

“..the secret isolated joy...”

Letters of Andrew Inglis Clark and Oliver  
Wendell Holmes Jr (1890-1905)

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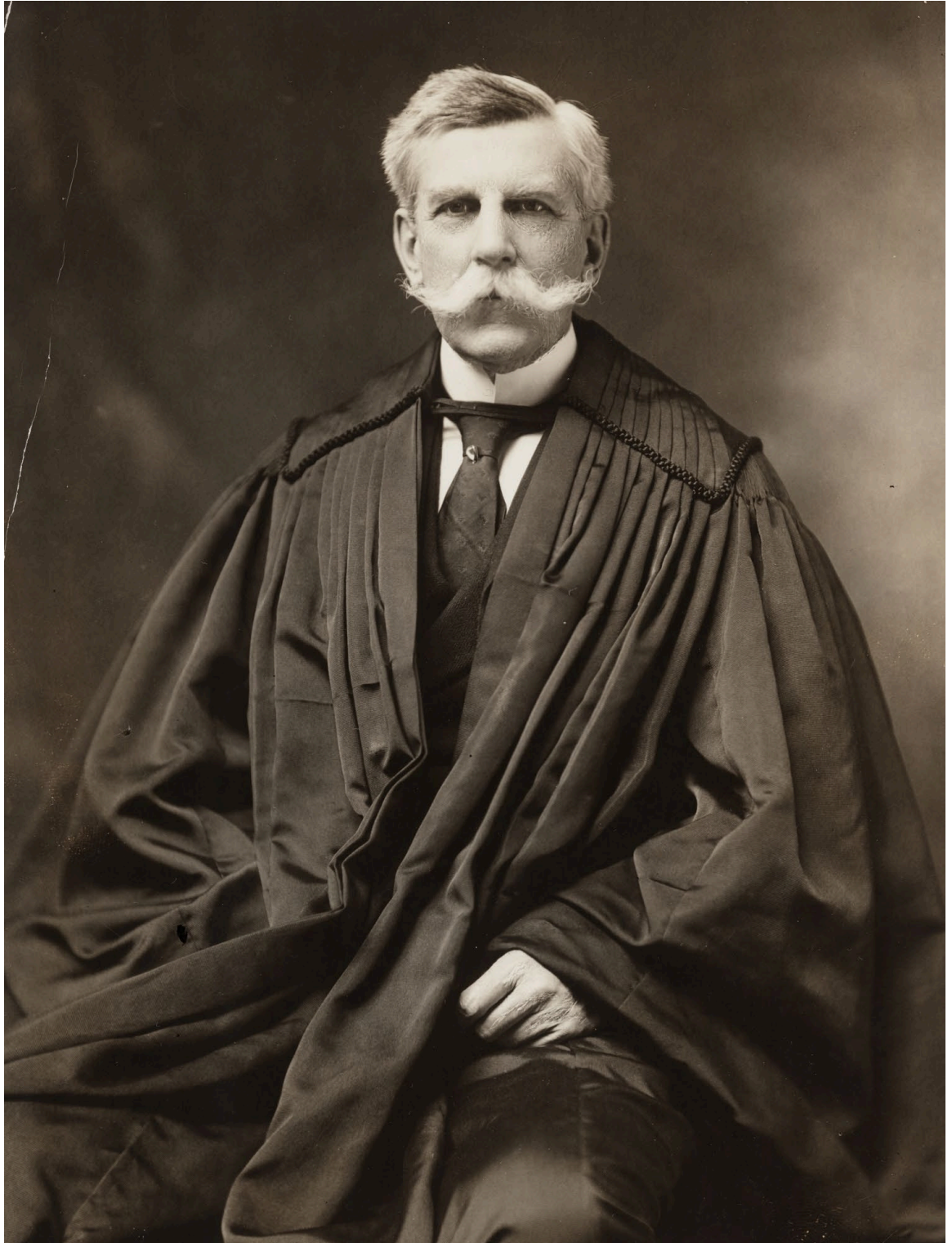
“.. the secret isolated joy of the thinker who knows that, a hundred years after he is dead and forgotten, men who have never heard of him will be moving to the measure of his thought”.

Oliver Wendell Holmes Jr, “Speech to the Graduating Class, Harvard University, 1886 (Healy)

“.. 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, and who cannot have anticipated the problems which would arise for solution by future generations, but as declaring the will and intentions of the present inheritors and successors 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. Every community of men is governed by present possessors of sovereignty and not by the commands of men who have ceased to exist.”

Andrew Inglis Clark, **Studies in Constitutional Law**, 1901 (A. Inglis Clark, pp. 21-22)

For Prof. C and Prof. D with thanks



**Justice Oliver Wendell Holmes Jr.**



JUDGE CLARK.

Justice Andrew Inglis Clark

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## **Introduction**

What if the Australian jurist Andrew Inglis Clark had lived into his nineties and served fifty years on the Tasmanian and then Commonwealth High Courts as his friend Oliver Wendell Holmes Jr did on the Massachusetts and United States Supreme Court? Australia would have been a different place - a dazzling thought, amongst many others, that emerge as we contemplate the correspondence of these two great men of law.

Some might ask why, after more than a century, are the letters between these two nineteenth century gentleman worth bothering about? In empirical terms two volumes of Holmes letters have been published but none of his letters with Clark; those published here for the first time have been stored at the Harvard Law Library and the archives of the University of Tasmania seen only by biographers and archivists. As Holmes wrote “the originators of transforming thought” are often obscured by pragmatism. {Holmes} <sup>1</sup>

Deane, J, has inscribed Clark as “the principal architect of the Australian constitution” into the national statute book and with him the idea that the constitution is *a living force* subject to the will and views of each generation. (“Theophanus v Herald and Weekly Times Ltd,”) This concept, illuminated in the late 20<sup>th</sup> century by Deane, J, ss alive from the very first meeting between Holmes and Clark in 1890. Clark’s first letter seeks a meeting to discuss Holmes’ **The Common Law** from which this ‘modern’ notion of law as *an experiential, living force* first emanates into the English speaking world. Thus are we urged to think about the relationship between Holmes and Clark at the formative point of the Australian Commonwealth.

The weight of history thus implores that these letters be published and discussed. However, only eleven letters survive from a larger volume of correspondence. These few letters in the hundreds strong archive of Clark and the thousands fold archive of Holmes occur on dates critical in the formation of the Australian Commonwealth and at a time when the horse and buggy age was soon to give way to the modern era of electricity, automobiles, aviation, industrial work forces and modern war fare. They are crossroads letters in more ways than one. Historically they speak to us of different passing worlds, nations and times, personally they speak to us

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<sup>1</sup> “The men whom I should be tempted to commemorate would be the originators of transforming thought. They are often half obscure, because what the world pays for is judgement, not the original mind”. Oliver Wendell Holmes, “John Marshall”, February 4, 1901, Occasional Speeches, p. 134 cited in {White}



of the nuances and the relative luck of two influential lives and philosophically they remind us of the ideas that drove nation builders and statesmen and still, two centuries later, shape Australian and American national and political life.

The Holmes/Clark letters reflect a mutually respectful and affectionate friendship between two triple-barrell-named white gentlemen, both born in the mid-19<sup>th</sup> century. Both would become statesmen, lawyers, jurists, judges then High Court judges of their respective States – Massachusetts and Tasmania, and in Holmes' case, US Supreme Court justice 1902-32.

Holmes survived his friend by 28 years and for most of this time he was an active participant in interpreting the US Constitution in the age of modernity, so it is instructive to consider how his thinking evolved. Through Holmes we can look forwards past Federation and contemplate the strengths and weaknesses of the young Australian nation state. Through their penned relationship we visualize the United States as an older wiser brother that sought independence and underwent profound challenges even as "Australia" was nothing more than a few huts on the shore at Sydney Cove. For many in the 21<sup>st</sup> century these important questions and issues have been lost in dusty archives, the letters bring them back, alive.

PCB May 2024

## ***Prologue***

“A. Inglis Clark”, as was his legal moniker, shaped the structure of Australian nationhood, its laws, its federal structure and the whole agency of the Commonwealth government including its courts, its parliament and its executive office in the form of the Governor-General. His inspiration came from more than just the blank interpretation of law. Alfred Deakin<sup>2</sup> observed that for Clark the “United States (was) a country to which in spirit he belonged, whose Constitution he revered and whose great men he idolized”. (Deakin) To most Australians this does not mean a lot. They do not know of Clark, and without ever experiencing in their history the tumult of a Revolutionary beginning and a Civil War, the way in which the US Constitution shaped the Australian Constitution and our polity means little.

In 1890 as Australian politicians like Henry Parkes and Edmund Barton began to envision ‘a nation for a continent and a continent for a nation’ a friendship began between 42 year old Andrew Inglis Clark, soon to be Attorney General of Tasmania and 49 year old Oliver Wendell Holmes Jr, Civil War Veteran and Hero and Justice of the Supreme Court of Massachusetts.

A. Inglis Clark described himself as a politician in the mould of Abraham Lincoln. He was a Republican who celebrated the Declaration of Independence on July 4 every year in Hobart. He believed ‘all men are born equal and are endowed with fundamental, inalienable rights’. As a young man Clark closely followed what Holmes called the ‘cold tempering fire of the Civil War’.<sup>3</sup>

How and why would Holmes, already a famous American jurist in 1890, accept and meet Clark, so readily and warmly, from a little known colony, and build up a genuine friendship that lasted all Clark’s life?<sup>4</sup>

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<sup>2</sup> Alfred Deakin (3 August 1856 – 7 October 1919) served as the second prime minister of Australia from 1903 to 1904, 1905 to 1908 and 1909 to 1910

<sup>3</sup> Holmes, “...Clark's parents, brothers and their friends were all sympathizers with the federal cause. They did not have to rely for their information solely upon newspapers, because Hobart was a base for the New England whaling fleet which fished in the Southern Ocean. Clark always recalled how deeply impressed he was by the sight of many Nantucket whalers riding at anchor in the River Derwent, safe from the depredations of the Confederate raider "Shenandoah". (Reynolds, p. 62)

<sup>4</sup> Clark’s biographer Frank Neasey observed Clark had no “exalted position as a jurist and jurisprudent as Holmes had acquired” (F. M. Neasey & Neasey, 2001).

Notwithstanding Holmes' fame as a soldier and an emerging jurist from a prominent Boston family, Clark was an engaging man who has achieved much in a short time. At the stage in which Holmes and Clark first met there was much to admire about Clark. Not only had he completed his articles at an early age, he was a qualified engineer, had won and lost office as a State politician. He came to Boston after settling a case before the Privy Council in London on behalf of the Tasmanian government and was a significant figure in a ruling parliamentary majority government.

Clark like Holmes was a member of the Unitarian Church and while his small debating societies in Hobart were nothing compared to the revered circles of Holmes' father Oliver Wendell Homes Sr and the so-called "Boston Brahmins", Clark was nonetheless an erudite and influential intellectual force within his own community and his papers and speeches were informed by the great statesmen of the era. He was passionate about the big questions of the times.<sup>5</sup>

Clark was reaching for the stars from the second oldest colony of the great Southern continent then forming itself as a nation, Australia; and Holmes' to his credit recognised Clark immediately. As John Reynolds observed in a letter to Holmes' biographer, Clark "found in Holmes the most responsive spirit in his intellectual world".<sup>6</sup>

The Clark/Holmes correspondence illuminates other questions: "How did Clark in Hobart by the early 1870s make the transition from received mid-century British ideas to Reconstruction era American republicanism?", as wonderfully put by James Warden: "How did Clark, the local Tasmanian boy, come to adopt American pluralist democracy, the ideals of republicanism, natural rights theory, proto-feminism, the case for a written federal constitution as well as the New England version of Unitarianism and the Transcendentalists? In other words, in a rhetorical turn, how did Clark get from Van Diemen's Land to Massachusetts, from Collins Street to Concord, from Hampton Road to Harvard and from Battery Point to Boston and back? How did he get across that great divide?" (Warden)

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<sup>5</sup> As James Warden has described so well. Tasmania was transforming from penal colony to democracy "Yet somehow Van Diemen's Land, born in chains in 1803, turned into the Tasmania of 1903 with the universal franchise. The magnitude of that change ought to be emphasised and more fully appreciated. No polity in the history of the world has had such transformation. In 1808, on the Hobart town parade ground, a woman called Martha Hudson was brutalised on the arbitrary orders of Lieutenant Edward Lord. For insubordination, she was tied to a moving cart, stripped to the waist and publicly flogged to unconsciousness.<sup>12</sup> In 1914 three women living in Tasmania also by the name of Martha Hudson are shown on the electoral rolls." (Warden)

<sup>6</sup> John Reynolds letter to Mark De W Howe, 28 September 1947, Holmes Correspondence.

Clark and Holmes were also linked by the continuity of their jurisprudential philosophy. As the correspondence goes on the letters become letters between judges charged with administering laws and constitutions. Clark, like Holmes, was passionate about the business of law. Both men believed in the law as a living breathing force, they embodied this notion in their inquiry, their scholarship and the questions they posed to each other. You can see in these letters that they were practitioners as well as theorists. What melded their friendship was ideas and a mutual interest in the historical foundations and practical machinations of jurisprudence and its day to day implementation and practical applications.<sup>7</sup>

There was genuine friendship also between ‘the Clarks of Rosebank’<sup>8</sup> and ‘the Holmes of Beverley Farms’ that seemed to flourish after Clark’s 1900 trip to the USA when he was accompanied by his wife and two sons. Then in 1905 Clark was accompanied by his wife and eldest daughter Esma. Reading between the lines Fanny Holmes, who lead a more solitary and child less life, might well have been taken by the large Clark family of five sons and two daughters. There might also have been discussion of the vast continents, the extraordinary natural mineral wealth of the lands, the vast prairies and pastoral lands and the transformative development of cities and towns and civic life away from the centres of Western civilization. The Australian colonies were not even as old as Harvard or Yale universities, so accounts of life in these strange and wild places must have fueled endless conversations. One can only imagine the conversations between Fanny Holmes and Grace Clark in 1900 and 1905 and perhaps the young architect Conway Clark visited the Holmes residence 1720 Eye St, Washington between 1905 and 1908. (Headon)

There are profound silences in these letters.<sup>9</sup> No where in the correspondence between the two great jurists was the status or history of Aboriginal peoples ever mentioned. These became silences in law and constitutions and social life with profound consequences for the moral authority and standing of both nations but more so Australia. If oligarchies, despots and the ruthless exploitation of people and land were

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<sup>7</sup> See Sir Guy Green, “Mr Justice Clark” in (Ely, pp. 286-293)

<sup>8</sup> John Reynolds, “The Clark’s of Rosebank”, Papers and Proceedings, Tasmanian Historical Research Association, vol 4, 1955.

<sup>9</sup> “.given that he [Clark] had such a deep knowledge of American jurisprudence and venerated the tradition of Chief Justice John Marshall it is intriguing to wonder whether he ever read the great cases concerned with Indian Native Title, *Johnson v Macintosh* in 1823, *Cherokee Nation v State of Georgia*, 1831 and *Worcester v State of Georgia* in 1832 – and if he ever thought the principles enunciated should apply to the Australian Aborigine”. Henry Reynolds “Inglis Clark: Some Afterthoughts”, in (Ely, p. 399)

the moral baggage of the old world dispensed in the new world, then the terrible injustice and treatment of Aboriginal peoples was the significant imperfection of Australia and the United States. The fact that it was such a hollow silence in the discourses of these men, who might talk passionately about the rights of every man and the injustice of slavery - the cause for whom Holmes' nearly died - is pause for thought. The invasion of Aboriginal peoples' lands in Tasmania, where a near holocaust had been committed, was never an item of conversation so far as we know.<sup>10</sup>

The splendid compilation of essays **A Living Force: Andrew Inglis Clark and the Ideal of Commonwealth (Ely, 2001)** as well as Justice William Deane's 1993 portrayal of the Constitution as a 'living force' in Australian life, following Clark's **Studies in Constitutional Law** (A. Inglis Clark), have revived interest in Clark; but he is little known to the Australian public. Examining these letters and casting the life of Clark alongside his friend Oliver Wendell Holmes, described as "the most famous judge in U.S. history" (White, 2006, p. 1), will encourage more Australians to inquire into the ideas that Clark championed and which drove the formation of the Australian Commonwealth.

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<sup>10</sup> On this see Henry Reynolds, "Inglis Clark: Some After Thoughts", in (Ely), pp. 399-400

## ***Biography and Time Line***

Oliver Wendell Holmes was born in Boston on March 8, 1841. Andrew Inglis Clark was born a world away, seven years later, in Hobart on 24 February, 1848. Clark was seven years younger and died 28 years before Holmes, who was still a member of the United States Supreme Court at the age of ninety. Holmes judgements spanned a half a century, Clark was a member of the Tasmanian High Court for nine years from 1898 until his death in 1907.

Holmes attended private schools and Harvard College in Boston. His household was dominated by his father and namesake Dr. Oliver Wendell Holmes Snr who wrote a popular column in the *Atlantic Monthly*. The young Holmes was influenced by Ralph Waldo Emerson and even at an early age his thought was of an evolved human consciousness and society. The idea of perfecting man and society also roused and energized Clark too as Tasmania moved from a convict administration to self government.<sup>11</sup> Clark attended ‘The High School of Hobart Town’ from 1859-64.

When Clark was in High School; at the age of 20, in his last term at Harvard, Holmes enlisted in the Federal Army during the US Civil War. He served for two years in the Twentieth Massachusetts Infantry at Hall’s Bluff, the Peninsula Campaign and Antietam and was wounded three times, twice near fatally. In the winter of 1863-4 he became an aide to Generals Winter and Sedgewick of the Sixth Corps. He served through the Wilderness Campaigns and the Siege of Vicksburg. After three years (1861-4) he left the army. (O. W. Holmes, 1994, pp. 8-9)

Holmes’ war years profoundly influenced his philosophy of life and politics. In April 1864 Holmes told Charles Eliot Norton that “The Civil War was a crusade in the cause of the civilized world”.<sup>12</sup> In Hobart Clark could be counted as a fellow crusader. According to Carrel Clark the whole family followed the events of the Civil War avidly. The young Andrew Clark reportedly ran through his father’s foundry shouting “Lee has surrendered and Grant taken Richmond” signalling the end of the Civil War. In 1876 at a meeting of his American Club on 4 July Clark proclaimed: ‘We have met to-night in the name of the principles which were proclaimed by the founders of the Anglo-American Republic

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<sup>11</sup> Known as Van Diemen's Land the colonies name changed to Tasmania when the British Parliament granted the colony responsible self-government from 1856.

<sup>12</sup> Holmes to Charles Eliot Norton, April 17, 1864 in G. Edward White, **Oliver Wendell Holmes Jr**, Oxford University Press, 2006

... and we do so because we believe those principles to be permanently applicable to the politics of the world.”

In his campaign to be elected to the Tasmanian Parliament in 1878 Inglis Clark said that he: ‘believed in the theory of Government which was propounded by the late A. Lincoln—‘Government of the people, for the people, and by the people’. Government moreover should not be for the benefit of any particular class”. (J. Williams)

While Holmes may have been known as the most famous judge of the US Supreme Court he was not a founding father of the American Republic. Ironically the relatively unknown Clark was as Deane, J affirmed ("Theophanus v Herald and Weekly Times Ltd,") ‘a principal architect of the Australian constitution’ and even the doubters agree to his significance. (Irving) Just after meeting Holmes, Clark penned the first, original draft of what has become the founding document of Australia.

Clark was considered for the Commonwealth High Court in 1903 and again in 1906. As Williams has written: ‘he was overlooked, in part because of the decision of the Commonwealth Parliament to reduce the size of the original court from five to three, and because of the politics of judicial appointment’. Clark expressed his bitter disappointment in a letter to Thomas Bavin in 1906: “If I were free to ventilate my opinions in the press I would deplore the prospect of making the seats on the Bench of the High Court the rewards for political services” (J. Williams) For Liberals, and people who believe in ideas and merit, the fact that Clark was denied, in the few more years that he lived, from sitting on the first Australian High Court is a source of endless disappointment. These letters are something of a condolence for Australian Republicans. They show just how thoughtful and active the Republicans Clarks and Holmes were in the evolution of the law and democracy in the modern age.



## Chronology of Events

1841, 8 March Oliver Wendell Holmes Jr (OWH) is born in Boston, Mass, USA

1848, 24 February Andrew Inglis Clark (AIC) is born at Macquarie St, Hobart, Tasmania, Australia

1857 OWH enters Harvard College

“The Civil War was a crusade in the cause of the civilized world”. OWH<sup>13</sup>

1859 AIC begins Hobart High School completes his Association of Arts degree (matriculation) in 1864,

1861 OWH graduates from Harvard and enlists in the Twentieth Regiment of Massachusetts and is shot through the chest in October at Ball’s Bluff

1862 OWH returns to active service in March

1863 OWH shot through the neck, one of 17,000 wounded at the Battle of Antietam Creek. On September 17 returns to active service, wounded by canon shrapnel in the heel near Fredericksburg.

1864 OWH resigns from military service enters Harvard Law School.

1865 Apprentice engineer Andrew Inglis Clark, 17, races through his father’s workshop, a foundry and sawmill, yelling Robert E. Lee has surrendered, signaling the end of the Civil War in the United States of America.<sup>14</sup>

1866 OWH receives LL.B from Harvard joins George Shattuck’s law firm in Boston.

1867 OWH formally recognised to practice law in Massachusetts

1872, 17 June OWH marries Fanny Bowditch Dixwell, AIC leaves the family business, takes up legal studies and leaves the Baptist Church to become a unitarian

1874 AIC edits Quadrilateral his article “Our Australian Constitution”, written in three parts, compares all the Australian colonial constitutions,

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<sup>13</sup> Oliver Wendell Holmes to Charles Elliot Norton, April 17, 1864 in (White, p. 17)

<sup>14</sup> (Tate)

British and other Federations. It is the earliest indication of Clark's thinking about Australian Constitutional matters. (F. Neasey, 1991, November)

1877 January AIC admitted to practice as a barrister and solicitor.

1878 AIC marries Grace Patterson Ross, elected to the Tasmanian House of Assembly. In a speech at Longford Clark says "in the spirit of the late A. Lincoln I believe in Government of the people, for the people, and by the people".

1881 OWH's **The Common Law** published March 3.

1881 OWH accepts Professorship at Harvard

1882 OWH accepts position of associate justice on the Supreme Court of Massachusetts; AIC defeated in elections.

1883 At AIC's invitation Moncure Conway delivers four lectures in Hobart

1884 Clark defeated in election

1886 Clark defeated in election

1887 AIC elected as Member for South Hobart, then Hobart retains the seat for eleven years 29 March appointed Attorney General of Tasmania until 17 Aug 1892. He initiates 150 Ministerial bills "one less than Sir Henry Parkes initiated in his entire political career". (J. M. Williams, p. iv)

1890 Australasian Federation Conference Melbourne (6-14 February) Acting for the Tasmanian government, AIC settles the Main Line Railway dispute before the Privy Council, London, (October) visits Boston and OWH on return journey to Tasmania.

1891 (February) Clark circulates the definitive draft of the Australian Constitution for the consideration of leaders of the National Australasian Convention (2 March – 7 April) 1891 Federal Convention held in Sydney.

1894 OWH Sr dies

1894, April 14 AIC reappointed Attorney General of Tasmania introduces 228 bills including Hare Clark Voting system before his -resignation on 22 October 1897

1897 AIC with his wife Grace and sons Alex and Andrew travel to the USA (6 March – 30 June) on health grounds he does not attend the Federal Conventions but is active in commentary and briefings of delegates; Australasian Federal Convention – First Session, Adelaide (22 March – 5

May) Australasian Federal Convention - Second session Sydney (2-24 September)

1898 AIC appointed to the Tasmanian Supreme Court; Australasian Federal Convention - Third session Melbourne (22 January - 17 March 1898)

1899 OWH becomes Chief Judge of the Supreme Court of Massachusetts

1902 OWH is nominated to the Supreme Court of the United States by Theodore Roosevelt and is confirmed in December. AIC, his wife Grace and daughter travel to the USA for his last visit to meet with Holmes.

1905 OWH writes dissent in *Lochner v New York*, May AIC's son Conway takes up residency in the USA as an architect for three and a half years.

1907, 14 Nov AIC dies at his home Rosebank. 15 Nov Clark's friend and mentor Moncure Conway dies in Paris

1919 OWH writes opinions in the free speech cases *Schenck v United States* and *Abrams v United States*

1920 OWH's *Collected Legal Papers* is published.

1924 OWH receives the Roosevelt now the Presidential Medal of Freedom

1929 April 30 Fanny Holmes dies at the age of 89

1930 OWH celebrates his 90<sup>th</sup> birthday with a national radio address.

1932 OWH resigns from the Supreme Court January 12

1935 OWH dies of bronchial pneumonia at his home in Washington, D.C.

## ***The letters***

### **Letter 1: Clark to Holmes 4 October 1890**

Adams House  
No. 553 Washington Street,  
Boston, 4 October 1890

Dear Sir,

My admiration of your book on the **Common Law** induced me to apply to my friend Mr Moncure Conway for a letter of introduction to you, and he not having the pleasure of knowing you personally gave me a letter to your father informing him that I was desirous of taking advantage of my visit to America to see you, but subsequently, I met Mr. Allen of the New York Bar who gave me the enclosed letter to you, and I shall be pleased to call on you at any time at which it may be convenient for you to see me.

I am

Yours Sincerely,

A. Inglis Clark

Your Honour  
Judge Holmes  
Supreme Court  
Boston



Adams House.  
No. 553 Washington Street.  
Boston, ~~4~~ Sept. 1890

Dear Sir,

My admiration of  
your book on the Common  
Law induced me to apply to my  
friend Mr. Monroe Conway  
for a letter of introduction to you,  
and he not having the pleasure  
of knowing you personally,  
gave me a letter to your father  
informing him that I was  
desirous of taking advantage  
of my visit to America to  
see you. But subsequently  
met Mr. Allen of the New  
York Bar who gave me the

enclosed letter to you, and  
shall be pleased to call  
on you at any time at  
which it may be convenient  
for you to see me

I am

Yours sincerely  
A. Briggs Clark

Mr. Homer

Judge Holmes  
Supreme Court  
Boston

## Commentary Letter 1

Perhaps more than any other, this first simple letter of October 4, 1890, in which Clark seeks a meeting with Oliver Wendell Holmes Jr, helps us to contextualize the formation of the Australian constitution as a document. It also helps us to understand something of the philosophy and ideals of the Australian constitution which Clark drafted soon after meeting Holmes in Boston in 1890.

Others have noted the importance of this letter.<sup>15</sup> (Headon) John Reynolds was the first to note its significance. “The two men immediately became friendly, a friendship which continued in spite of geographical separation ... With Clark’s strong predilection towards American institutions and his study of American history, it is safe to assume that Holmes had much influence in the final development of his thinking upon the structure and working of the Australian Constitution.”(Reynolds, 1958)<sup>16</sup>

Holmes and Clark met at Youngs Hotel not far from where Clark was staying at Adams House on Washington St, Boston in October 1890. It was a memorable evening for both gentlemen. Holmes was revived by and enjoyed the company of younger intellectuals. His relationship with Clark foreshadows that of his relationship with the “House of Truth” **New Republic** writers and editors in Washington twenty years into the future.(Snyder) The only obstacle was that the two were separated by half a world at a time when the tyranny of distance did really matter. But that did not retard their mutual regard or their immediate rapport.

Did the two men talk about Constitutional matters?

Clark’s draft of the Australian Constitution was completed soon after he met with Holmes. Only three months later February 1891 Clark had prepared a full draft Constitution with the help of the Tasmanian

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<sup>15</sup> Headon notes that Clark’s mentor Moncure David Conway had written to Oliver Wendell Holmes Sr to meet with Clark. But he was out of town. The famed writer asked his son Oliver Wendell Holmes Jr an emerging and noted jurist to meet with Clark. But the fact that Clark knew and mentioned Holmes’ book on the **Common Law** in the reproduced letter below might cause us to revise Headon’s version of how this meeting took place and why (Headon) Frank Neasey follows the text of Clark’s letter and I believe is accurate. (F. M. Neasey & Neasey, p. 117).

<sup>16</sup> It should be observed here too that Holmes, having been appointed as an associate to the Supreme Judicial Court of Massachusetts, was not at this point Chief Justice. Frank Neasey understandably perhaps, given Holmes formidable career, attributes Holmes the status of Chief Justice, he did not achieve this for another nine years, so at this point in his career Holmes was very much writing, thinking and giving lectures and and no doubt amenable to new ideas. (F. Neasey)



Parliamentary Draftsmen W.O Wise and circulated his manuscript to the lead figures of the 1891 Constitutional convention.

This was an extensive document, he must have almost certainly had a draft when he met Holmes. Presumably Clark used the voyage back to Australia to do further drafting work. As such the meeting had profound implications. It is now accepted that Clark's first draft was the most important document in framing the Australian constitution and much of it, particularly Clark's vision of the High Court, survived intact through all Australia's constitutional conventions leading up to its enactment in 1900.

<sup>17</sup>

Clark wanted to meet Holmes because of his admiration for Holmes' **The Common Law**. (O. W. Holmes) This was a ground breaking text. It was the first to consider law as a 'sociological entity'. As Holmes protégé and US Supreme Court Justice Felix Frankfurter (1882-1965) observed after Holmes "the life of the law was seen to be experiential". (F. M. Neasey & Neasey, pp. 115-117) In his writings Clark expresses this idea, in contrast to the dominant Australian jurisprudential orthodoxy for much of the 20<sup>th</sup> century, that the Constitution is a *living force* subject to the historical interpretations and understandings of each generation of citizens. (J. M. Williams, pp. 359-363)

We may conjecture at this point as to why for so much of its history Australian constitutional history has been so locked in the grip of 'black letter lawyers' and why the many shortcomings of the Australian Constitution devised in 1900 have never been satisfactorily addressed. Part of the reason may be that Clark did not ever become a High Court judge of the Commonwealth. It is often observed that this is one of the great injustices of Australian law and politics, a point of critique in the functioning of the early court. In contrast Holmes was an enormous influence on the US Supreme Court serving from 1902-1931, retiring at the age of 91.

The Clark/Holmes philosophy of the Constitution as a *living entity* has only really started to be a factor in Australia since the more active judicial period of Sir William Deane. Even this one initial letter of 1890 between Clark and Holmes should prompt Australian jurists to compare carefully Holmes judgements as a Supreme Court judge in the early part of the 20<sup>th</sup> century, with the character of the Australian High Court at the same time.

As it was, Australia's comparatively bland, lily-white Constitution was incidental to the achievement of economic and social equality in Australia

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<sup>17</sup> "As the markings in Griffiths hand shows, in this initial exercise much of Clark's work remains intact" (Castles, p. 274)

in the early part of the twentieth century. The modern Australian trade union movement, one of the earliest and most active in the world to pursue its aims through courts and parliaments, created, through its offshoot, the Australian Labor Party, an innovative system of State and Federal arbitration. In 1907, J.B. Higgins, simultaneously High Court Justice and President of the newly created Commonwealth Court of Conciliation and Arbitration delivered a judgement which formed what has become known as the Australian “wage earners welfare state”. (F. G. Castles) Known as the "Harvester Judgement", the case involved one of Australia's largest employers, Hugh McKay, a manufacturer of agricultural machinery. Higgins ruled that McKay was obliged to pay his employees a wage that guaranteed them a standard of living that was reasonable for "a human being in a civilised community". This became the measure for all wage decisions in Federal and State courts over the entire 20th century in Australia. It created a unique economy and society that was proudly egalitarian in nature and was spared the extremes of wealth and inequality in the United States economy.

Arguably the Harvester Case supplanted the more high-minded freedoms of Clark and Holmes or did it? For an industrial economy and society central wage fixation based on “a living wage” was primary for the great majority of citizens, however, in the 21st century, in the post-industrial era, we come back to Holmes and Clark and their concept of the primary natural rights of every man and woman whatever their citizenship, work status, age or any other human characteristic. It seems history leads us back to these letters.

This simple letter and thought of the discussions these men had also demands we think about the independence of the Australian nation. For what the Australian constitution lacked was of course a Revolution and a statement of separation from the British Crown. The preamble of the American Constitution of 1778 reads. “We, therefore, the Representatives of the United States of America, in General Congress assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the name, and by the authority of the good people of these Colonies, solemnly publish and declare, that these United Colonies are, and of right ought to be, free and independent States; that they are absolved from all allegiance to the British crown, and that all political connection between them and the State of Great Britain is, and ought to be, totally dissolved; and that as free and independent States, they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent States may of right do. And for the support of this declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other our lives, our fortunes, and our sacred honour.”

Australia has no statement of separation. It is still uncomfortably linked to the British monarch. The formal position of the governor general is still defined within the Australian Constitution as essentially a colonial position, the British monarch's principal servant. In addition, because there is no defined Australian independent state there are several inadequacies: the invisible status of the Prime Minister, the archaic conceptualization of the Australian Commonwealth as a federation of colonial states, the invisible status of local government, political parties, Indigenous peoples, individual rights, the environment, diversity, women and the equality of gender, the appointment and role of Cabinet Ministers, the sovereignty of the people etc.

All this neglect would have surely have made A. Inglis Clark and Oliver Wendell Holmes jr turn over in their graves especially if they knew one hundred years after their death this state of flux would still define the Australian nation. The Australian constitution was not living, it was dead.

## Letter 2: Clark to Holmes 20 January, 1892

‘Attorney Generals Office

Hobart

20 January 1892

My dear Judge Holmes,

I wish to thank you very much for the copy of your “Speeches”<sup>18</sup> which reached me about six weeks since, also for the two numbers of the Harvard Law Review containing your articles on *Agency*. I became a subscriber to the Review when I visited Harvard fifteen months ago, but I had not received my copy of the number containing your second article when the copy you sent to me arrived, and I was very pleased to find that your remembrance of me had supplied my loss.

The perusal of the Speeches has given me very much pleasure and has vividly revived the memory of the very delightful time I spent in your company in Boston. Whether that period of personal intercourse warrants me or not in regarding myself in the “few friends’ for whom those chance utterances of faith and doubt” were printed, I shall always have a place among those “who will care to keep them”.

Your book on the *Common Law* continues with received charm to supply me with an annual cause of instructions in first principles, and the whole substance of a lecture delivered to a local association of law students last Autumn was taken from it and Maine’s *Ancient Law*.<sup>19</sup>

We had an extra amount of litigation in our little colony during the past year, and my numerous engagements in our Supreme Court combined with my parliamentary duties have delayed the writing of this letter beyond the time when the arrival of your gifts ought to have been acknowledged by me.

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<sup>18</sup> Holmes, Oliver Wendell, Jr, **Speeches**, Boston: Little, Brown, and Company, 1891.

<sup>19</sup> Maine, Henry James Sumner, **Ancient Law, its connection with the early history of society and its relation to modern ideas**, London, John Murray, first published 1861

Last July, the directors of one of our local banks brought up a very glowing report of the financial condition of the institution and recommended the distribution of a larger dividend than any that the shareholders had previously received., the dividend was paid and a month afterwards the bank stopped payment, and it has since gone into liquidation. A number of persons who bought shares in the bank on the strength of the last report of the directors have commenced actions against them for deceit and the counsel retained in the several cases are diligently studying and discussing the case of *Peek v Derry*. Some of the plaintiffs are shareholders in the bank at the time they were induced by the report of the directors to purchase the shares in regard to which they are suing; and the question has been raised whether such plaintiffs have not a good cause of action against the directors, irrespective of fraud, for a breach of their legal duty to furnish the shareholders with a faithful and correct statement of the financial condition of the bank. The discussion of Lord Lindley in *Low v Bouverie* (L.E.N.S. Vol 111 ch 100) that ‘where there is a legal delegation on the part of the defendant towards the plaintiff to give him correct information. “The case of *Derang v Peek* does not apply, would seem to indicate that the directors would be liable on that ground, but it is very doubtful whether the legal obligations of the directors exists towards the separate shareholders in respect to any other shares than those they held at the time the report was brought up.

If you feel that I have talked too much shop in this letter, I must remind you that you complained that we had not talked enough shop the night I dined with you at Young’s Hotel in Boston and so I thought that I should make up now for my omission on that occasion.

With kind remembrances and in the hope of meeting you again either in America or Australia

I am

Very Sincerely Yours,

A. Inglis Clark



Attorney General's Office,  
Boston.

20 January 1882

My dear Judge Holmes,

I wish to thank you very much for the copy of your "Speeches" which reached me about six weeks since, also for the two numbers of the Harvard Law Review containing your articles on Agency. I became a subscriber to the Review when I visited Harvard fifteen months ago, but I had not received my copy of the number containing your second article when the copy you sent to me arrived, and I was very pleased to find that your remembrance of me had supplied my loss.

The perusal of the Speeches has given me very much pleasure and has vividly revived the memory of the very delightful time I spent in your company in Boston. Whether that short period of personal

intercourse warrants one or not in regarding myself as included in the "few friends" for whom those "chance utterances of faith and doubt" were printed, I shall always have a place among those "who will care to keep them".

Your book on the Common Law continues with renewed charm to supply me with an annual course of instruction in first principles, and the whole substance of a lecture I delivered to a local association of law students last Autumn was taken from it and Maine's Ancient Law.

We had an extra amount of litigation in our little colony during the past year, and my numerous engagements in our Supreme Court combined with my parliamentary duties have delayed the writing of this letter beyond the time when the arrival of your gifts ought to have been acknowledged by me.

Last July the directors of one of our local banks brought up a very flowing report of the financial condition of the institution and



recommended the distribution of a larger dividend than any that the shareholders had previously received. The dividend was paid and a month afterwards the bank stopped payment, and it has since gone into liquidation. A number of persons who bought shares in the bank on the strength of the last report of the directors have commenced actions against them for deceit and the counsel retained in the several cases are diligently studying and discussing the case of *Leech v. Derry*. Some of the plaintiffs were shareholders in the bank at the time they were induced by the report of the directors to purchase the shares in regard to which they are suing; and the question has been raised whether such plaintiffs have not a good cause of action against the directors, irrespective of fraud, for a breach of their legal duty to furnish the shareholders with a faithful and correct statement of the financial condition of the bank. The dictum of Lord Lindley in *Lowe v. Bouverie* (L.R. N.S. 10 L. 421) that "where there is a legal obligation on the part of the defendant towards the plaintiff to give

him correct information "the case of Derry v. Peek does not apply, would seem to indicate that the directors would be liable on that ground, but it is very doubtful whether the legal obligation of the directors exists towards the separate shareholders in respect to any other shares than those they held at the time the report was brought up.

If you feel that I have talked too much shop in this letter, I must remind you that you complained that we had not talked enough shop the night I dined with you at Young's Hotel in Boston and so I thought that I would make up now for my omission on that occasion.

With kind remembrances and in the hope of meeting you again either in America or Australia

I am

Very sincerely Yours

A. Diglis Clark

## Commentary Letter 2

Clark received a letter from Holmes in December 1891 with a copy of his book **Speeches** and copies of two articles derived from his lectures at Harvard that were republished in the **Harvard Law Review**. There is no record of this letter that accompanied these books but the exchange is in itself significant.

It seems that Clark as well as Clare Castleton in Ireland were amongst the recipients of Holmes privately published **Speeches**. Castleton exerted a special appeal for Holmes (White, p. 51) and the gift to Clark is indicative that he too was in Holmes thoughts.

Clark may have sent Holmes a copy of the Draft Constitution he circulated before the Sydney Constitutional Convention to the other significant participants Griffith, Kingston, Parkes. Again there is no record of this exchange if it did take place.

In a Memorial Day Speech in 1884 Holmes had told his audience “..the one and only success which is (a man or woman’s) to command is to bring to his work a mighty heart.”(O. W. J. Holmes) Clark and Holmes had this mighty capacity for work. For Holmes it was partly driven by competition with his father, for them both the thought that society could be better and mankind could improve, drove them.

In 1890-2 Holmes was very much finding his pathway and establishing his reputation. It was a period of consolidation and public service and striving. It is easy to pass on to the twenty years that Holmes served on the US Supreme this time was ‘the shaping and proving years’ of Holmes’ early public life. (Howe)

1892 was a high point for Clark. In quick fashion Clark had stood for parliament, lost his seat, regained it and been appointed Attorney General of Tasmania. Clark as Attorney General passed into law in two terms as many statutes as Henry Parkes had achieved in his entire career.<sup>20</sup> Clark was active, progressive, thoughtful and thorough. This was a time when Holmes too was learning to study cases and decisions “ to the bottom” , meanwhile Clark was reforming the legal architecture of Tasmania and thinking about how he could deepen its democracy.

The two articles Holmes sent to Clark on “Agency” (O. W. C. Holmes, 1891) were derived from Holmes’ Harvard lectures and were meant as a

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<sup>20</sup> Sir Henry Parkes (27 May 1815 – 27 April 1896) Premier of the Colony of New South Wales known as the "Father of Federation" because of his early promotion for the federation of the six colonies of Australia.

supplement to **The Common Law**.. They were published in the Harvard Law Review in March and April 1891. The articles discuss the principle *Qui facit per alium facit per se* "He who acts through another does the act" the fundamental precept of the law of agency.. It explores the rights, duties, and liabilities of both parties involved in an agency relationship. The article provides insights into the nature of agency, its historical development, and its application in various legal contexts that Clark found useful in several judgements on the Tasmanian High Court.

### **Letter 3: Holmes to Clark Sept 4, 1898**

Court House Boston

296 Beacon St,

Sept 4 '98

Beverley Farms

My Dear Judge,

I am delighted at the news which I find waiting here in your letter on my return from Europe. I have no doubt that you will do honor to the place and to yourself I trust that you will find the life as happy as I have found mine for the last 15 years. You speak as if I have not thanked you for the volumes you so kindly sent me. I had it in my mind that I had written and I still hope that I was not mistaken. I thank you also for the interesting new volume which you sent me and still more for the photograph which I am very glad to possess. It gave my wife and me such pleasure as to see you and Mrs Clark that it is doubly agreeable to hear that you recall the meeting with pleasure also. There is one place where you both will be sure of a welcome while we inhabit it – be it soon or after the lapse of years, But the years begin to grow terrible. In 2 ½ half years I shall be 60. Friends die and one is slow to make new ones. However I have just been in the midst of friends in England and Ireland who though made in later years love me I think and whom I love I know. I won't pretend to feel old, but only to know the facts – and to feel a slight shudder at the approach of the inevitable. I am just on the mend from an attack of shingles in my right arm which makes it hard for me to write. I send a poor photograph of me by this mail with renewed felicitations to the State and yourself and all kind messages to you and your wife from mine and me.

Sincerely Yours,

O.W. Holmes

address { Court House } Boston  
or { 296 Beacon St. }

Sept 4/98

BEVERLY FARMS.

My Dear Mr. Brewster

I am delighted  
at the news which I just  
received from you after my  
return from Europe. I have no  
doubt that you will soon  
be at the place and to yourself and  
I trust that you will find the  
life as happy as I have found  
mine for the last 15 years. You  
speak as if I had not thanked  
you for the volume you so kindly  
sent me. I had it in my mind

that I had written - and I still  
hope that I was not mistaken.  
I thank you also for the interesting  
new volume which you send me,  
and I take leave for the photographs  
which I am very glad to possess.  
I give my wife and son  
much pleasure to see you and  
Mrs Clark that it is doubly  
agreeable to hear that you recall  
the meeting with pleasure also.  
There is one place where you both  
which turn of a welcome while  
uninhabited it - but it soon on and  
after the lapse of years. But the  
years begin to grow terrible.



In 2 1/2 years I shall be 60  
Friends die and one is slow to  
make new ones - How can there  
be such loss in the midst of friends  
in England and Ireland who though  
made in later years, were as I  
think and whom I love I know.  
I was pretent to be old, but  
only to know the facts - tend to  
feel a slight chagrin at the approach  
of the inevitable. I am full on  
the head from an attack of shingles  
in my right arm which makes  
the hand for me to write. I  
will send <sup>a few</sup> the photographs of  
<sup>by this mail.</sup>  
x with renewed solicitation of

to the State and yourself and  
all kind messages to you and  
your wife from mine and the

hundred ones

Overseas

### Commentary Letter 3

There is missing correspondence between Holmes and Clark in the period from 1892 to 1898. Clark's letter, informing Holmes of his appointment to the Tasmanian Supreme Court, has not survived. Neither the photographs nor the volumes which Holmes mentions in this letter are also not known to have survived.

Holmes congratulates Clark on his appointment to the Supreme Court of Tasmania which had occurred in June, 1898. The epithet "My Dear Judge" is now used by Holmes to greet Clark and this fraternal greeting continued in their correspondence after this time. It would be rewarding to compare their time on their respective State Supreme Courts. As an eminent Tasmanian jurist<sup>21</sup> has observed: "The diversity of Clark's contributions reflects the fact he was both a theorist and a practical man, a man of action as well as a man of ideas, an idealist as well as a pragmatic politician. His vision, creativity and intellectual breadth enabled him to identify and articulate great political and constitutional principles, while his craftsmanship and drafting skills enabled him to give those principles concrete practical expression in the real world. These qualities admirably fitted Clark for judicial work". (Ely, p. 287) The parallels here with Holmes as a writer of legal opinions and High Court decisions are striking.

In 1897 (6 March – 30 Dec) the Clarks – Grace, Andrew, Alex and Andrew Jr visited the United States and in the summer of 1897 the Clarks' stayed with the Holmes' at Beverley Farms. Reynolds writes "During Clark's second and third visits to the United States (1897-98 and 1902-3) he spent as much time as he could spare with Holmes. He seems to have stayed at Holmes' delightful country residence at Beverley Farm (Mass.). His extant papers reveal that he travelled extensively in the country. Through Holmes' introduction, he visited several of the Harvard professors, notably Hart (Modern History) and Taussig (Political Economy). In New York he saw much of the leading "progressives" and at Philadelphia he appears to have seen the founders of the American Faculty of Political Science. For the rest of his life he maintained a correspondence with these leaders of advanced American liberal thought. His expert engineering knowledge gave him a special interest in the immense developments which were taking place in American metallurgy, rail-road building, oil refining and manufacturing. He visited the naval

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<sup>21</sup> Sir Guy Green, Chief Justice of the Tasmanian Supreme Court (1973- 1995) and Governor of Tasmania (1995-2003)

dockyards then amongst the finest in the world, and renewed his friendship with H. N. Stevenson<sup>22</sup>.” (Reynolds, p. 64)

It was during this period that Grace and Fanny Holmes became friends. We know this because in the correspondence, both men invariably wish affectionate greetings from their respective spouses. Behind every great man is a great woman. Grace Clark and Fanny Holmes were formidable characters and they got on. Grace was blessed with a large and vibrant family. Fanny suffered from recurring bouts of Scarlet Fever and never had children. This might have been a barrier the contrary was the case.

Biographies of great lawyers often omit significant details about their family life. In Holmes case a lot has been written about his summer trips to London which he mentions in his correspondence with Clark and others, but much less was written about his remarkable wife. Fanny shunned the limelight. She was a significant artist<sup>23</sup> but she destroyed several of her finest works much to the chagrin of art historians.(Laidlaw) The winds of whaling which, in so many ways, had brought the Clarks, also brought “Japanism” to Boston. (Benfey)This was a heady cosmopolitan mix which must have been a tonic to the Clarks, Grace no less than Andrew. Grace was the son of John Ross a significant boat builder in Hobart who had come to Tasmania from Nova Scotia and had lived in Boston. Ross built several ships in Hobart and had almost certainly repaired several Boston whalers. His patent slip was one of the significant ship yards of Hobart.<sup>24</sup> Fanny appreciated the Tasmanian

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<sup>22</sup> H.N. Stevenson first met Clark when the USS Swatara came to Hobart to observe the transit of Venus in 1874. The Clark family and their circle of friends made friends with the officers and scientists. Later Alexander Clark who was present with Clark on the trip to Beverley Farms went to study naval engineering under Stevenson. There are sixteen letters from Stevenson in the Andrew Inglis Clark Archives in the University of Tasmania collection including four which talk of the Clark’s trip to the United States in 1897. <https://eprints.utas.edu.au/10377/>

<sup>23</sup> Fanny Dixwell Holmes (1841-1929) created highly original land- scape embroideries that were an important part of early Japanism in Boston. With their mixture of American and Japanese elements, these innovative works won great praise during the 1870s and early 1880s. Critics marveled at Holmes's poetic landscapes and hailed her as a leader in the revival of embroidery in the United States. The painter William Morris Hunt said she was "the only really creative artist beside himself in America."<sup>1</sup> Her works even impressed Oscar Wilde, who called her "that Penelope of New England whose silken pictures I found so beautiful." (Laidlaw, p. 42)

<sup>24</sup> John Ross, (1814-1876) amongst the boats he built were Derwent 1849, Eucalyptus 1852, Isabella Brown 1859, Thomas Brown 1861, Margie Laurie 1861, Mary Williams 1863, Hector 1865, Gift 1866, Duke of Edinburgh 1868 and Acacia 1871.

children and the obvious good cheer of the Clark band.(Francis Mervyn Neasey & Neasey, pp. 41-42)

In this letter Holmes declares that he will soon be 60 and that he is starting to feel his age. The truth is that it was Clark who suffered from chronic bouts of ill health, again a possible link with Fanny Holmes, and it was Clark who would die prematurely. The Holmes would live on into the 20<sup>th</sup> century witnessing all the electric changes of modernity.<sup>25</sup>,

At the end of 1899 Holmes would be appointed Chief Justice of the Supreme Judicial Court of Massachusetts and two years later on May Day 1901 Clark himself would become the Senior Judge on the Tasmanian High Court.

Suddenly over the next few years the tables would turn again and Holmes would find himself be propelled into his nations affairs.

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<sup>25</sup> The Clark children would represent Andrew and Grace and make a distinguished contribution to the modern age as jurists engineers and architects and his oldest daughter Esma would marry perhaps predictably an American. Andrew Inglis Clark, Jr (1882-1953), barrister, Justice of the Supreme Court of Tasmania 1928–1953, Esma Inglis Clark (1878-1942), Alexander Inglis Clark (1879-1931) marine engineer, Conway Inglis Clark (1883-1928) Architect, Ethel Inglis Clark (1889-1948), Melwn Inglis Clark (1886-7), Carrel Inglis Clark (1889-1953) clerk Tasmanian House of Assembly 1945-1953,



Top left, Andrew Inglis Clark, Supreme Court of Tasmania, 1898, centre Sir John Dodds, right Robert Adams.



**Grace Clark & the Clarks at Rosebank, Battery Point, Andrew, Carrel, Esma, Wendell, Ethel, Grace, Andrew Inglis and Alex; Clark Collection - C7/L286(1)**

**Letter 4: Clark to Holmes 3 Nov 1899**

Judges Chambers

Hobart

3 Nov 1899

My dear Chief Justice,

It is now nearly two months since I received an American newspaper containing an announcement of your appointment to the office of Chief Justice of Massachusetts. Since then I have been twice on circuit and have been compelled to postpone all my private correspondence until I found myself settled at home again for a few weeks, otherwise I should have sent my congratulations to you by an earlier mail.

I have not anything in my own life to tell you. I often wish that you were much nearer to me than you are so that I might discuss a point of law with you. A short time ago I differed from my colleagues on a question relating to the distribution of assets of a deceased insolvent who left personal property in several colonies in which there was a conflict of laws. I found several American decisions in support of my opinion, but we could not discover any English authority directly on the point.

If at any time you deliver a judgement on a point of common law in which you think I would be interested I shall be glad to receive a copy of it if it is reported in a form convenient for transmission by post.

My wife wishes me to convey to you her congratulations and we both desire you to convey our kind remembrances to Mrs. Holmes.

I am

Yours Sincerely,

A. Inglis Clark



Judges' Chambers,

Hobart. 3 Nov<sup>r</sup> 1899

My dear Chief Justice,

It is now nearly  
two months since I received  
an American newspaper  
containing an announce-  
ment of your appointment  
to the office of Chief Justice  
of Massachusetts. Since  
then I have been twice  
on circuit and have  
been compelled to



postpone all my private correspondence until I found myself settled at home again for a few weeks, otherwise I should have sent my congratulations to you by an earlier mail.

I have not anything new in my own life to tell you. Often wish that you were much nearer to me than you are so that I might

OWH 39-19

discuss a point of law  
with you. A short  
time ago I differed from  
my colleagues on a  
question relating to the  
distribution of the assets  
of a deceased insolvent  
who left personal property  
in several colonies in  
which there was a con-  
flict of laws. I found  
several American  
decisions in support  
of my opinion but we  
could not discover

61-19  
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any English authority  
directly on the point.

At any time you  
deliver a judgment  
on a point of common  
law in which you think  
I would be interested I shall  
be glad to receive a copy of it  
if it is reported in a form  
convenient for transmission  
by post.

My wife wishes me to con-  
vey to you her congratulations  
and we both desire you to  
convey our kind remem-  
brances to Mrs Holmes.

I am  
Yours sincerely  
A. Inglis Clark

#### **Commentary Letter 4**

In this letter Clark congratulates Holmes on his appointment in 1899 as Chief Justice of the Massachusetts High Court.

Clark is already in this letter, prior to Federation, referring to U.S. Federal and State court decisions as guides to his own judgements on the Tasmanian High Court.

US decisions would become even more important after Federation when the Australian High Court would be confronted with several matters of jurisdictional clarity concerning Commonwealth and State rights and legal precedence. The request by Clark for Holmes to provide relevant points of the Common Law anticipates these developments. The haunting thought here is that if Clark had been appointed to the first Australian High Court then there might have been a prospect of the two judges of their respective countries high courts' conferring over points of law. Would this have brought the courts and the two nations closer together?

## Letter 5: Holmes to Clark, September 2 1900

Beverly Farms

September 2 1900

My Dear Judge,

Your most welcome letter and this little book arrived two or three days ago and I thank you for them most sincerely. I hasten to say that although I would not swear to anything (although I have no prejudices against an oath) I believe that I have received no letter which I have not answered and I fear that there must have been something wrong in the direction of my letters. I shall hope to read your articles. I don't get much time for writing outside what I do in a judicial way. The only thing I have done, except one or two necessary speeches, is a short introduction to Montesquieu's *Esprit Des Lois* for the Appletons<sup>26</sup> - which I wrote in the Spring as the subject pleased my fancy. It does not seem to have come out yet, although I had hoped to see it before now. It is a charming theme and one could go on moralizing on it for a good while. I found my work this last year pretty hard and I am glad to take a rest here by the side of the ocean for two months. I have read one or two big books and more light ones. Now I have staying with me an ex Confederate officer who was doing his best to kill me 40 years ago - Last night I had in to meet him Gildersleeve<sup>27</sup> a distinguished scholar and ex Confederate who was badly wounded, and my kinsman Henry Higginson<sup>28</sup>, who has a beautiful sabre cut on his face - and there we were - two from each side of the old war - hobnobbing as cheerfully as possible. But the opposite soldiers got on very

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<sup>26</sup> Appleton & Co, publishers (Originally of Boston) Appletons' Cyclopædia of American Biography was a six-volume collection of biographies of notable people involved in the history of the New World

<sup>27</sup> B.L. Gildersleeve (1831-1921), philologist & scholar of Virginia

<sup>28</sup> Henry Lee Higginson (1834-1919) Portrait can be viewed at this link:  
<https://harvardartmuseums.org/collections/object/300057>

well in the intervals of fighting. McCabe<sup>29</sup> my guest, who was in the artillery, told us last night of a Captain of sharpshooters coming in to him and asking who was in front of his guns - "Why" he said "Your men are". "No they are not"~ he answered "I've just been going over the line there isn't a man for a mile and a half - they are all over in the Yankee picket line, playing Seven up" - and McCabe says he took the other fellow's night glass and could see them then! Well - I have been stealing a moment to write to you while my guest is getting shaved. I have just heard his step and must go and look after him. My wife sends kind remembrances to you and Mrs Clark in which I join. I shall read your book a week from now. My duty begins this week.

Ever Sincerely Yours

O.W. Holmes

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<sup>29</sup> William Gordon McCabe (1841- 1920) of Virginia, Confederate Captain of Artillery, School Master & Latin scholar

Beverly Farms

September 2, 1961

My dear Judge

Your most welcome

letter and the little book arrived  
two or three days ago and thank  
you for the most interesting &  
helpful to say the least. I  
would not swear to anything (also  
though I have no prejudices against  
an oater) I believe that I have  
received the letter which I have been  
awaiting and I am sure that there  
has been something wrong

in the direction of my letter. I shall  
hope to read your article. I don't  
get much time for writing outside  
what I do in a judicial way. The  
only thing I have done, except one or  
two necessary speeches, is a short  
introduction to Montaigne in English  
for the Liberator. which  
I wrote in the Spring on the subject  
pleasing my fancy. It does not seem  
to have come out yet, although I had  
hoped to see it before now. It is a  
charming theme and one could go on  
moralizing upon it for a good while.  
I found my work this last year pretty  
hard and was glad to be a rest here



by the side of the ocean for two months  
I have had on or two big boats and  
have kept on. Now I have staying  
with me an ex-Confederate officer who  
was doing his best to kill me 40 years  
ago. Last night I had to meet  
him Goldsleeve a distinguished soldier  
another ex-Confederate who was badly  
wounded, and my kinsman Henry  
Higgins, who has a beautiful  
Sabre Cut on his face. And then  
we were two men each side of  
the old war-hobnobbing as cheaply  
as possible. But the opposite soldiers  
got on very well in the intervals of  
fighting. McClellan by guest, <sup>who was in the artillery,</sup> told of  
last night of a Captain of Sharpshooters

Coming in to him and asking who were  
in front of his pass - "Why" he said  
"You been here?" "No they are not," he  
answered - "I've just been going over  
the line - There is a man for a  
mile and a half - They are all over in  
the Yankee pocket line, playing  
seven up - And he has says he took  
the other / them's right place and came  
in there then! He - I have been  
stealing a man to write to you  
while my guest was getting shaved  
I am just hearted this step and  
himself and took after him. My  
best sends kind remembrances to  
you and Mrs. Clark in which / from  
I hope had you both a week from  
now. My duty begins this week. I am  
Gone out to the

## Commentary Letter 5

This letter again refers to correspondence that has not survived. Clark sent Holmes a copy of his book **The Federal Financial Problem and Its Solution**.(A. I. Clark)

Holmes was now Chief Justice of the Supreme Judicial Court of Massachusetts and began to reflect on his judicial career. In a well known speech he noted the thousand cases many of them trifling represented a half a lifetime of his work. He would have liked to studied to the bottom of each case and to consider every law ever presented “.. and then to go on and invent new problems which should be the test of doctrine.. we cannot live our dreams!”. (White, p. 253) Nevertheless if ever there were two jurists who studied things to the bottom setting forth challenges for the future it was Clark and Holmes. At this stage of their lives they had already shaped their respective State’s laws, Clark even more so than Holmes. Both would go on to have a major impact on the their national laws and polity, again Clark even more so than Holmes.

Holmes notes he will start to read the articles sent by Clark. This must have included Clark’s “Natural Rights” (A. Inglis Clark) which is a little commented upon article that should be of increasing interest to contemporary students of law. This article skirts an area of law of interest to Holmes. Clark argues the idea of natural rights is inscribed in three great 18<sup>th</sup> century declarations – the American Declaration of Rights, the Declaration of Independence and the French Declaration of the Rights of man. Clark defines a modern natural right “as a condition of the well-being consistent with the highest standard or human excellence that can be regarded as practicable of attainment”. Such a natural right ought to be possessed by the claimant and a logical product of human evolution. Clark here echoes the modern jurisprudence of Dworkin and Rawls. But his compass bearing is clearly set by his hero Holmes “We must continue to carry on the good fight under the old flag which was borne aloft by the men who stormed the citadels of despotism and privilege in the past and on which is written as the record of its history and the promise of its future service ‘*in hoc signo vinces*’ (*In this sign thou wilt conquer*) (F. M. Neasey & Neasey, p. 122)

Holmes refers to his introduction to Montesquieu’s *Spirit of Laws* which certainly did give him some wry amusement. He wrote of Charles II of Brede: “He made a reasonable amount of love in his day, I infer not wholly before 1715. Whether or not he would have said that the society of women makes us "subtle and insincere," he did say that it spoils our morals and forms our taste. I suspect also that it added a poignancy to his phrase when he came to write, as it certainly gave him a freedom and alertness of interest in dealing with matters of sex. He took his passions easily. As soon as he ceased to believe that a woman loved him he broke with her at once, he says, and elsewhere he tells us in more general terms that he never had a sorrow which an hour's reading would not dispel.” Holmes also wrote prophetically perhaps, “To read the great works of the past with intelligent appreciation, is one of the last achievements of a studious life.”(Holmes, pp.

vi-vii, ) for much more was to come in Holmes' later life than even in his illustrious early career.

Holmes refers to the redoubtable Henry Higginson whose portrait, with the sabre cut on his face, still hangs in the Harvard Art Gallery. This is the only time in the correspondence where we hear directly of Holmes thoughts of the generation of Americans "touched by fire" in the civil war. Fourteen years hence Australians, including Clark's sons, would be touched by another kind of fire in which the incomplete Australian nation would be fused together as its finest sons were slaughtered on the fields of Gallipoli due to the ineptitude of their British commanders. The fire would fuse them further in 1944 when Australians through their Prime Minister Curtin would have to find their way back to a relationship with the United States - the nation was saved from invasion by the South West Pacific Command of General Douglas Macarthur. The Australian style declaration of independence from the British Crown was spurned by pragmatism not revolutionary idealism.. At the end of 1941 Curtin asserted that Australia would make its own declaration of war. To do this, the Curtin government formally advised the King to officially assign the power to declare war to the Governor-General. Confirmation of the King's assent was then telegraphed immediately from London to Australia so that the Cabinet could then advise the Governor-General to declare war. What would the old warrior Holmes have made of this? No doubt he would have been one with the Republican Clark, hoping that the Australian Constitution would live with each generation, both would have been well advanced in planning the office of an independent Australian Head of State checked and balanced by the High Court and the houses of 'responsible government'. It was just a basic, logical step but not in the imagination of the majority of those who were vested with the virtues of British high office in Australia.

**Letter 6: Holmes to Clark, March 1901**

Commonwealth of Massachusetts

Supreme Justice Court

Court House, Boston

March, 1901

Dear Judge,

I hope I shall find your book awaiting me on my return from England to which pleasing centre of Evil I propose to turn my weary steps on the 22d for a short vacation. I have been pretty hard at work since Sept. 1, the beginning of our judicial year, and shall be glad to forget law and the frets of daily life in the wash of the ocean and the whirl of London.

I have done little outside of the law. A little - very little - touch of the Latin Classics now and then - a tribute to advancing time as I shouldn't have wished to die without having read Lucretius or remain quite as ignorant of Horace as I was. I actually returned a day or two ago to the Aeneid, after 50 years, and read some of it this morning before coming here to my shop. I even found myself enjoying it. I have always suspected people of Cant who said they did and this is my punishment.

I don't remember whether I sent you a little introduction that I wrote to an Edition of Montesquieu's *Espirit De Lois* - it was written a year ago and I had a few extra copies with too pretentious a title page for which I am not responsible. I sent one by this mail.

I don't think of any event in which I have taken part that would interest you except perhaps the universal difficulties of Marshall on Feb. 4. From one point of view right enough - but in the personal estimate rather indeiscriminate - I hope when you write Constitutional decisions you will not emulate some of our judges who having only half a page to say take 50 pages to say it in - I was remarking yesterday to one of my brethren that we appreciate the

boa constrictor but not the asp here. For my part I prefer an unpretentious little thing virulent with originality and insight to these swelling discourses padded with quotations from every accessible source. However I must go to work. We always recall the visit of you and Mrs Clark with great pleasure and hope that some day it may be repeated.

Sincerely yours

O. W. Holmes

COMMONWEALTH OF MASSACHUSETTS.  
SUPREME JUDICIAL COURT,  
COURT HOUSE, BOSTON.

June 1901

Drumfitter

I hope I shall find  
you back awaiting me on my  
return from England to which place  
I am going doing I suppose to  
two very weary days on the 22<sup>nd</sup> of  
at least vacation. I have been pretty  
hard at work since Sept. 1, in  
beginning of our judicial year, and  
shall be glad to press law and  
all the rules of daily life in the  
wash of the ocean and the air  
of London.

Did work like slaves for Shute and  
now am idling and reading books, Is  
this monomania or is it the King's English? which  
has taught me some mistakes there  
I wish but happily idling is not work  
Enough written to Cass & Fair, A little  
Baker's lives much interested in  
Some American Sociological books -  
Esp. Lester Ward (of all that he wrote)  
and Ross, 'Social Control' - a mighty  
thump all the popular work. I have  
amused myself with some Cass and  
Shuttle's Social history with Rabbin



and Euripides - and I have on hand  
a book on the Roman Law which  
I've placed back up. which I don't  
get much at all. A rare lady, an  
occasional intelligent youth -  
no dinner after the day at work?  
then are my amusements - The  
whole is made difficult by automation  
so I don't remember then the  
poetry from which I have put  
back the book on Latin. We had then

Christ I wrote

In my last speech an unfortunate  
little thing, virulent with originality,  
led up to these swelling discourses & padded  
with quotations from English accessible  
sources. How would I have been able to work  
so always local the thing you and  
his Clark with great pleasure and  
hope that you may find it useful.

Yours truly

Quotations

## **Commentary Letter 6**

Letter 6 hints at more lost correspondence from Clark to Holmes.

Had Clark been discussing with Holmes the revised version of his Issues in Constitutional Law?

For Holmes biographers the letter refers to Holmes almost yearly visits to London without his wife Fanny.

Holmes sends with the letter an introduction to Montesquieu.

He refers to the “universal difficulties” of applying John Marshall’s decisions in State cases. In less than a year Holmes would have the job of thinking about such matters from the standpoint of the US Supreme Court not the supreme body of the States.

The final part of this letter refers to the now famous quality of Holmes prose in decisions ‘say it to the point’. This was something that he developed during his apprenticeship on the Massachusetts Court and was something that Clark too adhered to. Both men were draftsmen of legal decisions that would reverberate through time and were in almost every respect clear and precise. Of Clark, former Chief Justice Green wrote: “He always resisted the temptation to take the easy course of reciting in an indiscriminating way the whole actual background of a case, but instead carefully isolated the salient relevant facts; he fully restated the arguments put to the Court by counsel so that the parties, including especially the losing party, could feel reassured that their submissions had been understood and considered, and he avoided mere assertion, being always at pains to expose as lucidly and explicitly as he could, the chain of reasoning which led to his conclusions.” (Ely, p. 292)

## **Letter 7: Clark to Holmes 26 October 1901**

26 October 1901

My dear Chief Justice,

I have postponed the writing of this reply to your last letter until I had a copy of my book to send to you. The publication of it was delayed by various causes for a period of three months beyond the date at which I expected it to appear. But I am pleased to be able to say that the wearisome work of correcting proof sheets and completing indexes has come to an end, and I am sending a copy of the book to you with this letter.

The Federal Judiciary Bill has not yet been introduced into the Federal Parliament so that I have nothing to report to you about the Federal Bench. There are abundant indications of the work for the High Court as soon as the Judges are appointed.

The people of Australia were all greatly shocked to hear of the assassination of President Mc Kinley and they hope that the American people will take effective steps to put down the propaganda of anarchism.

I suppose that you had a good time in England. I often wish that Australia was as near to California as Massachusetts is to England I should then see Boston every three or four years and would probably now be preparing for a journey there early next year. But I must bow to the geographical configuration of the earth and all its consequences and wait in patience until my time to cross the Pacific Ocean again comes. My wife sends the kindest remembrance to Mrs. Holmes and yourself.

I am ever sincerely yours

A. Inglis Clark



Judges' Chambers,

Hobart 26 Octr 1901.

My dear Chief Justice,

I have postponed the writing of this reply to your last letter to me until I had a copy of my book to send to you. The publication of it was delayed by various causes for a period of three months beyond the date at which I expected it

to appear. But I am pleased to be able to say that the wearisome work of correcting proof sheets and compiling index &c. has come to an end, and I am sending a copy of the book to you with this letter.

The Federal Judiciary Bill has not yet been introduced into the Federal Parliament, so that I have nothing to report to you about the Federal Bench. There are abundant indications

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of work for the High Court  
as soon as the judges are  
appointed.

The people of Australia  
were all greatly shocked  
to hear of the assassination  
of President McKinley  
and they hope that the  
American people will  
take effective steps to put  
down the propaganda of  
anarchism.

I suppose that you  
had a good time in  
England. I often wish  
that Australia was as

near to California as Massachusetts is to England. I should then see Boston every three or four years, and would probably be preparing now for a journey there early next year. But I must bow to the geographical configuration of the earth and all its consequences and wait in patience until my time to cross the Pacific Ocean again arrives. My wife sends her kindest remembrances to Mrs Holmes and yourself.

I am  
Ever sincerely Yours  
A. Dwight Clark.



## Commentary Letter 7

This is another of the letters in the exchange between Clark and Holmes that has attracted some attention.

Professor John Williams noted it in his discussion of the ongoing influence of Clark on Constitutional interpretation in 2014. (J. Williams) Williams was taken with the last paragraph and its reference to Clark's bow to "the configuration of the earth". However it is clear that even with great geographical separation the power of ideas was a common bond between Holmes and Clark.

This letter is poignant in that Clark notes that the Federal Judiciary Bill was still not introduced into the Federal Parliament. It must have been a frustrating wait for the man who was most responsible for Section 71 of the Australian Constitution. Clark's book, which was included with the letter to Holmes, was a special study of constitutional and Federal law in preparation for a position on the High Court.

But more than this Clark had definite ideas on the make-up of the High Court. He wrote to the Federal Attorney General Alfred Deakin in March 1902, a few short months after his letter to Holmes, with a six point note about why the High Court should consist of not less than five judges. Referencing Holmes, Clark writes "Judges, like other men, differ in their mental characteristics and opinions, when they are engaged in the discussion of debatable propositions of constitutional law. It is therefore eminently desirable that the High Court should as far as possible contain representatives of different types of intellectuality and of political sentiments and opinions. *It has been well said by one of the most eminent jurists of the present age that a nation's laws embody the story of its moral life and its political evolution, and that they cannot be interpreted and applied as if they were so many axioms and corollaries of a book of mathematics*" emphasis added (A. Inglis Clark, p. 352)

Later, in 1903, Deakin would write to Clark informing him that he was being considered for a High Court position but then at the last minute Edmund Barton, Australia's first Prime Minister supplanted Clark as a member of the three person High Court.

Such is the politics of judicial appointments.

**Letter 8: Clark to Holmes 4 October 1902**

Judges Chambers

Hobart

4 October 1902

My dear Judge,

The heading of this letter is untrue. I am writing it in Sydney N.S. Wales, where I am staying for a few days on my way to America. I leave here in two days for San Francisco where I shall stay about a week, and then proceed to Boston, and afterwards visit New York and Washington. Only a week before I left home I received my American papers in which I saw the announcement of your appointment to the bench of the Supreme Court at Washington. I tender my hearty congratulations to you upon the event. Boston will never seem quite the same again to me when I think of it without you in it, but I hope after my return to have another bond of association with Washington. I did not know that I would be able to take a holiday this year until a month ago, and I did not have an appointment to write to you by the last mail. This letter will go in the same steamer in which I travel, but it will reach you some days before I leave San Francisco, and I shall be glad if you will send a telegram to me at the Occidental Hotel saying where you will be during the last half of November and the first half of December. I suggest a telegram because I am doubtful if a letter in reply to this would reach San Francisco before I commence my journey eastward, I am bringing my oldest daughter with me to see the land I love so much.

Hoping to see you soon

I am

Very Sincerely Yours,

A. Inglis Clark



Judges' Chambers,

Hobart.

4 October 1902

My dear Judge,

The heading of  
this letter is untrue!  
I am writing it in Sydney  
N.S. Wales, where I am  
staying for a few days  
on my way to America.  
I leave here in two days  
for San Francisco where  
I shall stay about a

week, and then proceed  
to Boston, and afterwards  
visit New York and  
Washington. Only a  
week before I left home  
I received my American  
papers in which I saw  
the announcement of  
your appointment to the  
bench of the Supreme Court  
at Washington. Tender  
my hearty congratulations  
to you upon the event.

Boston will never seem  
quite the same again to me  
when I think of it without  
you in it, but I hope

after my return home  
to have another bond  
of association with  
Washington. I did not  
know that I would be  
able to take a holiday this  
year until a month  
ago, and I did not have  
an opportunity to write  
to you by the last mail.  
This letter will go in the  
same steamer in which  
I travel, but it will  
reach you some days  
before I leave San Fran-  
cisco, and I shall be glad  
if you will send a  
telegram to me at the

Occidental Hotel saying  
where you will be during  
the last half of November  
and the first half of December.  
I suggest a Telegram because  
I am doubtful if a letter  
in reply to this would reach  
San Francisco before I com-  
mence my journey eastward.  
I am bringing my eldest  
daughter with me to see the  
land I love so much.

Hoping to see you soon  
I am

Very sincerely Yours

R. Inglis Clark

## Commentary Letter 8

This letter bookmarks Clark's third trip to the United States in 1902 in which he was accompanied by his wife Grace and eldest daughter Esma. Written twelve years after their first meeting in 1890 Clark and Holmes at this point in time destined to serve as Justices of their country's highest Courts.

As he is leaving Sydney for San Francisco Clark reads of Holmes' appointment to the US Supreme Court. It should be observed here that Clark seemed a much more likely appointment to the Australian High Court than Holmes to the US Supreme Court.

In his letter to Holmes in 1901 (Letter 7) Clark mentions the assassination of President Mc Kinley. If Mc Kinley had remained President then it is almost certain that Holmes would never have been appointed to the US Supreme Court. As luck and fate would have it, it was Vice President Theodore Roosevelt, appointed President after Mc Kinley's death, who made Holmes' appointment to the Supreme Court. Even with Roosevelt Holmes' appointment was not a certainty and it did not occur without a political grilling that was ultimately disappointing for the new President. For Holmes' to his credit was his own man. (White, pp. 62-64)

Holmes sat on the US Supreme Court for the thirty years he served from 1901 to 1931. In contrast, we can only speculate about what might have happened if Clark had been appointed to the High Court and if the Federal Parliament had got its act together more quickly and appointed a five person and not a three person High Court Bench. 'A continent frozen in time jurisprudentially' might have melted, been more flexible and our Constitution more open to change and more transparent to the people.

Certainly, if Clark had been on the first High Court bench, the early years would have been less fraught. Clark's often overlooked role as a "consolidating" Attorney General and then Tasmanian High Court judge would have positioned him to do all the heavy lifting work of coordinating and consolidating State and Federal law. As Stefan Petrow has noted: "In the number of Bills he (Clark) saw passed into law, he can lay claim to being the most capable and productive nineteenth-century Attorney-General, not just in Tasmania, which he certainly was, but also Australia". (Petrow) Sir Samuel Griffith as Chief Justice may well have been thankful for Clark's assistance.

The petty politics of early Australia's High Court was marked by the fact that at one stage the judges threatened to strike. Not only did the Federal parliament not appoint five judges, the Attorney General following Deakin, Sir Josiah Symon, sought control by refusing to allow them

reasonable expenses and to meet in the respective State capitals for hearings. (Mason, pp. 180-182) It was an ignoble start that is often overlooked in the vain glorious portrayals of jurists wanting to remain on the right side of God and the Australian judiciary. The fact that Clark too was swept away until recently is something for regret.



## Letter 9: Clark to Holmes, 7 Sept 1905

Judges Chambers

Hobart

7 Sept 1905

My dear Chief Justice,

I have been looking forward for some time past to the pleasure of writing to you again and I would have realized my anticipation of it before today, if I had felt that I had anything to say to you that was worth your attention. I do not know that I am in that happy position today, but at least I have an excuse for reminding you of my existence in that I am sending you forthwith a copy of the second edition of my book **Australian Constitutional Law** which was published in Melbourne last month. It contains a new chapter on the Limits of the Living Powers of the Commonwealth and the States, and several of the other chapters have been more or less re-written.

I do not expect you to burden yourself with a perusal of the book but I wish you to place it alongside of your copy of the first edition so that if any curious person is at any time hereafter tempted to look at them he, or perhaps it would be more correct for me to say I may have the advantage of knowing that he is reading my revised observations on the subject about which he is making inquiry.

I have read with much pleasure your judgement in the case of *Lockner v State of New York*, and I very pleased to see Harlan<sup>30</sup> and you on the same side. I always read his judgements on questions of Constitutional law with great interest, and I feel uncomfortable when you and he differ.

Our High Court is making great havoc of many of the judgements of the Supreme Courts of the States, and some of the judges of the State courts

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<sup>30</sup> John Marshall Harlan (June 1, 1833 – October 14, 1911) was an American lawyer and politician who served as an associate justice of the Supreme Court of the United States from 1877 until his death in 1911. He is often called "The Great Dissenter" due to his many dissents in cases that restricted civil liberties, including the Civil Rights Cases, *Plessy v. Ferguson*, and *Giles v. Harris*. Many of Harlan's views expressed in his notable dissents would become the official view of the Supreme Court starting from the 1950s Warren Court and onward.

have been foolish enough in their chagrin in carping criticism of the decisions which have reversed their own. Unfortunately I trace something like a knock in return in a late judgement of the Chief Justice of the High Court. His critics are waiting anxiously for the judgement of the Privy Council in a case to which leave to appeal has been permitted.



Judges' Chambers,

Hobart.

7 Sept 1905

My dear Judge,

I have been  
looking forward for  
some time past to the  
pleasure of writing to you  
again, and I would have  
realized my anticipation  
of it before today, if I had  
felt that I had anything  
to say to you that was worth  
your attention. I do not  
know that I am in that  
happy position today, but

at least I have an excuse  
for reminding you of my  
existence in the fact that  
I am sending to you here-  
with a copy of the second  
edition of my book on  
Australian Constitutional  
Law which was published  
in Melbourne last month.  
It contains a new chapter  
on the Limits of the Taxing  
Powers of the Commonwealth  
and the States, and several  
of the other chapters have  
been more or less rewritten.  
I do not expect you to bur-  
den yourself with a perusal  
of the book, but I wish you  
to place it alongside of your  
copy of the first edition,  
so that if any curious  
person is at any time

great havoc of many of the  
judgments of the Supreme  
Courts of the States, and  
some of the Judges of the  
State Courts have been  
foolish enough to express  
their chagrin in carping  
criticism of the decisions  
which have reversed  
their own. Unfortunately  
I trace something like a  
knock in return in a  
late judgment of the  
Chief Justice of the High  
Court. His critics are  
waiting very anxiously  
for the judgment of the  
Privy Council in a case  
in which leave to appeal  
has been granted.

## Commentary Letter 9

Clark notes to Holmes in this letter, dated 7 Sept 1905, that the new edition of his **Australian Constitutional Law** contained chapters on the limits of State and Commonwealth powers and much had been re-written. He requests that Holmes places the new edition alongside the first edition on his bookshelf so that students of law might compare the development of Clark's constitutional ideas. It was a marker perhaps of Holmes and Clark's discussions of the formation of Australia's constitution. Perhaps also a marker for history. Clark's **Studies in Constitutional Law** is recognised as one of the classic works of Australian constitutional scholarship. (Francis Mervyn Neasey & Neasey, p. 210)

Clark closely followed the decisions of the US Supreme Court and was a supporter of "the great dissenter", John Marshall Harlan, whose minority judgements became the basis for much modern law in the late 20<sup>th</sup> century. He notes that he feels *uncomfortable* when Holmes and Harlan's judgements are at odds. This was not just lobbying from Clark, it was an indication of his foresight. More than any jurist in Australia at this time, perhaps barring Victoria's George Higginbotham, Clark could see the future.

The case of *Lochner versus the State of New York* 1905 was a landmark case on the question of "liberty of contract". In this case the owner of a bakery successfully challenged the New York State legislation which limited the work week of bakers to sixty hours. In this decision the Supreme Court invalidated the New York law. The majority maintained that the statute interfered with the freedom of contract, and thus the Fourteenth Amendment's right to liberty afforded to employer and employee. The Court further held that the New York law failed the rational basis test for determining whether government action is constitutional. The majority reasoned that *the Bakeshop Act* had *no rational basis* because long working hours did not dramatically undermine the health of employees, and baking is not particularly dangerous. Justice Harlan's dissent informed later decisions in the post-*Lochner* era. Rather than requiring the government to prove that a law had a *rational basis*, he would require the party challenging the law to prove that the test was not met. (This is the contemporary process.)

In fact as Holmes' biographer has argued, Holmes position was very interesting in the light of the primacy of the concept of "liberty" in constitutional law in the 21<sup>st</sup> century. Holmes "...argued that the concept of a constitutional "liberty of contract" was a fiction. He did not find it the text of the Constitution, nor did he believe it was an inviolate principle of economic relations. Because legislatures represented the majority of citizens, they could regulate economic affairs unless the Constitution

expressly forbid them from doing so. When judges created doctrines such as “liberty of contract”, they were submitting their views on issues of political economy for those of the majority. They were not authorized to do that unless the Constitution mandated it. .. In his dissent in *Lochner v New York* he said, “ a constitution is not intended to embody a particular economic theory” and the word ‘liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion’”. (White, p. 93)

Clark’s observation on the early work of the Australian High Court in this letter is also telling. Clark was disappointed that Barton resigned as Prime Minister and made himself a High Court judge alongside Chief Justice Sir Samuel Griffith and Richard O’Connor. But the substance of Clark’s critical commentary concerned State challenges to decisions of the High Court. In the first important constitutional case, *D’Emden v Pedder*, the Court embraced the doctrine of inter-governmental immunities enunciated by Marshall C.J. in *McCulloch v Maryland*. According to this doctrine, State laws could not “*fetter, control, or interfere with, the free exercise of the legislative or executive power of the Commonwealth*” and vice versa. The application of the doctrine of inter-governmental immunities, as applied in the first two cases, did nothing to protect the revenue base of the States. So, in *Webb v Outtrim* the States by-passed the High Court by appealing to the Privy Council. The Privy Council overruled the two earlier High Court decisions. Although the Privy Council rejection of the inter-governmental immunities doctrine foreshadowed the Engineers’ case, the reasoning in *Webb v Outtrim* was vulnerable to criticism, a vulnerability that was subsequently exposed when the High Court re-affirmed the doctrine in *Baxter v Commissioners of Taxation (NSW)*, where the majority was able to point to errors in the approach of the Privy Council to s.39(2) of the Judiciary Act 1903 and to the relevance of United States constitutional interpretation to a proper understanding of the Australian Constitution. (Mason, p. 183)

All this must have been galling for Clark the Republican. In noting all this to Holmes he must have been thinking ‘imagine if the US Supreme Court had still to settle its disputes between the Federal Government and the States through appeals to the London Privy Council’. Clark’s view on the Privy Council was well known. A speech Clark made in parliament in 1897 was reported in the Hobart **Mercury**: “When he went to England to conduct an appeal on the Main Line Case, the solicitor employed pointed out to him the desirableness (sic) of having a good court, as sometimes they had old fossils sitting on the bench. He went one day to hear a case being tried, and found the judges sitting in ordinary clothes round a common table. Only one of the judges was awake and the other three were all dozing. That was the grand and august tribunal which superior to

anything that Australia could muster”.(Francis Mervyn Neasey & Neasey, p. 114)

In time as Sir Anthony Mason has noted the crisis abated: “The decision in *Baxter* marked the final recognition of the exclusive authority of the High Court in the determination of *inter se* questions and, with it, the acceptance by the Supreme Courts and the legal profession of the status of the High Court at the apex of the Australian judicial system, subject to the appeal to the Privy Council. No question of conflict with that august body was to arise until the passage of legislation restricting the appeal from the High Court to the Privy Council, leaving on foot appeals from State courts in non-federal matters to the Privy Council. **The elimination of that appeal in 1986 put an end to the problem.**” Emphasis added.



## Letter 10: Holmes to Clark, c1906

Beverly Farms

Massachussets [n.d.]

My dear Judge,

I am truly sorry to hear of your illness, but I infer that you will be perfectly well by the time this reaches you and therefore will say no more. I cannot recall having received your second edition and I never mean to leave a letter from you unanswered. I do not think I have done so but I do not swear to what may have happened in the heat of work and worry. I did work like the blazes for 8 months and now am idling and reading books. At this moment it is 'The Kings English'<sup>31</sup> which has taught me some mistakes I have made but happily itself is not well enough written to cause despair. A little earlier I was very much interested in some American Sociological books e.g. Lester Ward<sup>32</sup> (all that he writes) and Ross 'Social Controls'<sup>33</sup> – a mighty sharp little popular work. I have amused myself with some law and slightly bored myself with Rabelais and Euripides – and I have on hand a book on the Roman Law which Fred Pollock<sup>34</sup> cracks up which I doubt if I shall attack. A rare lady, an occasional intelligent youth – no dinners after the many at work – these are my

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<sup>31</sup> Henry Watson Fowler and Francis George Fowler King's English, Oxford: At the Clarendon Press. 1906

<sup>32</sup> Lester Frank Ward (June 18, 1841 – April 18, 1913)

<sup>33</sup> Edward A. Ross (born Dec. 12, 1866, Virden, Illinois, U.S.—died July 22, 1951, Madison, Wisconsin) Social Control (1901) New York, Macmillan & Co.

<sup>34</sup> Sir Frederick Pollock, 3rd Baronet PC, FBA (10 December 1845 – 18 January 1937)[1] was an English jurist best known for his History of English Law before the Time of Edward I, written with F.W. Maitland, and his lifelong correspondence with US Supreme Court Justice Oliver Wendell Holmes. He was a member of the Cambridge Apostles. See Mark De Wolfe Howe, ed. (1961). Holmes-Pollock Letters: The Correspondence of Mr. Justice Holmes and Sir Frederick Pollock, 1874-1932; with Introduction by John Corham Palfrey & Sir John Pollock (2nd ed.). Cambridge, Massachusetts: the Belknap Press of the Harvard University Press – via Internet Archive.

amusements. The wheel<sup>35</sup> is made difficult by automobiles so I didn't get much further from the post office from which I have just bought back your letter. We had some (piece torn out of the bottom of the page) that I wrote in a suit by *Missouri vs Illinois* to stop Chicago from draining into the Illinois River and thence, after 350 miles within the State, into the Mississippi. My colleague White and I, who generally agree, ran against each other in a divorce case which stirred up his monkeys – but in the main it was a pretty peaceful year. Do remember me most kindly to your wife and daughter. Now I will return to my books and study once more how to distinguish between this and that. (piece torn from page)

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<sup>35</sup> A bicycle

BEVERLY FARMS *Manaden li*

*My Dear Judge*

I am truly sorry to hear  
of your illness. but I hope that you  
will be perfectly well by the time this  
reaches you and therefore wish say  
nothing. I cannot recall having  
heard you second edition and even  
mean to see a letter from you soon?  
Answered. I do not think I have done so.  
but I don't know. I can't say  
has happened in the history of the world.

Lord work like Hayes for months and  
now am idling and reading books, At  
this moment it is 'The King of English' which  
has tempted me. Some histories I have  
read but happily idling is not work  
Enough written to cause despair. A little  
earlier I was much interested in  
some American Socialistic books -  
esp. Lester Ward ~~of~~ who that he wrote  
and Ross. 'Social Control' - a highly  
cheap little popular work. I have  
amused myself with some laws and  
shightly bored myself with Rabbin

and Enriphids - and then on hand  
a book on the Roman Law which  
Dr Powell cracks up which I don't  
of course attack. A rare book, an  
occasional intelligent gentleman  
he drives after the many at work?  
there are my amusements - the  
which is made difficult by antiquity  
So I don't purchase them than the  
history of the world which has been  
brought back by the Latin. In Latin  
that I write

in a suit by Missouri vs Illinois to  
stop Chicago from draining into the  
river and thence, after 350 miles of  
state, into the Mississippi. My Chicago  
Whites and, who generally agree, have  
against each other in a divorce case  
which stirred up the mortals. but  
in the main it was a pretty peace  
year. So you enter us most kindly  
to your wife and daughter. how  
will it turn to my profit and study  
over now the distance between the  
and that -

## Commentary Letter 10

Clark suffered from periodic illness and within two years he would be dead. Holmes who had survived so much in the Civil War would live on.

Holmes seems not to have received the second edition of *Issues in Constitutional Law* in 1905. It is likely that another letter from Clark in this interim period was lost from the record.

This was indeed a time when Holmes was working like blazes. His celebrated dissent in *Lochner v New York* 198 U.S. 45, 75 (1905) following on from ruling that *Otis v Parker* 187 U.S. 606 (1902) created a pathway for progressive regulation of working hours by governments. “Freedom” was not an obstacle to a government wishing to restrict a capitalist or business owners’ capacity to set working conditions or hours for workers. This was a monumental decision of importance particularly to the way in which Labor governments in Australia chose to regulate wages, work and industry for the next one hundred years. Holmes’ had an idea of an unfettered freedom that was not economic or doctrinaire in form it at this time a strange and complicated minority concept. But it would win sway over the course of the 20<sup>th</sup> century. The so-called “police powers” of governments and regulatory agencies and laws themselves could be used to protect the framework of freedom for individuals. Though this feature of capitalism would not prevent all inequality and exploitation it was also not in the conception of more radical revolutionaries, socialists and communists when they predicted workers would rise up against their masters. Holmes had in his own way conceptualized the possibility of a “wage earners welfare state” that would become the hallmark of the Australian economy and society in the 20<sup>th</sup> century.

Given all this was happening on Holmes’ watch this playful letter seems to reflect the summer on Beverley Farms when for a time the world could be held at bay. Perhaps too Holmes was reminded of other summers passed when Clark his wife and children had enjoyed the seeming miracle of a month or two of New England summer sun.

## Letter 11: Clark to Holmes, no date, c1906<sup>36</sup>

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<sup>36</sup> We may surmise that this letter is the last letter from Clark to Holmes and between the two men because Conway Clark was working as an architect in the United States from May 1905 to December 1907. It is poignant to imagine Conway calling on the Holmes family after his fathers death on 14 November 1907.

Judges Chambers

Hobart

no date

I am sending to the *Harvard Law Review* an article which I expect to appear in November or December. It was suggested to me by six cases which I heard together without a jury in Launceston last year. It will not contain anything that will be profitable to you either for "instruction" or "correction" or "reproof" in that kind of "righteousness" which the law attempts to establish among men; but as an attempt to explain the grounds of my decision to myself if may provide a few minutes amusement to you. I have a boy settled in Boston for a time. He is an architect and is acquiring experience in the office of Shepley, Rutan and Coolidge<sup>37</sup> and will probably visit Washington before he returns to Australia. If he does so I shall request him to call on you. My wife and daughter send their kind remembrances to Mrs Holmes and to yourself and

I am very sincerely yours

A. Inglis Clark

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<sup>37</sup> Shepley, Rutan and Coolidge was an architecture firm based in Boston operating between 1886-1915 with extensive commission in monumental, civic, religious and collegiate architecture in the spirit and style of Henry Hobson Richardson.



2.



Judges' Chambers,

Hobart.

I am sending to the Harvard  
Law Review an article  
which I expect to appear  
in November or December.

It was suggested to me  
by six cases which I heard  
together without a jury  
in Launceston last year.

It will not contain  
anything that will prove  
profitable to you either  
for "instruction or correction"  
or "reproof" in that kind of

"righteousness" which the law attempts to establish among men; but as an attempt to explain the grounds of my decision to myself it may provide a few minutes amusement to you.

I have a boy settled in Boston for a time. He is an architect and is acquiring experience in the office of Shepley Putnam & Coolidge. He will probably visit Washington before he returns to Australia.

and if he does so I shall  
request him to call on  
you.

My wife and daughter  
send their kind re-  
membrances to Mrs. Holmes  
and to yourself, and

I remain

Very sincerely Yours

A. Dexter Clark

## Commentary Letter 11

Clark sent with this letter a copy of his article “A Study in the Law of Torts” which appeared in the Harvard Law Review in November 1906 (A. Inglis Clark, 1906, November) to Holmes. From this we can surmise that the letter below was probably Clark’s last letter to Holmes.

Clark’s article would have met Holmes’ favour as it was a prime case of what Holmes called “a study to the bottom” of the practice of law. For Holmes and Clark this was a duty of all justices in the higher courts. The presentation of their reasoning in a written judgement was what kept the law alive. In an address in 1900 Holmes noted “I look into my book in which I keep a docket of the decisions of the full court which fall to me to write and find about a thousand cases... A thousand cases, when one would have liked to study to the bottom and say his say on every question which the law has ever presented” (White, p. 141)

This letter also refers to Andrew Inglis Clark’s son, Conway Inglis Clark, who lived in the United States from May 1905 to December 1908.

Clark died at his house Rosebank on 14 November 1907 while Con was in the United States. We do not know whether Con called on Holmes we do know that he visited many of Clark’s acquaintances in Boston..

As David Headon has written Con Clark went on to become the secretary of the international competition that resulted in Walter and Marion Burley Griffin’s design being selected as the plan of Australia’s new national capital city Canberra.<sup>38</sup> (Headon) The Clarks mark on the national life of Australia seems everywhere when you look through the threads of time.

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<sup>38</sup> “When he finally returned home in December 1908 (the same month that ‘Yass–Canberra’ was declared as the official site for the new national capital), little did Con Clark realise that, when the time came to promote an international design competition for Australia’s new national capital city in 1911, the incumbent Minister for Home Affairs would be the ‘legendary’ King O’Malley, an extroverted member of the House of Representatives, representing a Tasmanian constituency—and an American. O’Malley was supposed to be Canadian, but his political colleagues knew the truth of his background. Both of these facts would not have harmed Con’s prospects when he was chosen, in February 1912, as the proactive, informed secretary to the competition’s judging committee. It is probable that Con Clark was more familiar with contemporary town planning and architectural trends—better qualified than the three judges to assess the hundred-odd serious, professional entries in the competition. It is virtually certain that he was aware of the origins of the 23 American entries, including number 29 from a design dream team from Chicago, Walter and Marion Griffin.” (Headon)



## Epilogue

Events, decisions, cases, wars and politics seem to have passed over the thoughts and letters of Andrew Inglis Clark and Oliver Wendell Holmes. It is true in many respects that the letters in their exchange have been buried by time. The statute book ticks over. High court judges come and go.

But letters, people and the wonder of lives lived at different times, help us to appreciate *the experiential reality of the law* as it has evolved. Holmes **The Common Law** principles and Clark's devotion to it still matters. Australians did not have a Holmes who connected the Civil War era with new ideas in the twentieth century, but we had a founding father in Clark whose ideas still live and are important and relevant. Clark's work was appreciated the "grand old man of American history" Albert Bushnell Hart wrote to him from Harvard after Federation "The friends of good government throughout the world are rejoiced at the final accomplishment of your long task".<sup>39</sup>

Had Clark lived longer and had he been appointed to the Australian High Court he would have had to rethink and no doubt radically change many of his ideas. The State colonies have not been the organic communities that perhaps they once were in the 19<sup>th</sup> century. The Federal Senate is not reflective of any organic community interests but has become, a place where opportunistic, minority political interest groups with the capacity to gather a couple of hundred thousand votes can wield disproportionate power and influence over the great majority of Australians. The handsome resources of the Senate are used to propagate misinformation and hateful social media messages day in and day out.

Similarly State laws do not deserve the respect that Clark had for them. There is really no need for so many bureaucratic structures that are absurdly replicated over a large continent with a relatively small population. Do we need State based motor licenses, teacher and lawyer certifications, educational diplomas and qualifications, traffic regulations etc etc. And if recognizing the sanctity of small communities was our goal then the Constitution of Australia must recognize local municipal government and absurdly it does not.

Yet Clark's interest in a bill of rights and his care in forging a Federal system with the principles of "responsible government" ie parliamentary elections of leaders and Ministers and parliament as the basis of majority

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<sup>39</sup> Letter to Clark, June 6, 1900, [Eprints.utas.edu.au/10316/](http://Eprints.utas.edu.au/10316/)

government leave us many issues in the present that have to be resolved without looking back.

The Australian constitution has not been a living breathing document that is owned and cherished by succeeding generations of Australian citizens. It is a lifeless document that has only changed eight times in minor amendments since 1900. The failure in 2023 to constitutionally recognise First Nations Aboriginal communities and their prior occupation and ownership of the Australian continent remains an ongoing stain on the country's reputation and standing. At least some of this may be attributed to the fact that Australians know so little about the writers and founders of the Australian constitution. There are no Hamiltons, Washingtons, Lincolns and we know nothing of how these figures in fact created the momentum for an Australian democracy to evolve.

In his second and third decades as a Supreme Court Judge Holmes was supported and feted by the writers and thinkers associated with **The New Republic**. He was someone from the 19<sup>th</sup> century who understood the issues of American modernity in the 20<sup>th</sup> century. He grappled with issues that the founding fathers of the American Republic could not have fathomed. His judgements on labor laws and freedom of speech became markers of a maturing American democracy. What had been at the start of his career seen as oddities, such as his tendency to write judgements in literary and philosophical terms, began to be appreciated.

The correspondence of Clark and Holmes, their themes and ideas was taken up by the latter correspondence between Australia's High Court judge H.B. Higgins – the father of Australia's wage earners welfare state and Holmes young protégé Justice Felix Frankfurter. (Lake) But the premature death of Clark and the shadow of Holmes' long tenure on the US Supreme Court makes poignant the Australian people's lack of connection with their High Court.

Of the 57 judges that have served on Australia's High Court only a handful could be described as Republican Democrats in the spirit of Clark. Higgins, Evatt, Murphy, Brennan, Gaudron, Mc Hugh, Kirby, Bell and French have held the torch. But it was Sir William Deane who made the somewhat surprising reference to Clark's *living force* theory of constitutional interpretation in *Theophanous v Herald & Weekly Times Ltd* 1994 and drew Australian jurisprudence back to the Constitutional conventions of the 1890s.

Australia's High Court and its Constitution remains still largely remote from the people and this remains a significant weakness for the nation.

It is astonishing that perhaps the major constitutional controversy of Australian 20<sup>th</sup> century jurisprudence concerned the right of the Governor

General to sack the Prime Minister without consultation with the British monarch. In 1975 Australian Governor-General John Kerr went beyond even the UK Monarch's customary powers of consultation, encouragement and cautioning of the British Prime Minister of the day and simply removed Prime Minister Gough Whitlam from office. Furthermore, Kerr had controversially and secretly consulted the longest serving Chief Justice of the High Court Sir Garfield Barwick. Kerr's actions created a profound political crisis at the time which rocked the Australian nation. Clark and Holmes, for that matter, would have been appalled that such an action could have been taken without a judicial censor let alone encouragement from the High Court.

Gough Whitlam wrote in 1997 the events of October-November 1975 have profound implications for a future Australia republic<sup>40</sup> and the complicit involvement of Garfield Barwick in the events of the sacking has still not been adequately addressed. Thus in 2024 not only is there no Australian Republic there is no formal resolution of the role of an

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40 Prime Minister Gough Whitlam wrote of these events as follows. "My chief interest in the events of October-November 1975 now lies in their relevance to Australia's advance towards the Republic; and secondly, in the 22 years since, nothing has emerged to invalidate my basic contentions: that the crisis of November 1975 was not a true constitutional crisis, an insoluble deadlock between the two houses of Parliament, but a political crisis, fully capable of being resolved by political means; and that, but for Sir John Kerr's action, it would have been resolved – quite quickly – in my government's favour. Nevertheless, until Barwick published his book in 1995, I confess I had not realised the full significance of his letter to Kerr dated 10 November 1975. Nor was I totally aware of important circumstances surrounding the letter although a vital clue had been uncovered by Gerard Henderson, in his ABC interview with Barwick in February 1994. You may recall that Barwick's letter supporting "the course Your Excellency has already resolved to take", stated: "A Government having the confidence of the House of Representatives but not that of the Senate, both elected Houses, cannot secure supply to the Crown". In his book, Barwick expands this assertion into a full-blown constitutional doctrine. Not only does he assert that I was constitutionally obliged to resign immediately the Opposition in the Senate decided to stall the Budget, i.e. 16 October; but he denies legitimacy to any government not having a majority in the Senate – that is, a series of Australian governments from Barton to Howard. When he handed me his letter dismissing my government, Kerr did not tell me that he had a letter from Barwick. I had expressly tendered him advice, based on precedent and prudent practice, that he should not consult with the Chief Justice on matters that might ultimately come before the High Court. Kerr did not release the Barwick letter till a week later, after Attorney-General Enderby had released an authorised and different opinion from Solicitor-General Maurice Byers and himself, given on 4 November in accordance with Kerr's request on 21 October. It was only after a lapse of 18 years, in an ABC interview with Gerard Henderson, that Barwick revealed that, at Kerr's request, he showed his letter to two other justices, Sir Anthony Mason and Sir Ninian Stephen, later Chief Justice and Governor-General respectively.



Australian Head of State, President or Governor General, notwithstanding. Although most opinion would now hold that Kerr's action were not grounded in law and should have never occurred, the matter of the role of an elected Head of State makes the lack of Constitutional clarity around these issues simply embarrassing and possibly dangerous.

In that respect Australia has certainly not moved towards a *New Republic* it still continues to operate as a post-colonial dominion of the British Crown. Clark's relative invisibility in the making of the Australian constitution and the absence of his democratic Republican philosophy has left us scratching for the dozen letters that provide us with a hint of what an Australian Republic might look like and what a progressive and modern High Court might have looked like in the context of a "constitutionally frozen" jurisprudential continent".

As luck and politics would have it, Australia was denied its "Tasmanian from Olympus" and well may we compare him with his friend known in 1926 as "the Yankee from Olympus". (White, p. 114)

In the end the importance of Andrew Inglis Clark for Australia was not about politics it was about how the Australian constitution, its founding national documents, became so stale and so remote from every day Australians. As G. Edward White wrote of Holmes "Over and over in his opinions Holmes was able to communicate through such generalized pronouncements, which were often helpful in showing readers what lay at "the bottom" of the case Holmes was deciding: the policy choices he and his fellow judges were making and the philosophical basis of the principles they were laying down. Such pronouncements also often provided the reader with a phrase that was easy to remember because of its arresting language and memorable imagery: 'A word is not a crystal, transparent and unchanged; it is the skin of a living thought'." (White, p. 118)<sup>41</sup>

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<sup>41</sup> Warden suggests that Clark was not so eloquent. "Clark regrettably is not a particularly engaging writer. He is long-winded and often laborious. His language generally lacks rhythm and it is too ornate. His meaning wilts in imprecision. Perhaps that style made him a good Judge of the period. While Clark read Lincoln deeply he did not have an ear for Lincoln's lean, rich language. If the American historian Garry Wills is right that the Gettysburg Address profoundly changed political language then unfortunately Clark did not grasp that point.<sup>10</sup> Clark writes as a high Victorian rather than as a new republican of the reconstruction era. Wills argues that Lincoln of the later period wrote with spare elegant phrasing because he had spent the Civil War in the Telegraph Office of the White House. He was the first telegraph President. Alas President Clark in the Telegraph Hotel lacked that style. Clark wrote long letters. He should perhaps have written more telegrams or at least have applied more consistently that economy to his drafting style and to his own prose". (Warden)

Whatever we may lament about Clark, primarily the failure to appoint him to the first Australian High Court, like Holmes he was a man of the future and his words remain with us. Like Holmes “His obsolescence has not yet come and may never come”. (White, p. 138)

## **Quotable Quotes**

“All gruesome imagination about Tasmania vanished when I found myself in the delightful home circle at Rosebank, residence of the Clarks at Hobart” (Conway)

“We have met to-night in the name of the principles which were proclaimed by the founders of the Anglo-American Republic ... and we do so because we believe those principles to be permanently applicable to the politics of the world.” Andrew Inglis Clark, 4 July, 1876 (Reynolds, p. 62; Warden)

“I believe in the theory of Government which was propounded by the late A. Lincoln- ‘Government of the people, for the people, and by the people’. Government moreover should not be for the benefit of any particular class”. Andrew Inglis Clark, election speech as reported by the Hobart *Mercury*, 27 July, 1878<sup>42</sup>

“I would prefer the lines of the American Union to those of the Dominion of Canada” Andrew Inglis Clark, Federation Conference, 1890<sup>43</sup>

“A federal constitution is a totally new thing in these colonies, and I may say a totally new thing, in the sense in which we understand it, to the British Empire, because it is generally understood we are not going to follow the lines of the Canadian Dominion.” Andrew Inglis Clark, Federation Conference, 1890<sup>44</sup>

“We are asking now for the political autonomy of a United Australia, in order that that national life, which we believe will exist under those conditions, may be produced and may bear the best fruits.” Andrew Inglis Clark, 1890<sup>45</sup>

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<sup>42</sup> (Williams)

<sup>43</sup> (Williams) Official Record of the Proceedings and Debates of the Australasian Federation Conference, Melbourne, 12 February 1890, Government Printer, Melbourne, 1890, p. 33.

<sup>44</sup> (Reynolds, p. 66)

<sup>45</sup> (Williams) Official Record of the Proceedings and Debates of the Australasian Federation Conference, Melbourne, 12 February 1890, Government Printer, Melbourne, 1890, p. 36.

“..a nation’s judiciary is next to its legislature the most potent and influential organ of its national consciousness”. Andrew Inglis Clark, 1900<sup>46</sup>

“If I were free to ventilate my opinions in the press I would deplore the prospect of making the seats on the Bench of the High Court the rewards for political services ..” Andrew Inglis Clark, Private Correspondence, 1906<sup>47</sup>

“We do not habitually recognise the existence of any connection between things which are usually described as mechanical and those which we designate as ideal” Andrew Inglis Clark, ‘Machinery and ideals in politics’

“Intense to a degree, and enthused with a divine unrest, that soon made him a leading spirit in all movements having for their object the uplifting of humanity ... The convictions that governed him then governed him up to the time of his death; and at no period of his life could it be said that he proved false to the principles that he professed, or betrayed the trust reposed in him. Generous by nature ... he was a passionate advocate for the true democracy which means the affording of equal opportunity to all men ...

A.J. Taylor, A.J. Taylor, ‘Andrew Inglis Clark (1848–1907), an Australian Jefferson’<sup>48</sup>

“A spotless private life was the crown of a useful public one, and the name of Andrew Inglis Clark deserves to be remembered across the great divide with a tenderness and regard which few other public men have been able to so justly claim at the hands of their fellow countrymen.”

“Jacques”, *The Mercury* (Hobart), 16 November 1907, p. 8. (Warden)

“The means of the study are a body of reports, of treatises, and of statutes, in this country and in England, extending back for six hundred years, and now increasing annually by hundreds. In these sibylline leaves are gathered the scattered prophecies of the past upon the cases in which the axe will fall. These are what properly have been called the oracles of the law.” Oliver Wendell Holmes, Jr., “The Path of the Law,” *Harvard Law Review* 10, no. 8 (1897) 457.

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<sup>46</sup> (F. M. Neasey & Neasey, pp. 205-206) *Daily Telegraph*, Sydney & Launceston, 2 August, 1900.

<sup>47</sup> (Williams)

<sup>48</sup> (Headon) citing (Mc Laren) p. 96

“The most stringent protection of free speech would not protect a man falsely shouting fire in a theatre and causing a panic...The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.”  
Oliver Wendell Holmes, Jr, *Schenck v. United States* (1919)

“The lawyer, girded and armed for combat, must pick his way forward in quest of an ideal.” (Novick, 1997)

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Professor Daniel Botsman and Professor Crystal Feinster at Harvard University in 2003 and at Yale University in 2024 enabled this volume to be completed. Their genuine pursuit of ideas is legendary and their great capacity, intellectual generosity, support and kindness are well known to all their colleagues and students. I am lucky to count them as close family as well as supporters in the business of writing and thinking about history.

Brian Kiss and Zowie Oliver on the front reference desk at Stirling Memorial Library at Yale University showed me why this library is such a revered place of research and learning. Brian saved me a great amount of time in a single consultation concerning the Oliver Wendell Holmes Papers in April 2024 and thus helped speed up the process of compiling this book. Yale library is renowned for supporting research students and university staff. Going beyond the call of normal duty is a normality.

The Andrew Inglis Clark Collection at the University of Tasmania and The Oliver Wendell Holmes Jr Papers in the American Legal Manuscripts at Harvard Collection hold the original copies of the letters referred to and copied in this manuscript. One hopes that one day the originals will be shown in an exhibition and that these two magnificent collections will be the subject of ongoing interest particularly by Australian legal historians and scholars.

Andrew Inglis Clark loved the United States. In my lifetime as a high school student at Lansing and Ithaca, New York, and then an undergraduate at Cornell in the 1970s, a Harkness Fellow in the 1990s and by sharing family ties that know no international boundaries, I too have come to love the place and the people.

This book is in many ways about piecing together the lost pieces of the national relationship between Australian and the United States and understanding the way the young colonies of Australia looked to the United States as a mentor in civics, law, politics and Republicanism. It is also about appreciating the worth of a great Australian who was reaching for the stars through the formation of an Australian Commonwealth: Andrew Inglis Clark. Clark is one of the few ‘bearded white men’ who created the Australian constitution whose ideas and legacy stand the test of time and is worth celebrating. Many, over the course of Australian history, have stood on his shoulders without acknowledging his contribution.

PCB, Spring 2024.

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***Cover note***

Oliver Wendell Holmes and Andrew Inglis Clark shaped the structure of nations. Their friendship is something for historians and lawyers alike to think about particularly in Australia where the philosophy and ideals of the Commonwealth constitution are too little considered. More than this their correspondence and the reasons for their mutual admiration are helpful for lawyers and judges considering points of law and the wider interpretation of jurisprudential matters.