20 February 1898 published in *Wise Papers*, Australian National Library, Canberra ('*Clark to Wise*').

And in any case, some of our most esteemed framers supported such a provision as a mechanism for rights protection. Indeed, with some revision for the present time, it would be beneficent to our constitutional law in several important ways. The prevailing Australian political reality makes comparisons with the United States complicated. Whereas the Fourteenth Amendment's century of jurisprudence is a useful doctrinal repository, there is no denying that the current political climate renders the appeal of the US constitutional model a reluctant political template for Australian reforms. While these developments do not discredit the normative arguments for textual entrenchment of rights, they do make the rhetorical case for wholesale transplantation of American constitutional texts harder to sustain in a modern Australian referendum campaign.

Given the domestic referendum calculus that every reformist must do, and the reputational headwinds surrounding contemporary American constitutional politics, a plausible strategic conclusion is to prioritise narrower, politically realistic fixes, such as the progressive adoption of the 'Tasmanian Amendment' proposal of Clark.

In establishing this argument, I shall firstly frame the history surrounding this proposal, with particular reference to the debates of the 1890's. Following from this I shall set out how an analogous provision, if added to our supreme law, would clear up legal mischiefs which have developed since federation and create a new era of rights protection in Australia.

Ultimately, this article seeks to make three distinct contributions to the literature on constitutional rights and citizenship.

First, it reconstructs the debates that produced (*and ultimately defeated*) Andrew Inglis Clark's 'Tasmanian Amendment', bringing to light the neglected archival and doctrinal reasons that the framers declined an express national citizenship and equal-protection guarantee. Second, it provides a systematic comparative analysis of how the US Fourteenth Amendment's text and jurisprudence would operate in the Australian constitutional system, showing precisely which 'legal mischiefs' in modern Australian law (*citizenship, the aliens power, due process and race-based legislation*) the Tasmanian approach would have most proximately sought to remedy. Third, it recasts the Tasmanian proposal as a spectrum of reform choices, to which presents a modern reformist the opportunity to pursue incremental, targeted amendments rather than committing to a single sweeping constitutional overhaul (such as with a broader Bill of Rights).

II The History

While there has been a slow and incremental move towards rights protection legislatively over time,[7] constitutional reforms to limit government power and confer individual rights protections have been absent.[8] Consequently, aggrieved applicants are left with appeals to a High Court that is both ill-equipped to temper the sharper aspects of government action, and has resigned itself largely to deferring to the legislature. In contrast, the United States after passing the Fourteenth amendment has had a gradual and profound growth of jurisprudence relating to rights protection that has touched all aspects of American life.

Before a discussion of the amendment and its effect on our constitutional law may be articulated, it is prudent to enumerate some relevant history relating to the provision. As such, in chronology I shall firstly discuss the establishment of the Fourteenth amendment in the United States, then move to the debates of the Australian Federation conventions of the 1890's and finally conclusions we may derive from this history.

A *American Slavery and Reconstruction*

For the first two centuries of American history, millions of people of African descent were subject to slavery, permitted by the state.[9] The institution became so perverse that at the time of the American Revolution in states like Virginia, slaves could not be manumitted without the permission of the Governor.[10] Slaves were deemed chattels, and not considered legal 'persons'.[11] Further, if a runaway or criminal slave were 'destroyed' according to the law of the state, the owner would be paid by the public in many cases for the loss.[12]

While the Revolution produced a new nation built upon liberty, the benefits (in contradiction) were denied to a large portion of African people left in bondage. The dilemma which America faced at that time was later described by Howard Jay Graham, who stated:[13]

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7 See, eg, *Victorian Charter of Human Rights and Responsibilities 2006* (Vic); *Anti-Discrimination Act 1977* (NSW); *Racial Discrimination Act 1975* (Cth).

8 Perhaps in a limited fashion the 1977 referendum is the closest Australia has come, amending s 128 to allow the electors of territories to count towards the national vote in referenda.

9 Avidit Acharya, Matthew Blackwell and Maya Sen, 'The Political Legacy of American Slavery' (2016) 78(3) *The Journal of Politics* 621, 623.

10 Aaron Schwabach, 'Thomas Jefferson, Slavery and Slaves' (2010) 33(1) *Thomas Jefferson Law Review* 11, 13.

11 Ibid 12.

12 Jenny B Wahl, 'Legal Constraints on Slave Masters: The Problem of Social Cost' (1997) 41 *The American Journal of Legal History* 1, 21; Andrew Napolitano, *Dred Scott's Revenge: A Legal History of Race and Freedom in America* (Thomas Nelson, 2009) 20.

13 Howard J Graham, 'Our "Declaratory" Fourteenth Amendment' (1954) 7(1) *Stanford Law Review* 3, 9.

> Slavery rested on and sanctioned prejudice; it made race and colour the sole basis for accord or denial of human rights. Human chattelization was the worst aspect of it, but the racial criterion affected every phase of life and human contact. The institution stigmatized even those fortunate enough to have escaped it, and its associations continued to stigmatize those who had been emancipated from it. This was the fundamental problem faced by the framers of the Fourteenth Amendment.

The status of enslaved and freed African people would be defined in the *Dred Scott Case* of 1857,[14] in which the Supreme Court held that American citizenship could not be afforded to black people, regardless of whether they were slaves or not. Chief Justice Roger Taney delivered the opinion, stating of African Americans:[15]

> …they were at that time [of America's founding] considered as a subordinate and inferior class of beings who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.

The decision found not only that African Americans were of a constitutionally inferior race, but also that they were subject to the legislature in the broadest possible terms.[16] Aside from justifying the abhorrence of slavery, the Court had effectively allowed the status and rights of residents to be distinguished by the legislature, based solely upon their skin-colour. While one class would enjoy the privileges and protection of the law, the other was left bare to the invasions of government. This was the abhorrence of racial laws.

In some ways the ruling of the Supreme Court in *Dred Scott* was an attempt to settle a long running political and constitutional dispute as to the legality of slavery.[17]

For some time, the Abolitionist movement accepted the view William Lloyd Garrison put forward in 1843, that the US Constitution permitted slavery and ought to be abolished entirely.[18] This view persisted until Massachusetts lawyer Lysander Spooner published *The Unconstitutionality of Slavery* in 1845, which became extremely influential among reformers. In this book, Spooner points out that 'slavery' is not directly authorised in the constitution, and that proponents of its continued legality rely on its implication through the text and the subjective 'intent' of the founding generation in its drafting.[19] In the alternative, Spooner posited that the American

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14 *Dred Scott v John F A Sandford*, 60 US (19 How) 393 (1857) ('*Dred Scott*').
15 Ibid 404, 405.
16 Ibid 407.
17 *Dred Scott* (n 14).
18 Randy E Barnett, 'Was Slavery Unconstitutional Before the Thirteenth Amendment? Lysander Spooner's Theory of Interpretation' (1997) 28(4) *Pacific Law Journal* 977.
19 Lysander Spooner, 'The Unconstitutionality of Slavery (1860)' (1997) 28(4) *Pacific Law Journal* 1015, 1016.

Constitution, as a form of social contract, relied upon the consent of the governed to be brought into existence,[20] thereby accepting the inherent natural rights of the people as being antecedent to the creation of positive law.[21] As such, the constitution would have to be interpreted strictly in alignment with natural rights and justice, unless a *clear* provision expressed the opposite to displace the presumption.

This principle was derived from the decision of *United States v Fisher*, where Marshall CJ stated:[22]

> Where rights are infringed, where fundamental principles are overthrown, where the general system of laws is departed from, the legislative intention must be expressed with irresistible clearness, to induce a court of justice to suppose a design to effect such objects.

Spooner adopted this principle, formulating the following interpretative maxim quite convincingly:[23]

> 1st, that no intention, in violation of natural justice and natural right, (like that to sanction slavery,) can be ascribed to the constitution, unless that intention be expressed in terms that are legally competent to express such an intention; and 2d, that no terms, except those that are plenary, express, explicit, distinct, unequivocal, and to which no other meaning can be given, are legally competent to authorize or sanction anything contrary to natural right.

Therefore, all language in constitutions and legislation ought to be interpreted 'strictly' in favour of natural rights.[24] As such, Spooner argued compellingly that slavery, and by extension all violations of natural rights, were unconstitutional absent a clear provision to the contrary.[25] The presumption therefore was always favourable to protection of individual liberty and equality, as opposed to government authority.

Chief Justice Taney in *Dred Scott* found the opposite and sought to ascertain the 'intention' of the framers, as implied in the constitution. Taking an interpretation which considered the constitution with respect to attitudes held by the founders towards slaves, he stated:[26]

> The duty of the court is, to interpret the instrument they have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its *true intent* and meaning when it was adopted.

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20 Ibid 1031.
21 Ibid 1021.
22 *United States v Fisher*, 6 US 358, 390 (1805).
23 Spooner (n 19) 1016, 1017.
24 Barnett (n 18) 989.
25 Ibid 990.
26 *Dred Scott* (n 14) 405 (emphasis added).

The ruling did in fact contradict his earlier exposition of principle in *Aldridge v Williams*, where his view correlated somewhat with Spooner's brand of textualism:

> …the judgment of the Court cannot in any degree be influenced by the construction placed upon it by individual members of Congress in the debate which took place on its passage nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered.[27]

By shifting direction in *Dred Scott*, Taney CJ's ruling would seal the fate of the American republic and ensure the issue of slavery and race became one of the chief disputes in the American Civil War of 1861 – 1865. The consequence was devastating to the newly industrializing nation, with an unprecedented number of casualties and utter breakdown of social cohesion.[28]

In resolution, the Thirteenth Amendment was passed in 1865 to prohibit slavery and involuntary servitude, except as punishment for a crime, in the United States.[29] However, following its passage through Congress and adoption by the States, the Reconstruction era which followed the Civil War saw newly emancipated African Americans subject to southern state 'Black Codes' to restrict their freedom and rights, ensuring an inferior legal status in the South.[30] The exception stated in the Thirteenth amendment was abused by southern legislatures to burden and criminalise newly freed peoples to subject them to terms of involuntary servitude once more.[31] In response, the *Civil Rights Act of 1866* ("the Act") was passed, which stated:[32]

> …That all persons born in the United States and not subject to any foreign power… are hereby declared citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude… shall have the same right, in every State and Territory of the United States…and to full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens…

While the Congress passed this law, even overriding President Andrew Johnson's veto in doing so,[33] the constitutionality of the Act

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27 *Aldridge v Williams*, 44 US 9, 44 (1845).

28 Caroline E Janney, 'Memory' in Aaron Sheehan-Dean (ed.), *A Companion to the US Civil War* (John Wiley & Sons, 1st ed, 2014) 1139, 1146.

29 *United States Constitution* amend XIII.

30 Walter F Murphy, James E Fleming and Sotirios A Barber, *American Constitutional Interpretation* (The Foundation Press, 1995), 873.

31 James G Pope, 'Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account' (2019) 94(6) *New York University Law Review* 1465, 1501.

32 *Civil Rights Act of 1866*, 14 Stat. 27–30 (1866)

33 Pope (n 31) 1483.

was questioned.[34] As a result, the Fourteenth Amendment was passed in 1868 to address both the evolving 'convict trade', and establish the basic equality of civil rights and citizenship for all Americans, particularly those newly freed.[35] The first section of the Fourteenth amendment states:[36]

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The new amendment had a profound effect on the nation. The first section created simultaneously: a national citizenship, protection of due process, and a right to equal protection of the laws on the State level in an analogous manner to the Fifth amendment's application to the Federal government. Indeed, Rep. John Bingham who authored the amendment intended this, as is evidenced by his speech to Congress:[37]

> I say, with all my heart, that [the First Section] ... should be the law of every State, by the voluntary act of every State. The law in every State should be just; it should be no respecter of persons. It is otherwise now, and it has been otherwise for many years in many of the States of the Union. I should remedy that not by an arbitrary assumption of power, but by amending the Constitution of the United States, expressly prohibiting the States from any such abuse of power in the future.

Bingham, who was the chief architect and draftsman of the crucial section of the amendment sought to give effect to the true spirit of the US constitution, which was rooted ideologically in liberty and natural justice.[38] By the end of the nineteenth century the Fourteenth amendment was being utilised by a diverse number of litigants in court to challenge the validity of state laws which were discriminatory in either their terms or administration.[39]

It could not though, change the social attitudes of the citizenry. While the amendment was intended to protect all citizens from

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34 Ibid 1484, 1485; see also, Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* (Duke University Press, 1986) 80.

35 *Congressional Globe* 1291 (John Bingham) (1866, House of Representatives) ('*Congressional Globe*').

36 *United States Constitution* amend XIV.

37 *Congressional Globe* (n 35).

38 Graham (n 13) 18, 19.

39 See *Strauder v West Virginia*, 100 US 303 (1880) which overturned a criminal conviction decided by a racially biased jury and *Yick Wo v Hopkins*, 118 US 356 (1886) ('*Yick Wo v Hopkins*') which overturned a law being enforced in a racially prejudicial manner.

government discrimination based upon race, the decision of *Plessy v Ferguson* ruled:[40]

> The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either.

This concept of 'separate but equal' thereafter allowed racial segregation to persist at law[41] until the Supreme Court unanimously overturned *Plessy* in the 1954 case of *Brown v Board of Education of Topeka*,[42] finding that 'separate educational facilities are inherently unequal' and, therefore, segregated schools were a violation of the Fourteenth amendment.[43]

The deleterious effects of *Plessy v Ferguson* were anticipated by the sole dissenter in the case, Justice John Marshall Harlan, who with unambiguous clarity correctly stated the effects it would have upon American society:[44]

> In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott Case*.... The recent amendments of the Constitution, it was supposed, had eradicated these principles [of racial lawmaking] from our institutions. But it seems that we have yet, in some of the States, a dominant race -- a superior class of citizens, which assumes to regulate the enjoyment of civil rights, common to all citizens, upon the basis of race. The present decision, it may well be apprehended, will not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficent purposes which the people of the United States had in view when they adopted the recent amendments…

In quite extraordinary fashion, Andrew Inglis Clark gave an analogously ominous caution as to the effect of an omission of a Fourteenth amendment provision from our constitution.[45] While it is questionable whether the Supreme Court's decision in *Plessy* was well known to the Australian founders, a few were acquainted with prior decisions surrounding the Fourteenth amendment.

While the Americans debated the legalities of their constitution and its new amendments, the British colonials of the southern sea were debating the establishment of a new nation – and importantly, to what

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40 *Plessy v Ferguson*, 163 US 537, 544 (1896) ('*Plessy v Ferguson*').
41 See *Lum v Rice*, 275 US 78 (1927) which upheld the exclusion of a Chinese child from a white state school on the basis of their race.
42 *Brown v Board of Education of Topeka*, 347 US 483 (1954) ('*Brown v Board of Education*').
43 Ibid 495.
44 *Plessy v Ferguson* (n 40) 162, 163.
45 *Clark to Wise* (n 6).

extent their constitution would reflect the experience of the United States.

B *Federation – Power over Protection*

In 1890 the first conference took place with the hope to establish a union between the British colonies of Australia.[46] The delegates of the 1890-91 proceedings determined that the new Australian national government should predominately take on characteristics of federalism derived from the United States system of government, rather than the Canadian alternative.[47] This effort was driven in large part by Tasmanian Attorney-General Andrew Inglis Clark, a jurist considered to hold a sophisticated understanding of American constitutional law by his colleagues.[48] From the earliest stages of federation, Clark advocated the ideals of American constitutionalism, going so far as to acknowledge:[49]

> I believe that the cause of the political controversies of the United States, which resulted in that [civil] war, was the question of slavery… It roused all the passions and the faculties of human nature, good and evil, on one side or the other, and induced attempts to give the most tortuous interpretations to the Constitution, either to assist or resist its encroachments… I do not think we need fear to go upon the lines of the Constitution of the United States in defining and enumerating the powers of a Central Legislature, and leaving all other powers to local Legislatures.

The considered and learned position of Clark played a significant role intellectually, though it was equally upon the enlightened oratory of Sir Samuel Griffith and Charles Kingston during the successive convention debates that the 1891 draft would produce the features of federalism adopted in the US system.[50]

This was by no means easy however, and indeed, these founders met a great deal of opposition to adoption of American constitutional ideals. This is perhaps most clearly shown in the debates of 8 April 1891, wherein a proposal by Clark that State governments be capable of determining for themselves the method of selecting a Governor, was accused by fellow Tasmanian Sir Ayde Douglas as promoting a legal

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46 John Andrew La Nauze, *The Making of the Australian Constitution: Studies in Australian Federation* (Melbourne University Press, 1972) 17, 19.

47 Ibid 24.

48 Alfred Deakin and John Andrew La Nauze (ed.), *The Federal Story: The Inner History of the Federal Cause, 1880–1900* (Melbourne University Press, 2nd ed, 1963) 36, 37.

49 Andrew Inglis Clark, 'Debates and Proceedings of the Australasian Federation Conference' (Debate, Australasian Federaton Conference, 12 February 1890) 33, 34.

50 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' (2009) 33(3) *Melbourne University Law Review* 718, 722.

'fad' which sought to sever Australia from its motherland and the traditions of Westminster.[51]

The draft produced by the Sydney Convention in 1891 bore a resounding similarity in structure and prose to its U.S. equivalent. The convention also resolved, in a provisional manner, the question of whether Australia should emulate the Fourteenth amendment. During the proceedings, Andrew Inglis Clark is credited with introducing the following provision into the 1891 Convention in Sydney:[52]

> A State shall not make or enforce any law abridging any privilege or immunity of citizens of other States of the Commonwealth, nor shall a State deny to any person, within its jurisdiction, the equal protection of the laws.

This provision, drawing from the first section of the Fourteenth Amendment, appeared as clause 17 of Chapter V of the Draft of a Bill to Constitute the Commonwealth of Australia as adopted by the 1891 Convention.[53] It was adopted without any discussion at that time.[54] It is noticeably different in that this provision does not include the citizenship clause of its United States equivalent. This omission likely sought to limit the potential for the type of contention which inevitably did arise in later conventions regarding citizenship.

Despite the initial enthusiasm for the Federation movement, the process was stalled by several factors, the greatest of which was arguably the Depression of the 1890's. During this time real GDP fell 17% over 1892 and 1893, and the ensuing financial crisis was the most severe in Australian history.[55] This naturally drew political gravitas and social attention away from the cause of federation.[56]

The provision remained in a dormant state until the Adelaide session six years later at which time it became, in its original form, s 110 of the 1897 draft.[57] After the new draft was circulated to the colonial legislatures, New South Wales in particular sought to omit reference to

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51 *Official Report of the National Australasian Convention Debates* (Sydney, 8 April 1891) 871 <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22constitution%2Fconventions%2F1891-1033%22>.

52 John Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2005) 164.

53 George B Barton, *The Draft Bill to Constitute the Commonwealth of Australia* (1891) 65 <https://nla.gov.au/nla.obj-381266017/view?partId=nla.obj-381275925#page/n66/mode/1up>.

54 John Williams, 'Race, Citizenship and the Formation of the Australian Constitution: Andrew Inglis Clark and the "14th Amendment"' (1996) 42(1) *Australian Journal of Politics & History* 10, 11 ('Race, Citizenship and the Formation of the Australian Constitution').

55 Bryan Fitz-Gibbon and Marianne Gizycki, 'A History of Last-Resort Lending and Other Support for Troubled Financial Institutions in Australia' (2001) *Reserve Bank of Australia* 23.

56 Alfred Deakin stated that "the stress of the financial crisis leading up to the failure of the Banks overshadowed every other issue": Alfred Deakin, *The Federal Story: The Inner History of the Federal Cause 1880-1900* (Melbourne University Press, 1963) 57, 58.

57 South Australia, *Official Report of the National Australasian Convention Debates* (Adelaide, 1897) <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22constitution%2Fconventions%2F1897-1040%22>.

the privileges or immunities clause.[58] By this time with the benefit of six years of contemplation, and a trip to America, Clark had decided that the wording of the clause should entirely emulate its American catalyst. He proposed to the Tasmanian Parliament that s 110 be replaced with the following provision:[59]

> The citizen of each State, and all other persons owing allegiance to the Queen and residing in any territory of the Commonwealth shall be citizens of the Commonwealth, and all shall be entitled to all the privileges and immunities of citizens of the Commonwealth in the several States; and a State shall not make or enforce any law abridging any privilege or immunity of citizens of the Commonwealth: nor shall a State deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of its laws.

In many ways this 'Tasmanian Amendment' would have entirely cleared up the difficulties which arose under the Immigration power,[60] firstly in *Potter v Minahan* and successive cases whereby a subject of her majesty sought to return home after time abroad.[61] However its application would be unlikely to have impacted decisions such as *Singh v Commonwealth*[62] drawn under the Aliens power,[63] as it did not contain reference to a birthright constitutional citizenship.

While the provision was deemed an improvement by the 1898 Melbourne Session, this was also ultimately where Clark's vision was undone entirely.[64] The Tasmanian amendment met fierce opposition led by Isaac Isaacs, who indicted the provision as being in its origin an American attempt to establish the rights of 'blacks' which were 'rammed down the throats' of southern States.[65] While delegates discussed if 'citizen' could include an 'alien,'[66] Isaacs raised the decisions of *Strauder v West Virginia*[67] and *Yick Wo v Hopkins* ('*Yick Wo*'),[68] in arguing that the 'equal protection' and 'due process' clauses would frustrate and curb the power of States to discriminate against specific racial groups.[69] In churning up opposition, it was emphatically asserted by Isaacs:[70]

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58 New South Wales, *Parliamentary Debates*, Legislative Assembly, 4 August 1897, 2616.
59 Williams (n 54) 12.
60 *Australian Constitution* s 51(xvii)
61 *Potter v Minahan* (1908) 7 CLR 277.
62 *Singh v Commonwealth of Australia* (2004) 222 CLR 322 ('*Singh*').
63 *Australian Constitution* s 51 (xix)
64 Josiah Symon and Isaac Isaacs, 'Official Record' (Debate, Australasian Federal Convention, 20 January–17 March 1898) 668.
65 Ibid.
66 Ibid 665 (Sir John Forest).
67 *Strauder v West Virginia*, 100 US 303 (1880).
68 *Yick Wo v Hopkins* (n 39).
69 Symon and Isaacs (n 64) 687.
70 Ibid 669 (Isaacs).

> There is no power on the part of any states of the United States of America to draw any distinction such as we have drawn with regard to factory legislation, and the question was decided in a case, the name of which is significant, *Yick Wo* against *Hopkins*, 118 United States Reports, where a Chinese established his right in spite of the state legislation to have the same laundry licence as the Caucasians have. You can draw no distinction whatever, and it is as well we should understand the full purport of the clause. In regard to the part of it which says that all citizens shall have equal protection it was held that no distinction could be drawn. You could not make any distinction between these people and ordinary Europeans. You could lay down all the conditions you like to apply all round, but you could not impose conditions that would in effect, no matter how the language was guarded, draw a distinction between them and ordinary citizens.

The vision of Isaacs was one wherein government could discriminate against members of the community, to the benefit of some, and to the detriment of others wholly upon racial grounds. This vision was consistent with an older constitutional instinct derived from Diceyan theories of parliamentary supremacy. Under Dicey's model, Parliament is the supreme lawmaker and rights of subjects are secured primarily through political rather than judicial mechanisms. Many of Australia's framers absorbed that tradition and were therefore reluctant to erect judicially enforceable limits on legislative power: they feared that entrenching substantive constraints (and thereby empowering courts to strike down Acts) would undermine representative government and substitute judicial for political judgment. In that intellectual climate, proposals resembling a Fourteenth Amendment-style check on parliamentary power struck contemporaries as both atypical and undesirable. For this reason, the reference to 'life, liberty and property' was also assailed by Dr John Cockburn, former South Australian Premier, who stated quite glibly:[71]

> Why should these words be inserted? They would be a reflection on our civilization. Have any of the colonies of Australia ever attempted to deprive any person of life, liberty, or property without due process of law?

Issacs J echoed the same sentiment, with a deep concern that protection of due process would result in a limitation on the power of federal and state government, which would arise through the judiciary to review the dictates of legislators:[72]

> If we insert the words "due process of law," they can only mean the process provided by the state law. If they mean anything else they seriously impugn and weaken the present provisions of our Constitution. I say that there is no necessity for these words at all. If anybody could point to anything that any colony had ever done in the way of attempting to persecute a citizen

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71 Ibid 688; this was stated in complete disregard of legislation such as the *Aborigines Act 1897* (WA) and the *Aborigines Protection Act 1886* (Vic).

72 Ibid 688.

> without due process of law there would be some reason for this proposal. If we agree to it we shall simply be raising up obstacles unnecessarily to the scheme of federation.

Despite some mild pushback by Richard Edward O'Connor on the provision, protection of due process was omitted.[73] The Tasmanian amendment, having been repudiated by its objectors was ultimately defeated, with the draft provision being fundamentally diluted and renumbered to what is now s 117 of our present Constitution.

It appeared the delegates of the 1898 Melbourne convention were stifled by the notion of constitutional citizenship and its ramifications for their provinces. They were fearful of limits being imposed on the power to racially discriminate (especially as concerned labour and commerce, perhaps why the *Yick Wo* decision ran afoul of many delegates) and were seemingly insulted by the implication that fundamental rights needed constitutional protection, given the imagined 'virtuous record' of the Australian legislatures in upholding civil liberties.

C *Antipodes of Federation — Isaacs and Clark*

While the above reasons reveal why an Australian Fourteenth amendment failed to be included, there is another factor which seems to have played a major role. This being that delegates were more reliant upon the understanding of Isaac Isaacs, who was present in Melbourne, as opposed to Clark who was not.[74] From this, one can deduce that several issues stemmed, which may indicate why many delegates were increasingly nervous about the Tasmanian proposal.

For one, Isaacs at numerous points during the debates drew upon a misconceived understanding of both American history and the Fourteenth amendment jurisprudence to bolster his argument. The most prominent being that the provision was intended to only apply to 'negroes' and addressing the issues associated with slavery.[75] Isaacs interpretation firstly, and most importantly, disregards the actual words of the provisions' text which are not racially narrow (referring to 'All persons'), secondly, it minimised the Supreme Court's multiple applications of the amendment to cases not concerning African Americans,[76] and finally, completely disregarded the historical reasons why the US Congress and Rep John Bingham in particular adapted the

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73 Ibid 689.

74 John Williams, 'With Eyes Open: Andrew Inglis Clark and our Republican Tradition' (1995) 23 *Federal Law Review* 149, 176.

75 Symon and Isaacs (n 64) 678, 688.

76 See, eg, *Slaughter-House Cases*, 83 US (16 Wall.) 36 (1873), *Hurtado v California*, 110 US 516 (1884); *Chicago, Burlington & Quincy Railroad Co v City of Chicago*, 166 US 226 (1897).

general words found in the provision.[77] The rationale of Issacs was also counter to the principle of interpretation set down in the *Slaughterhouse Cases* (which he otherwise referred to at the debates), where the court stated:[78]

> Undoubtedly while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter… if other rights are assailed by the States which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent… it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the Constitution, until that purpose was supposed to be accomplished, as far as constitutional law can accomplish it.

Lest I be accused of leaving context aside in making such a judgement, this is almost precisely the criticism Clark levelled against Isaacs following the mangling of the Tasmanian amendment, he stated:[79]

> Isaacs has indulged in a long argument upon the non-necessity of the Tasmanian amendment because it is modelled upon the 14th amendment of the Constitution of the United States which was made necessary by slavery and therefore the historical reasons for its adoption in America cannot apply in Australia. But the majority of the cases which have been decided upon the 14th Amendment in the Courts of the United States have not been cases in which the status or rights of the negroes have been involved; and every well instructed lawyer knows that many inconsistent rules and principles of the Common [law] remain in force long after the original reason for their adoption has ceased to operate or exist, until new and more cogent reasons are discovered for their application to new social and industrial conditions.

Law historian John Williams asserts that for Isaacs, race was the critical factor in his opposition to the notion of a constitutionally defined common citizenship, as well as legislative restrictions for due process and equal protection of laws.[80] While I support this proposition, one could also posit that he may have been dissatisfied by the influence American jurisprudence had upon our constitutional drafting due to his anglophile leanings. One could glean this most clearly, for example, from the judgement in the *Engineers case*.[81] His honour Isaacs J, who

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77 Graham (n 13) 18, 19; between the words of Congress expressed in the *Civil Rights Act of 1866* and the address of Rep Bingham regarding the Fourteenth amendment, one can glean the intent of the provision for general application.

78 *Slaughter-House Cases*, 83 US (16 Wall.) 72 (1873).

79 *Clark to Wise* (n 6).

80 Williams (n 54) 17.

81 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 ('*Amalgamated Society of Engineers v Adelaide Steamship Co Ltd*').

delivered the influential majority judgement, found that the crucial features of our system were those of English, as opposed to American origin and that the latter were not a 'secure basis on which to build fundamentally with respect to our own constitution' going forward.[82]

The case completely altered the conception of federalism and constitutional interpretation led previously by the Griffith court, which rigorously applied American precedent as informative until 1919.[83]

The overall understanding of American law at the Convention was well described by Edmund Barton in a letter to Clark following the Tasmanian provision being refused on 8 February 1898, which confirmed none of the delegates present, including Isaacs and O'Connor had read 'the case mentioned by you of *Marbury v Madison* or if seen it has been forgotten'.[84] In addition to the opposition the Tasmanian amendment received on racist grounds, and the general preference of many for British constitutional norms, there was also it seems, according to Barton, a degree of constitutional ignorance held by even the most enlightened delegates, regarding the American law being debated. This of course should not be taken as diminishing their efforts but reveals instead why no authoritative counter argument was mounted at the time by those in favour of the amendment.

In stark contrast Clark was deemed to have an expert understanding of American law.[85] In his draft constitution of 1891, the power to legislate based on 'race' was omitted,[86] as were many subjects which now find themselves in s 51.[87] Arguably, due to his adherence to federalism, he envisaged a much smaller federal government than that which the final draft created. He stated in his *Notes* to the 1898 convention the reason for the proposed Tasmanian amendment was:[88]

> Such a provision would place all rights of property under the direct protection of the Constitution as against all attempts to infringe them under colour of unconstitutional legislation by a State; and in connexion with a provision for giving the federal courts jurisdiction in all controversies between citizens of different States, would put beyond dispute the right to redress…

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82 Ibid 146; Isaacs J is considered the chief author of the judgement: see, eg, Michael Stokes 'The Role of Negative Implications in the Interpretation of Commonwealth Legislative Powers' (2015) 39 *Melbourne University Law Review* 175, 178.

83 See, eg, *D'Emden v Pedder* (1904) 1 CLR 91: for context, the case was an appeal from the Tasmanian Supreme Court on a point of constitutional law, with Griffith CJ endorsing the dissenting judgement of Clark J in *Pedder v D'Emden* (1903) 2 Tas LR 146.

84 Letter from Barton to Clark, 14 February 1898 in Williams (n 52) 846; this observation by Barton is especially interesting when one considers that all three men were later appointed to the High Court instead of Clark.

85 John La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972) 273; Sir Samuel Griffith is also credited with this expertise.

86 Williams (n 52) 85, 86.

87 *Australian Constitution* s 51.

88 Andrew Inglis Clark, 'Notes to the Australasian Federal Convention', 7 February 1898 in Williams (n 52) 845.

It was Clark's view that in the absence of the Tasmanian amendment provision, providing for national citizenship, as well as equal protection of citizens, the 'door would be left open' for a large number of discriminatory statutes.[89] History would prove him to be correct, regarding both the Commonwealth and State governments, which inevitably revealed they were not as *virtuous* as Isaacs had idealised in the 1898 conventions.

D *Natural Law & the Constitution*

Clark's reasoning for the Tasmanian amendment remains as accurate today as it was in the 1890's. The amendment also confirms the antecedent existence of the natural law rights to life, liberty and property and establishes through positive law limits upon government in infringing these rights. While Australian jurisprudence and politics gives little attention to natural law, it was certainly something our learned framers understood in their debates. Clark supported natural law jurisprudence, arguing in his essay 'Natural Rights':[90]

> If human nature has not any natural or inherent rights which can claim recognition to restrain a preponderance of physical force or the arbitrary will of majorities, then the weak and all minorities are without verifiable authority or justification for resisting oppression.

Restraining the '*arbitrary will of majorities*' is precisely the purpose of both the Fourteenth amendment and Clark's Tasmanian proposal. The provision is an acceptance that a democratically elected legislature may trample individual rights as effectively as a hereditary monarch, and with perhaps even greater perceived legitimacy in doing so. Proponents of the Diceyan theory that the Parliament may make or unmake any law it so wishes[91] rely upon the historically corruptible temperament of legislators and democratic majorities to protect the rights of minorities from encroachment and discrimination.

The failure of such a system of reliance upon the consistent virtues of legislators was well articulated by Thomas Jefferson, when he stated in terms equally applicable to the Australian context:[92]

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89 Clark to Wise (n 6); Clark noted that the American Fifth and Fourteenth amendments had 'frustrated' the ability of governments in the US to make laws of this kind. Impliedly, he seems to accept such a provision would not be a 'cure-all' solution to such an issue arising, but would be a counterbalance to the excesses.

90 Andrew Inglis Clark, 'Natural Rights' (1900) 282 *The American Academy of Political and Social Science* 36, 50.

91 A V Dicey, *Introduction to the Study of the Law of the Constitution (1885)* (Liberty Classics, 1982) 3.

92 Thomas Jefferson, 'Notes on Virginia – Query XIII The Constitution of the State and its Several Charters?' in Paul Leicester Ford (ed.) *The Works of Thomas Jefferson* (G P Putnam's Sons, vol 4, 1905) 21, 22.

> Nor should our assembly be deluded by the integrity of their own purposes, and conclude that these unlimited powers will never be abused, because themselves are not disposed to abuse them. They [the assembly] should look forward to a time, and that not a distant one, when a corruption in this, as in the country from which we derive our origin, will have seized the heads of government, and be spread by them through the body of the people; when they will purchase the voices of the people, and make them pay the price. Human nature is the same on every side of the Atlantic, and will be alike influenced by the same causes.

The reluctance and scepticism towards power expressed by Jefferson was unfortunately absent in the 1898 conventions and has continued to be so in much of our constitutional literature. History is replete with instances of democratic majorities, regardless of how temporary, trampling the rights of individuals and minorities.

It is for this reason constitutional limitations and rights are created as protections against unfettered legislative authority. Adopting Clark's rationale for our contemporary time, there is a strong case to be made that renewing the 'Tasmanian amendment' proposal is desirable to affect change.

III Reviving the Tasmanian Amendment

Transgressing a sacred rule of constitutional reasoning set down in the *Engineers Case*,[93] I shall now endeavour to discuss briefly the impact a modern 'Tasmanian Amendment' provision could have upon our existing jurisprudence, with comparative reference to American authorities.

A *Constitutional Citizenship*

Citizenship in Australia is defined by the legislature through the *Australian Citizenship Act 2007* (Cth), which is characterised under the 'naturalization and aliens' power set out in s 51(xix) of the Constitution.[94] This power of the Parliament in relation to both alienage and naturalization is considered plenary.[95] While the dissenting judgement of Gaudron J in *Nolan v Minister for Immigration and Ethnic Affairs*, held that it was not a power 'at large',[96] this view has not been entirely endorsed by the High Court in the time since. For example, in the case of *Ex parte Ame*, while it was argued that the power to terminate citizenship could not be exercised unilaterally by

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93 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (n 103) 146.
94 *Australian Constitution* s 51(xix).
95 *Re Patterson* (2001) 207 CLR 391, 680 (McHugh J).
96 *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178, 192 (Gaudron J).

government,[97] the majority (Kirby J dissenting) determined that this was not the case, stating:[98]

> In any event, no limitation of the kind proposed applies to the power conferred by s 51(xix). The extent of the power of Parliament to deal with matters of nationality and immigration, to create and define the concept of Australian citizenship, to prescribe the conditions on which citizenship may be acquired and lost, and to link citizenship with the right of abode, has been considered most recently by this Court in *Singh v The Commonwealth* …. [where the majority] rejected the view that concepts of alienage and citizenship describe a bilateral relationship which is a status, alteration of which requires an act on the part of the person whose status is in issue.

One of the chief concerns of Kirby J in his dissent, was that the applicant's status could be altered by legislative change, without:[99]

> …the specific knowledge or consent of the applicant, without renunciation or wrongdoing on his part, notice to him, due process or judicial or other proceedings, he was purportedly deprived of his Australian citizenship.

While the power has no express textual limits, advocates of restraint have often referred to Gibbs CJ's statement of principle in *Pochi v MacPhee*, as a basis of an implied limitation. Namely that:[100]

> …the Parliament cannot, simply by giving its own definition of 'alien', expand the power under s 51 (19) to include persons who could not possibly answer the description of 'aliens' in the ordinary understanding of the word.

However, even that statement is yet to be fully qualified and fleshed out by the High Court,[101] leaving with the legislature a broad power to alter and revoke one's citizen status. The effects of the present constitutional arrangements are such that children born and raised in Australia exclusively may even be subject to deportation. In *Singh v Commonwealth*, the court ruled that a 6-year-old girl who had been born in Australia was in fact subject to the Aliens power due to her Indian descent.[102] A similar issue arose in *Doumit v Commonwealth,* where the Federal court held that children born in Australia to non-citizen parents had no constitutional protection from the Aliens power.[103]

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97 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 222 CLR 439, [34].

98 Ibid [35]–[36].

99 Ibid [44].

100 *Pochi v MacPhee* (1982) 151 CLR 101, 109 (Gibbs CJ).

101 The majority in the case of *Love v Commonwealth*; *Thoms v Commonwealth* (2020) 270 CLR 152, endorsed this statement of principle repeatedly, however, in each circumstance failed to fully articulate what effect such a limitation had upon the exercise of power; particularly when the term 'alien' continues to ultimately be defined by the Parliament through legislation.

102 *Singh v Commonwealth* (2004) 222 CLR 322, 400 ('*Singh*').

103 *Doumit v Commonwealth* (2005) 144 FCR 298.

While egregious abuse of this broad power to alienate would doubtless draw the attention of the High Court, the reality is that the constitution fails to expressly define any limitation upon the Parliament in dealing with the subject of citizenship and alienage. This leaves the High Court in the (unfortunately, now familiar) position of 'discovering' an implied limitation 'inherent' to the text of the constitution. Feeling the 'vibe' of the constitution, as many law students now say in jest.

In contrast to this, we may examine the first clause of the Fourteenth amendment of the U.S. constitution, which at the outset provides:[104]

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

In the *Wong Kim Ark case* this was interpreted as protecting the principle of *Jus Soli* and ensuring that people born in the United States, with exception of those children of foreign diplomats, [105] are automatically entitled to citizenship. The applicant was a Chinese man who had been born in the United States to non-citizen parents and upon returning home from a visit to China, was denied permission to enter the country. The court stated, in clear terms that a:[106]

> …child born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the Emperor of China, but have a permanent domicil and residence in the United States… and are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States, by virtue of the first clause of the Fourteenth Amendment of the Constitution…

This landmark precedent has been accepted for over a century with little challenge. As such, the concept of constitutional citizenship was established and is protected by the Fourteenth amendment for all people born within the jurisdiction of the United States.

By close analogy to the *Wong Kim Ark case*, were the amendment implemented into Australian constitutional law, the applicant in matters such as *Singh*[107] would have been entitled to citizenship status and therefore outside the scope of the Aliens power.

The Congress possesses the power to determine matters of naturalization under Art I, s 8(4) of the US constitution. However, the Supreme Court has found that once admitted, Congress may not discriminate between native-born and naturalised citizens of the United States.[108] Further, the US Supreme Court in the case of *Afroyim v Rusk*

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104 *United States Constitution* amend XIV.
105 *Slaughterhouse Cases*, 83 US 36, 73 (1872).
106 *United States v Wong Kim Ark*, 169 US 649 (1898).
107 *Singh* (n 102).
108 *Schneider v Rusk*, 377 US 163 (1964); this was based primarily upon application of the analogous Fifth amendment.

('*Afroyim*'), determined that citizens could not be stripped of their citizenship involuntarily[109] (or unilaterally, as in *Ame's case*). In that matter, a Jewish-American who had been naturalized cast a vote in the Israeli elections, which according to the earlier precedent *Perez v Brownell* (1958), [110] would result in loss of US citizenship. In overturning its earlier decision, the Supreme Court recognized the constitutionality of dual citizenship,[111] and ultimately concluded that U.S. citizenship could only be revoked by either fraud in the naturalization process, or voluntary relinquishment.[112] Justice Hugo Black, writing in *Afroyim* of the citizenship clause, gave a profound exposition of principle when he stated:[113]

> There is no indication in these words of a fleeting citizenship, good at the moment it is acquired but subject to destruction by the Government at any time. Rather the Amendment can most reasonably be read as defining a citizenship which a citizen keeps unless he voluntarily relinquishes it. Once acquired, this Fourteenth Amendment citizenship was not to be shifted, canceled, or diluted at the will of the Federal Government, the States, or any other governmental unit.

In Australia by contrast, the various judgements of the High Court have widely defined the powers of the Parliament in relation to determining the terms of Australian citizenship and legal alienage. However, after a century of jurisprudence, the Court is yet to define any real limitation on the s 51 (xix) powers. Arguably, this is as there is no reliable textual basis for limiting the power at the present time. This is the effect of omitting a national citizenship from our constitution.

In the absence of such a citizenship provision, it remains as Dr Genevieve Ebbeck stated that if:[114]

> …an Australian citizen has no constitutionally guaranteed right, deriving from his/her citizenship… to enter and remain within Australia, the fundamental worth of his or her citizenship becomes questionable.

Taking the position that government is at its best a 'necessary evil; in its worst state an intolerable one',[115] and that the purpose of a constitution is to both establish and limit the powers of the state, there are inherent benefits to be found in entrenching a constitutional

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109 *Afroyim v Rusk*, 387 US 253 (1967) ('*Afroyim v Rusk*').
110 *Perez v Brownell*, 356 US 44 (1958).
111 *Afroyim v Rusk* (n 109) 262.
112 *Vance v Terrazas*, 444 US 252, 270 (1980), where the court stated that 'in proving expatriation, an expatriating act, and an intent to relinquish citizenship must be proved by a preponderance of the evidence'.
113 *Afroyim v Rusk* (n 109).
114 Genevieve Ebbeck, 'A Constitutional Concept of Australian citizenship' (2004) 25 *Adelaide Law Review* 137, 159-160.
115 Thomas Paine, *Common Sense and Selected Works of Thomas Paine* (Canterbury Classics, 2014) 5.

citizenship. It would undoubtedly create a clear (and much needed) express textual limitation on the Aliens power.

B *Due Process of Law*

The principle of due process is one which is highly valued in both the Australian and American common law traditions. Yet despite our shared values, the protections of due process are expressed quite differently.

Indeed, the major difference is that the Australian Constitution offers no express guarantee of due process analogous to the protections afforded by the Fifth and Fourteenth Amendments to the US Constitution.[116] As a consequence, such protections in Australia have been founded primarily as a consequence of our separation of powers, and focus upon the character of judicial power.[117] This was quite clearly stated in the case of *Chu Kheng Lim v Minister for Immigration*, where the court stated legislative power does not:[118]

> … extend to the making of a law which requires or authorizes the courts in which the judicial power of the Commonwealth is exclusively vested to exercise judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power.

As such, the functions of the court must retain their essential characteristics to be capable of exercising the judicial power found in Ch III of the constitution, one such being standards of natural justice.[119] This requirement is generally satisfied by a 'fair hearing' and 'lack of bias' in the proceedings.[120] Gaudron J in *Dietrich v The Queen*, described this protection of due process to be focused upon the application of 'evidentiary and procedural rules'.[121] The separation doctrine is, as Deane J stated in *Re Tracey; Ex parte Ryan,* 'the Constitution's only general guarantee of due process'.[122]

While not constitutionally enshrined, it should be noted that Australian courts have also protected fundamental aspects of due process by utilising the principle of legality to uphold a large number of common law rights.[123] The legal presumption against the Parliament

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116 George Winterton, 'The Separation of Powers as an Implied Bill of Rights' in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law: Essays in Honour of Professor Leslie Zines* (Federation Press, 1994) 204–5.

117 William Bateman, 'Procedural Due Process under the Australian Constitution' (2009) 31(3) *Sydney Law Review* 411, 415.

118 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 26-27.

119 Fiona Wheeler, 'The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia' (1997) 23 *Monash University Law Review* 248, 256–63.

120 *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, 34 (McHugh and Gummow JJ).

121 *Dietrich v The Queen* (1992) 177 CLR 292, 362–3.

122 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 580.

123 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 520 (Brennan J).

intending to invade these rights except by express legislative intention continues to be an effective central principle of statutory interpretation.[124] However, given the presumption may be displaced by either the express will of Parliament, or necessary implication by the courts,[125] it leaves fundamental rights unguarded against abrogation.

Looking to the American example by contrast, the Fourteenth Amendment relevantly provides "…nor shall any State deprive any person of life, liberty, or property, without due process of law…"[126]

The clause itself is specific to 'State' deprivations on the basis that the Fifth amendment provides an analogous protection against Federal laws.[127] These two provisions are considered to have an analogous application.[128] Over the course of the past century, the provision has been given a broad application as protecting non-citizens[129] and even corporations;[130] and accounting for a broad definition of 'liberty'.[131]

It has been applied to expressly uphold due process rights in relation to civil procedure, with the Court stating in *Snyder v Massachusetts* that a state government:[132]

> …is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless, in so doing, it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.

Moreover, the provision has consistently been utilised to ensure a high standard of due process within the criminal procedure.[133] The Supreme Court has found that, 'among the historic liberties so protected' by the provision 'was a right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security'.[134] It has also been accepted that the provision is an express source of protection for common law rights, and that:[135]

> … it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience,

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124 See *Potter v Minahan* (1908) 7 CLR 277, 304; *Bropho v Western Australia* (1990) 171 CLR 1, 17 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Coco v The Queen* (1994) 179 CLR 427, 437 ('*Coco v The Queen*'); *X7 v Australian Crime Commission* (2013) 248 CLR 92, 153 (Kiefel J).

125 *Coco v The Queen* (n 124) 438 (Mason CJ, Brennan, Gaudron and McHugh JJ).

126 *United States Constitution* amend XIV.

127 Ibid amend V.

128 *Malinski v New York*, 324 US 401, 415 (1945).

129 *Zadvydas v Davis*, 533 US 678, 693 (2001).

130 *Santa Clara County v Southern Pacific Railroad Company*, 118 US 394 (1886).

131 *Bolling v Sharpe*, 347 US 497 (1954).

132 *Snyder v Massachusetts*, 291 US 97, 105 (1934).

133 See *Vitek v Jones*, 445 US 480 (1980).

134 *Ingraham v Wright*, 430 US 651, 673 (1977).

135 *Meyer v Nebraska*, 262 US 390, 399 (1923).

> and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Until the case of *Williamson v Lee Optical Co.*,[136] the judiciary had even utilised the provision as a source of protection from interference with the fundamental right of contract.[137] The history and coverage of the principle has been well defined by Professor Randy Barnett and Evan Bernick, who compellingly argue not only that the provision was intended to protect fundamental common law rights, but that it always included a substantive element.[138]

By this albeit brief characterisation one may observe the stark contrast between the two systems. In the absence of such an amendment, the Australian courts have been left to establish basic due process standards by constitutional implication. However, even where protections of due process were entrenched expressly, such as the right to trial by jury,[139] the court has interpreted the provision narrowly and in deference to the power of the legislature.[140]

Contrasted to this is the robustness of the American tradition, which by its express protections in the Fifth and Fourteenth amendments have created significant limitations upon the exercise of government power. Arguably, it was this judicial robustness in protecting 'life, liberty and property' that Clark also sought to import into our founding document.[141] Had his Tasmanian amendment been supported, it is very likely our constitution would reflect at least, an 'American-like' quality in protecting such a fundamental right.

C *Equal Protection*

A significant part of the Fourteenth amendment, which attracted perhaps the greatest advocacy from Clark, as well as opposition from the 1898 convention was the equal protection clause, which reads, that a State may not "… deny to any person within its jurisdiction the equal protection of the laws."[142]

At present, our constitution not only omits a provision broadly ensuring the equal protection of citizens, but indeed, contains plenary powers regarding such subjects as 'Race'[143] which permits unequal

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136 *Williamson v Lee Optical Co*, 348 US 483 (1955).

137 See *Lochner v New York*, 198 US 45 (1905), where the court struck down state regulation of working hours.

138 See Randy Barnett and Evan Bernick, 'No Arbitrary Power: An Originalist Theory of the Due Process of Law' (2019) 60 (5) *William & Mary Law Review* 1599, 1627-28.

139 *Australian Constitution* s 80.

140 See *R v Archdall & Roskruge; Ex parte Carrigan and Brown* (1928) 41 CLR 128, 136 (Knox CJ, Isaacs, Gavan Duffy and Powers JJ).

141 Clark (n 90).

142 *United States Constitution* amend XIV.

143 *Australian Constitution* s 51 (xxvi)

treatment of citizens.[144] The dominant sentiment of the framers in 1898 was favourable towards government discrimination. In relation to the Race Power, this is exemplified by the rationale offered by Sir Edmund Barton, who advocated:[145]

> …the original intention of this sub-section was to deal with the affairs of such persons of other races-what are generally called inferior races… I entertain a strong opinion that the moment the Commonwealth obtains any legislative power at all it should have the power to regulate the affairs of the people of coloured or inferior races who are in the Commonwealth.

Quick and Garran in their seminal text, identify this power as being in direct antithesis to the Fourteenth amendment.[146] The power to discriminate between 'subjects' within the Commonwealth based upon race was by design, rather than default.[147]

The long history of legalised discrimination in the United States should not be understated, however, nor should the role of the Fourteenth amendment in ending such odious arrangements of power. In *Strauder v West Virginia*, it was established that it is a denial of equal protection of the law for states to exclude persons from jury service on the basis of race, colour or previous condition of servitude.[148] Further, *Yick Wo v Hopkins* found that even a racially neutral law would be contrary to the amendment when administered in a racially prejudicial manner.[149]

Despite these profound developments, the Supreme Court in later narrowing the application of the Fourteenth amendment reopened the road for state discrimination.[150] This narrowing of the provision led to significant judicial errors and injustices, such as the well-known case of *Korematsu v United States*, where the arbitrary imprisonment of Japanese Americans on the basis of their racial heritage was deemed constitutional.[151]

However, since the decision of *Brown v Board of Education*,[152] the provision has received wide application in protecting minorities from legislative and executive overreach.[153] One such example being the prohibition of sex-discrimination in either legislative or administrative contexts, unless such discrimination can be substantially correlated to

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144 *Kartinyeri v The Commonwealth* (1998) 195 CLR 337, [47] (Gummow and Hayne JJ).
145 Symon and Isaacs (n 64) 228, 229.
146 John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus and Robertson, 1901) 622, 623.
147 *Kruger v Commonwealth* (1997) 190 CLR 1, 45 (Brennan CJ).
148 *Strauder v West Virginia*, 100 US 303 (1880).
149 *Yick Wo v Hopkins* (n 39).
150 See *Plessy v Ferguson* (n 40).
151 *Korematsu v United States*, 323 US 214 (1944); but see *Trump v Hawaii*, 138 S.Ct. 2392 (2018) where Roberts CJ in obiter dicta confirmed the case was wrongly decided.
152 *Brown v Board of Education* (n 42).
153 See *Reed v Reed*, 404 US 71 (1971), prohibiting discrimination based upon sex.

achievement of important policy objectives.[154] The provision has also been extended to discrimination based upon sexual orientation,[155] such as in the landmark case of *Lawrence v Texas*, which found that the criminalisation of homosexual sodomy was unconstitutional.[156] More recently in *Obergefell v Hodges*, the Supreme Court held that same-sex couples have a fundamental right to marry guaranteed by the equal protection clause.[157]

These expansive cases are doubtless still considered contentious in American law.[158] Nonetheless, the benefit such an equal protection clause would yield in Australia, is an express limit on the otherwise plenary powers of Parliament, favourable to the equal protection of individuals and their property rights.

D *Privileges & Immunities*

One aspect of the Tasmanian amendment which was salvaged from the debates was an echo of the 'Privileges or Immunities' clause of its US counterpart, which now finds itself contained in s 117 of the Constitution.[159] The section was adopted on the advocacy of Josiah Symon QC and Richard O'Connor, who sought to prohibit differential treatment based upon state residence.[160] Their rationale was doubtless drawn from the *Slaughterhouse Cases*, where Miller J held the provision's:[161]

> …sole purpose was to declare to the several States that, whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify or impose restrictions upon their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction.

In the United States, this narrow interpretation resulted in scant application of the clause to case law until recently.[162] Quite similarly in Australia, s 117 received an extremely narrow application by the High Court,[163] until *Street v Queensland Bar Association* and subsequent

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154 *Craig v Boren*, 429 US 190, 197 (1976).
155 See *Romer v Evans*, 517 US 620 (1996).
156 *Lawrence et al. v Texas*, 539 US 558 (2003), overruling the earlier decision of *Bowers v Hardwick*, 478 US 186 (1986).
157 *Obergefell v Hodges*, 576 US 644 (2015).
158 See *Timothy Sandefur*, 'In Defense of Substantive Due Process, or the Promise of Lawful Rule' (2012) 35(1) *Harvard Journal of Law & Public Policy* 283, 285.
159 *Australian Constitution* s 117.
160 Quick and Garran (n 146) 954.
161 *Slaughter-House Cases*, 83 US (16 Wall) 36, 77 (1873) (Miller J).
162 See *McDonald v Chicago*, 561 US 742 (2010) (Thomas J, concurring).
163 See, eg, *Davies and Jones v Western Australia* (1904) 2 CLR 29; *Henry v Boehm* (1973) 128 CLR 482.

cases revitalised the section as providing protection from some interstate discrimination.[164]

However, it is quite possible that the principle as articulated in the *Slaughterhouse Case* and followed by our framers, was narrower than intended. The original public meaning of the provision, according to Professor Barnett,[165] should look to several historical references, particularly the judgement of Washington J of the Supreme Court in *Corfield v Coryell*, where his honour stated:[166]

> We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; *the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety*; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.

According to Professor Barnett, this exposition of principle incorporates the natural rights expressed by George Mason's draft of the Virginia Declaration of Rights.[167] The inevitable conclusion being that the provision reserves to the citizen certain natural rights, subject to limitations by the government to 'serve an end to which legislators are competent'.[168]

This provision, whether adopted by the original Tasmanian amendment or as it is presently found in s 117, was likely always destined to mimic its American counterpart in receiving a narrow application. However, in both contexts there are strong grounds to support that this clause ought to be given a wider and more substantive application in protecting the rights of citizens and subjects.

IV Conclusion

It is doubtless the case that this exposition of legal history and theory is unlikely to do justice to the subject matter in its entirety. Yet, the summary of my argument may be separated into two distinct conclusions.

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164 *Street v Queensland Bar Association* (1989) 168 CLR 461, 489 (Mason CJ); *Goryl v Greyhound Australia Pty Ltd* (1994) 179 CLR 463, 474 (Brennan J).

165 Randy Barnett, 'Three Keys to the Original Meaning of the Privileges or Immunities Clause' (2020) 43(1) *Harvard Journal of Law & Public Policy* 1, 2.

166 *Corfield v Coryell*, 6 F Cas 546, 551–2 (CCED Pa 1823) (No 3230) (emphasis added).

167 Barnett (n 165) 3.

168 Ibid 10.

The first, relating to our constitutional history, is that the decision of our framers to refuse the Tasmanian amendment was based primarily upon racial prejudice, and legal grounds which were not well founded in either the natural law, or the constitutional law of the United States. Their preference of power over rights protection, in the vein of British constitutionalism, has resulted in the present centralisation of power in the federal government and subjugation of all individual rights to the will of Australian governments. In contrast to this, the suggestion of Clark in the 1890's for constitutional restraints on power, would have ensured a textual basis for modern courts to limit the exercise of both legislative and executive authority.

The second, is that the absence of this Fourteenth amendment-like provision, as revealed by my comparative examples, is that in each instance the Australian constitution provides either no protection, or minimal protection for fundamental rights – the effect of which has been a reliance on the 'virtue' of politicians. Not to positively protect our rights; but to simply minimise their invasions. Modern Australian history evidences the folly of this constitutional approach, relying on the corruptible temperament of politicians. An express equal-protection clause would operate as a high-order, constitutional guard against both overt and structural forms of discrimination, complementing — rather than merely duplicating — Australia's extensive statutory regime. A constitutional prohibition would entrench a baseline prohibition on discriminatory government action, and would signal a normative ceiling that limits Parliament's power to legislate on the basis of protected characteristics.

History shows that Australians will endorse focused, clearly articulated constitutional changes that are framed as corrective and non-disruptive: the 1967 amendments (*which amended s 51(xxvi) and removed s 127*) passed with overwhelming support and remain the exemplar of targeted, successful reform. A carefully worded, short amendment — *for example* an explicit, flat constitutional prohibition on racial discrimination or a limited citizenship clause protecting *jus soli* births — could achieve much of the Tasmanian Amendment's remedial force while avoiding the electoral brittleness of a broad rights charter. The resolutions of the Uluru statement, and the ongoing debate as to rights protection in Australia reveal a growing demand for constitutional reform in the 21st century.

A good starting point for reform may well be to dive into waters which are already chartered with clearly defined textual reforms. To such an end, we may yet revitalise the 'Tasmanian amendment', tailoring it to our modern needs to begin a new era of constitutional rights protection in Australia. Such an approach would promote clear textual restraints on legislative power, while offering a politically feasible road map for reformers and policymakers.