

# The Australian Constitution and the United States' 14<sup>th</sup> Amendment

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*The framers of the Constitution considered including some aspects of the US 14th Amendment in the Commonwealth Constitution, including 'equal protection of the law' and 'due process of law'. Drawing on the Constitutional Convention Debates and the online resources of the [National Archives](#), explain which aspects of the 14th Amendment were incorporated in the Constitution, which were defeated, and why. In your view, were the framers right in the choices they made about what to include and exclude of the 14th Amendment?*

## I INTRODUCTION

The framers of the Australian Constitution considered adapting the 14th Amendment to the Constitution of the United States of America in Australia's Constitution but ultimately chose not to. The 14<sup>th</sup> Amendment defined citizenship and provided for the protection of privileges and immunities, due process and equality before the law. This essay will explain the process through which the framers of the Constitution considered the United States' 14<sup>th</sup> Amendment and the implications of their decisions. It will do so in three parts. The first part will introduce the 14<sup>th</sup> Amendment. The second will explain the consideration given to it by the framers. The third will explain that whilst the framers were right in the choices they made considering the vision they had for Australia, it is unclear whether or not Australia is better off as a result.

## II THE 14<sup>TH</sup> AMENDMENT

The 14<sup>th</sup> Amendment to the United States' Constitution was the second of three 'Reconstruction Amendments' added after the American Civil War.<sup>1</sup> The 'pervading spirit' of these amendments was to remedy the evil of slavery and elevate the freed slaves to full and equal citizenship.<sup>2</sup> The first of the three, the 13<sup>th</sup> Amendment, abolished slavery. Following its enactment legislators in the southern states quickly enacted 'black codes' to keep the newly freed slaves from full citizenship.<sup>3</sup> These actions were consistent with the 1857 *Dred Scott* decision of the Supreme Court, where those of African descent were held to be ineligible for citizenship and therefore did not have standing to sue in a federal court.<sup>4</sup> The 14<sup>th</sup> Amendment was adopted on

9 July 1868 to overcome both the ‘black codes’ and the *Dred Scott* decision. Its first section provided that:

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

By the end of the 19<sup>th</sup> Century non-whites were able to invoke the 14<sup>th</sup> amendment to invalidate legal discrimination. In *Strauder v West Virginia* the Supreme Court overturned the conviction of a black man by an all white jury on the basis that it violated the equal protection element of the 14<sup>th</sup> Amendment.<sup>5</sup> In *Yick Wo v Hopkins* the Supreme Court overturned a law that was being administered so as to exclude Chinese people from obtaining laundry licenses, for similar reasons.<sup>6</sup> However, these decisions have been described as ‘islands in a sea of judicial indifference to the rights of persons who were not non white males.’<sup>7</sup> Whatever hope they provided for non-white Americans was likely dispelled by the ruling of the Supreme Court in *Plessy v Ferguson*, where a 7-1 majority held that the amendment was never ‘intended to abolish distinctions based on color, or to enforce social, as distinguished from political equality.’<sup>8</sup> This case formed the basis of the ‘separate but equal’ doctrine that justified segregation until the decision in *Brown v Board of Education* over half a century later.<sup>9</sup>

The single dissenter in *Plessy v Ferguson*, Justice John Marshall Harlan, stated that ‘the judgment this day rendered will, in time, prove to be quite as pernicious as the decision of this tribunal in the *Dred Scott* case.’<sup>10</sup> This prophetic comment resonates with one made by Andrew Inglis Clark, the Tasmanian who proposed that Australia adopt the language of the 14<sup>th</sup> Amendment in its own Constitution. Following the defeat of his proposal in the 1898 Australasian Federal Convention, Clark wrote: ‘The more I consider it, the more I am persuaded that if the whole amendment is not adopted, the time will come when the omission will be deeply regretted.’<sup>11</sup>

### III THE AUSTRALIAN CONSTITUTION

Clark warned that Australia could not afford to ignore the experience of the United States when drafting its own Constitution.<sup>12</sup> A student and admirer of the American Constitution,<sup>13</sup> Clark is credited with introducing the following provision during the 1891 Convention in Sydney:<sup>14</sup>

A State shall not make or enforce any law abridging any privilege or immunity of citizens of other States of the Commonwealth, nor shall a State deny to any person, within its jurisdiction, the equal protection of the laws.<sup>15</sup>

This provision, which clearly draws from the first section of the 14<sup>th</sup> Amendment, appeared as clause 17 of Chapter V of the *Draft of a Bill to Constitute the Commonwealth of Australia* as adopted by the 1891 Convention.<sup>16</sup> It remained ch 5 cl 17 until March 1897, where, after a six-year slump in momentum for federation, the Australasian Federal Convention was held in Adelaide.<sup>17</sup> This Convention produced a new draft bill in which Clark's provision appeared as cl 110.<sup>18</sup>

When the draft bill was distributed to the colonies for their consideration, both the NSW Legislative Assembly and the Tasmanian Legislative Council proposed altering cl 110 to stipulate only that: 'A State shall not deny to any person, within its jurisdiction, the equal protection of the laws.'<sup>19</sup> Clark, who had just returned from the United States, circulated a memorandum of amendments that included a new cl 110 containing the entire (adapted) 14<sup>th</sup> Amendment.<sup>20</sup> His amendment was adopted by the Tasmanian Legislative Assembly and tabled at the Melbourne Convention. Clark himself, sick with influenza, did not attend.<sup>21</sup>

It did not take long for the delegates to concede that Clark's was 'the better amendment.'<sup>22</sup> It was at this point that the framers of Australia's Constitution first debated over the inclusion of the United States' 14<sup>th</sup> Amendment in its entirety: a definition of citizenship, protection of privileges and immunities, due process and equality before the law.<sup>23</sup> These four elements were confused, conflated and chopped up into pieces until the framers ultimately adopted what is now s 117 of the Constitution.

The first question asked regarding cl 110 came from Sir John Forrest, the Premier of Western Australia. He asked if 'citizen' would mean 'alien?'<sup>24</sup> From that moment in

time any chance of the Australian Constitution granting equal protection of the laws was doomed. Isaac Isaacs, aware of the decisions in both *Strauder v West Virginia* and *Yick Wo v Hopkins*, explained the origins of the 14<sup>th</sup> Amendment and the implications that such language would have on the States' ability to make discriminatory legislation.<sup>25</sup> Isaacs did not want the Constitution to stymie Victoria's ability to maintain industrial legislation that discriminated against Chinese people. Forrest did not want the Constitution to stop Western Australia from prohibiting Asian and African people from obtaining mining licenses – including those who were British subjects.<sup>26</sup>

The closest any delegate came to arguing in favour of equal protection of the laws was Richard O'Connor. Perhaps alluding to *Plessy v Ferguson*, O'Connor suggested that equal protection should be included, as it did not prevent the creation of laws that differentiate on the basis of race, but instead operated only to ensure equal administration of the law.<sup>27</sup> Clark, in a last ditch attempt to persuade the delegates to include it, wrote to Bernhard Wise suggesting the exclusion from cl 110 of 'all persons of Asiatic blood who have not been specially naturalized.'<sup>28</sup>

Thus equal protection of the laws was excluded on the basis that it was only granted in the United States as a consequence of having declared African Americans to be citizens.<sup>29</sup> Australia, without a 'disturbing...negro population,'<sup>30</sup> had no need to extend the equal protection of its laws to 'aliens' or those of 'coloured races.'<sup>31</sup> It also had, the delegates decided, no need to provide for due process or to include in its Constitution a definition of citizenship and guarantee of the privileges and immunities of citizens.

The same particular men who opposed extending equal protection of the laws to 'inferior races' opposed providing for 'due process of law' on the basis that deeming such a clause necessary would reflect poorly on their 'civilization.'<sup>32</sup> Both Isaacs and John Cockburn challenged anyone to point to a colony that had ever deprived a person of life, liberty or property without due process of law.<sup>33</sup> They did so whilst aboriginal people in three colonies were being forced onto reserves under colonial legislation.<sup>34</sup> When O'Connor lamented the notion that due process was going to be

excluded purely on the basis of the imputation that it was necessary,<sup>35</sup> John Gordon responded: ‘Might you not as well say that the states should not legalize murder?’<sup>36</sup>

More sophisticated consideration was given to the proposal to expressly define Commonwealth citizenship. Ultimately, the framers decided against doing so on the basis that it was not necessary,<sup>37</sup> and might lead to an interference with States’ rights.<sup>38</sup> They then eschewed the use of the word ‘citizen’ in lieu of the phrase ‘subject of the Queen’ when creating section 117.<sup>39</sup> This section was introduced to prohibit discrimination on the basis of a person’s state of origin,<sup>40</sup> something unrelated to the protections in the 14<sup>th</sup> Amendment. Had Clark been present at the Convention the outcome may have been different.

#### **IV WERE THE FRAMERS RIGHT?**

The framers wanted a white Australia and they got one. From their perspective, not adapting the 14<sup>th</sup> Amendment in the Australian Constitution was the right choice. Perhaps their honesty in this regard at least should be respected. There was not amongst Australia’s framers a man as hypocritical as Thomas Jefferson, who owned hundreds of slaves yet proclaimed in the Declaration of Independence that ‘All men are created equal.’ Men like Cockburn, Forrest and Isaacs expressed their prejudices openly and did not espouse such specious rhetoric.

The harder question to answer is whether or not it would have proved to be better for Australia if they had included Clark’s amendment. There is evidence in the records of the Convention Debates to suggest that, had the section been included, it would have initially been read down in the same manner as the 14<sup>th</sup> Amendment was in *Plessy v Ferguson*.<sup>41</sup> It also would not have been intended to affect the Commonwealth’s ability to discriminate under s 51(xxvi).<sup>42</sup> However, the language of the section would eventually have been interpreted in a more literal, egalitarian manner, just as the 14<sup>th</sup> Amendment was in the United States. It is likely that a person of non-white background would have successfully challenged State legislation on the basis that it was discriminatory and therefore unconstitutional.

If this had happened, then the moment where Australia stepped out of the dark and abandoned the prejudices that shaped its formation would have occurred in the High

Court rather than the Federal Parliament. The enactment of legislation such as the *Racial Discrimination Act 1975* (Cth) would have followed High Court decisions just as the US *Civil Rights Act of 1964* followed *Brown v Board of Education* and subsequent cases.<sup>43</sup> Some would consider this undemocratic.<sup>44</sup> Others would prefer to have a judiciary that is constitutionally empowered to protect the rights of the people.<sup>45</sup>

Consider the US Supreme Court's recent decision in *Obergefell v Hodges*.<sup>46</sup> The Court held 5-4 that the equal protection element of the 14<sup>th</sup> Amendment requires all states to grant same-sex marriages.<sup>47</sup> Progressively minded Americans welcomed the Supreme Court imposing marriage equality on the States who had not yet legalized it. Others, such as dissenting Chief Justice Roberts, saw the decision as five unelected people closing the debate, enacting their own vision of marriage and in the process 'making a dramatic social change that much more difficult to accept.'<sup>48</sup>

The inclusion of the 14<sup>th</sup> Amendment in the Australian Constitution could possibly have led to a similar decision by the Australian High Court, although the Australian situation would also be complicated by the Commonwealth's power with regard to marriage in s 51(xxii). Perhaps if there was constitutional protection of due process it could be used to invalidate aspects of the prospective *Australian Citizenship Amendment (Allegiance to Australia) Act 2015*.<sup>49</sup> However, as due process has been interpreted to be a fundamental element of the judicial power in s 71,<sup>50</sup> and the executive cannot make a finding of criminal guilt,<sup>51</sup> additional protection is unlikely to be necessary.

The true heart of the question concerns the delineations between legislative, executive and judicial power. Arguments in favour of entrenched constitutional rights often contain an underlying expectation that the judiciary will be more progressive than the legislature.<sup>52</sup> Certainly in Australia, given the High Court's creation of implied constitutional rights,<sup>53</sup> this may seem accurate. The problem is that if the High Court were to ever answer a constitutional question in a manner antithetical to Australian interests, absent the Court overruling its own decision as 'fundamentally wrong,'<sup>54</sup> the only way to undo it is by referendum.

In terms of the 14<sup>th</sup> Amendment, consider the US decision of *Roe v Wade*.<sup>55</sup> In that case the Supreme Court held that the word ‘person’ in the 14<sup>th</sup> Amendment did not extend to an unborn fetus.<sup>56</sup> Had the court held otherwise abortion might have been rendered constitutionally illegal throughout the entire country. In Australia, without the constitutional protections of the 14<sup>th</sup> Amendment, such litigation is impossible. Instead, faith is given to the democratic process: those who enact laws that violate fundamental freedoms can simply be voted out of office. Unfortunately, this eventuality is premised upon the existence a viable alternative to vote for and of an Australian electorate that values freedom, equality and the rule of law. It seems the choice is between the tyranny of majority rule and tyranny of the judiciary. Which is preferable depends upon what kinds of people occupy what roles in government at any particular time. This is why it is unclear whether the framers made the right decision when they chose to exclude the protections included in the United States’ 14<sup>th</sup> Amendment.

## V CONCLUSION

The framers of the Australian Constitution considered including within Australia’s Constitution the 14<sup>th</sup> Amendment to the Constitution of the United States of America in its entirety. They ultimately chose not to include any of it, although in the process they created a unique provision prohibiting any State from discriminating against a person on the basis of their state of origin. The framers excluded the 14<sup>th</sup> Amendment because they did not want to give equal protection to those they regarded as unequal, did not want to impinge upon the rights of the States and did not consider the civilized men of Australia as capable of abridging the rights of the people without due process of law. In doing so they created a system of government where the rights of the people are secured through their participation in the democratic process rather than through judicial control of legislative and executive action. It is not clear whether or not their choice was correct as the answer invariably depends upon what kinds of people occupy which positions of power at any given time.

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<sup>1</sup> Congressional Research Service and the Library of Congress, *Constitution of the United States of America: Analysis and Interpretation* (US Government Printing Office, interim ed, 2014), 1813.

<sup>2</sup> *Slaughterhouse Cases*, 83 US 36, 73 (Miller J) (1873).

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- <sup>3</sup> Walter F Murphy, James E Fleming and Sotirios A Barber, *American Constitutional Interpretation* (The Foundation Press, 1995), 873.
- <sup>4</sup> *Dred Scott v Sandford*, 60 US (19 How) 393 (1857).
- <sup>5</sup> *Strauder v West Virginia*, 100 US (10 Otto) 303 (1880).
- <sup>6</sup> *Yick Wo v Hopkins*, 118 US 356 (1886).
- <sup>7</sup> Murphy, above n 3, 885.
- <sup>8</sup> *Plessy v Ferguson*, 163 US 537 (1896).
- <sup>9</sup> *Brown v Board of Education of Topeka I*, 347 US 483 (1954); *Civil rights Act of 1964*, Pub L No 88-352, 78 Stat 241 (1964).
- <sup>10</sup> *Plessy v Ferguson*, 163 US 537, 559 (Harlan J) (1896).
- <sup>11</sup> Letter from Andrew Inglis Clark to Bernhard Wise, 20 February 1898 in John Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2005), 848.
- <sup>12</sup> *Ibid.*
- <sup>13</sup> John Andrew La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972), 13.
- <sup>14</sup> Williams, above n 11, 164.
- <sup>15</sup> Draft of a Bill to constitute the Commonwealth of Australia, *National Archives of Australia*, R25, 3, 12287516 ch 5 cl 14a.
- <sup>16</sup> Draft of a Bill to Constitute the Commonwealth of Australia (as reported from the Committee of the Whole Convention), *National Archives of Australia*, R17, 3, 11261268, ch 5 cl 17.
- <sup>17</sup> Williams, above n 11, 461-470.
- <sup>18</sup> Draft of A Bill to Constitute the Commonwealth of Australia, *National Archives of Australia*, R216, 160, 660090, cl 110.
- <sup>19</sup> New South Wales, Votes and Proceedings of the Legislative Assembly, Third Session of the 17th Parliament (4 August 1897) 261; Williams, above n 14, 667.
- <sup>20</sup> Williams, above n 11, 705.
- <sup>21</sup> JM Neasy, 'Andrew Inglis Clark Senior and Australian Federation' (1969) 15(2) *Australian Journal of Politics and History* 1, 18.
- <sup>22</sup> *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 20 January to 17 March, 1898, 668 (Josiah Symon, Isaac Isaacs).
- <sup>23</sup> See generally John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901), 953-4.
- <sup>24</sup> *Ibid* 665 (Sir John Forrest).
- <sup>25</sup> *Ibid* 668-669 (Isaac Isaacs).
- <sup>26</sup> *Ibid* 665-666 (Sir John Forrest).
- <sup>27</sup> *Ibid* 674 (Richard O'Connor).
- <sup>28</sup> Letter from Andrew Inglis Clark to Bernhard Wise, 20 February 1898 in Williams, above n 11, 848.
- <sup>29</sup> *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 20 January to 17 March, 1898, 685 (John Cockburn), 686 (Isaac Isaacs), 1791-1792 (William Trenwith).
- <sup>30</sup> *Ibid* 1792 (William Trenwith).
- <sup>31</sup> *Ibid* 668 (Sir John Forrest), 669 (John Gordon), 672 (Richard O'Connor), 687 (Isaac Isaacs).

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- <sup>32</sup> Ibid 688 (John Cockburn), 689 (John Gordon).
- <sup>33</sup> Ibid.
- <sup>34</sup> *Aborigines Act 1897* (WA); *Aborigines Protection Act 1886* (Vic); *Aborigines Protection and Restriction of the Sale of Opium Act 1897* (Qld).
- <sup>35</sup> *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 20 January to 17 March, 1898, 689 (Richard O'Connor).
- <sup>36</sup> Ibid 689 (John Gordon).
- <sup>37</sup> Ibid 672-3, 683, 1795-6 (Richard O'Connor), 1782 (Josiah Symon), 1795 (John Cockburn, George Reid).
- <sup>38</sup> Ibid 1785 (John Quick), 1792 (William Trenwith), 1793 (Bernhard Wise), 1794 (Josiah Symon), 1797 (Isaac Isaacs).
- <sup>39</sup> Ibid 1785 (John Forrest), 1786 (Edmund Barton).
- <sup>40</sup> Ibid 1796 (Simon Fraser, Richard O'Connor, Josiah Symon); see generally *Street v Queensland Bar Association* (1989) 168 CLR 461; James Stellios, *Zines's The High Court and the Constitution* (The Federation Press, 6 ed, 2015), 616-20.
- <sup>41</sup> *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 20 January to 17 March, 1898, 1788 (John Quick), 1789 (Patrick Glynn, Isaac Isaacs).
- <sup>42</sup> Ibid 687 (Patrick Glynn, Isaac Isaacs, Charles Kingston, Richard O'Connor).
- <sup>43</sup> *Hernandez v Texas*, 347 US 475 (1954); *Bolling v Sharpe*, 347 US 497 (1954); *Brown v Board of Education of Topeka II*, 349 US 294 (1955).
- <sup>44</sup> See, eg, James Allan and Richard Cullen, 'A Bill of Rights Odyssey for Australia: The Sirens are Calling' (1997) 19 *University of Queensland Law Journal* 171, 177; Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2000) 135 *The Yale Law Journal* 1346; Bob Carr, 'The Rights Trap: How a Bill of Rights could Undermine Freedom' (2001) 17(2) *Policy* 19, 19; George Brandis, 'The Debate We Didn't Have to Have: The Proposal for an Australian Bill of Rights' (2008) 15 *James Cook University Law Review* 24, 34.
- <sup>45</sup> See, eg, Commonwealth Constitutional Commission, *Final Report of the Constitutional Commission* (1988), 467-468; David Malcolm AC, 'Does Australia Need a Bill of Rights?' (1998) 5(3) *Murdoch University Electronic Journal of Law* 22, [22]; Julian Burnside, 'It's Time. A Bill of Rights for Australia' (Speech delivered at the 2008 International Human Rights Day Address, Adelaide, 13 November 2008).
- <sup>46</sup> *Obergefell v Hodges*, 576 US \_\_\_ (2015).
- <sup>47</sup> Ibid 10-27 (Kennedy J).
- <sup>48</sup> Ibid 2 (Roberts CJ).
- <sup>49</sup> Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth).
- <sup>50</sup> *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 580 (Deane J).
- <sup>51</sup> *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1, 11 (Jacobs J), citing *R v Davison* (1954) 90 CLR 353.
- <sup>52</sup> Michael Kirby, 'A Bill of Rights for Australia—but do we need it?' (1995) 21(1) *Commonwealth Law Bulletin* 276, 280.
- <sup>53</sup> See generally *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104.
- <sup>54</sup> *McGinty v Western Australia* (1996) 186 CLR 140, 235 (McHugh J).
- <sup>55</sup> *Roe v Wade*, 410 US 113 (1973).
- <sup>56</sup> Ibid 157 (Blackmun J).