

Protecting Commonwealth from Church: Clark's 'Denominational Education', and Beyond

Richard Ely

This essay has a double purpose. The first is to discuss the background, aim and context of Clark's 1885 essay 'Denominational Education', which was Clark's most extended venture into Church/State issues. The second is to explore Clark's subsequent efforts to define, defend and, where possible, constitutionally entrench what he saw as the proprieties of the relationship between the civil and the religious.

Introduction to 'Denominational Education'

This essay, which is in manuscript form in the Clark Papers,¹ was written shortly before the Bill which became the Tasmanian 1885 Education Act was to be considered by Parliament. The Second Reading of that Bill in the House of Assembly began late in August. Given that the essay is an urgent call to action, it was probably written in July or August 1885.²

From internal evidence, it is clear it was read to close associates of Clark who shared his fear that a movement to obtain State financial aid for denominational elementary schools might succeed. Since 1854 only non-denominational elementary schools had been publicly funded.³ Agitation in the years preceding the 1885 debates in the legislature, as indicated by letters to newspapers, petitions, and such-

1 University of Tasmania Archives, Clark Papers, C4/F 18 (i). Clark's essay is discussed, and a significant part of it reproduced, in Richard Ely, 'Andrew Inglis Clark and Church-State Separation', *Journal of Religious History*, vol. 8, no. 3, 1975.

2 First Reading 22 July; Second Reading 26, 27 August, 1 September; in Committee 4 September; Third Reading 8 September (House of Assembly). Debates were reported in detail in the *Mercury* on the day following.

3 'Elementary schools' refers to what are now called primary schools. When State high schools were established early in the twentieth century these were called secondary schools, and 'elementary' schools were called 'primary' schools.

like had come mainly, although not only, from Roman Catholics. Clark assumes that this church was the prime mover.

Admittedly he refers at the start to one or more 'theological sects', and to the prospect that 'the several sects' would seek aid for schools of their denomination if the 'Payment by Results' agitation succeeded; but it soon becomes clear that the Catholic Church is only one he has in mind. Nearly all non-State Tasmanian elementary schools in the last third of the nineteenth century were private and not denominational ventures. Richard Davis, in *State Aid and Tasmanian Politics, 1868-1920*, says that 'most Protestant clergy were completely satisfied with the [non-denominational] system.'⁴ A questionnaire was issued by the 1883 Tasmanian Royal Commission on Education to clergy who visited public elementary schools to give religious instruction. Time was provided for this by statute, but attendance by children at such classes was voluntary. Very few Protestants, in their responses, Davis notes, expressed dissatisfaction with the existing system.⁵ In Tasmania, as in Australian colonies generally in this period, Protestant denominations were content to invest most of their educational energies in Sunday schools. Most Protestants were content that Church and State be separate, and were not troubled (indeed regarded it as proper) that Catholic schools would not receive State aid.⁶ Some Tasmanian Anglicans still favoured the denominational model of elementary schooling, but these (usually of the high church party) were a minority in their own church. Their bishop represented the general Anglican view, Davis considered, when he told the Commission that while he saw a denominational system as a distant ideal, he did not object in practice to mixed education.⁷ Clark's 'one or more' can be plausibly read as a lawyer's just-in-case, catch-all phrase.

4 Published in Hobart, 1989, p. 29. Davis has offered the most complete study of religious controversies associated with the 1885 Act, in part 2 of that study. See also Ely, 'Clark and Church-State Separation', pp. 274-280. Useful for the general historical background are A G Austin, *Australian Education, 1788-1900: Church, State and Public Education, 1788-1900*. Melbourne, 1965; C Reeves, *A History of Tasmanian Education: State Primary Education, vol. 1*, Melbourne, 1935; D Phillips, 'making more adequate provision': *State Education in Tasmania, 1831-1985*, Hobart, 1985.

5 Davis, *State Aid in Tasmanian Politics*, p. 29.

6 J S Gregory, *Church and State: Changing Government Policies towards Religion in Australia; especially With Reference to Victoria since Separation*, Melbourne, 1973, offers a general interpretation similar to that of Davis. So does A G Austin, in *Australian Education, 1788-1900*.

7 Royal Commission on Education, 1883, *TPP (LC)*, Paper 9, p. 92.

But while Catholics made the running,⁸ some non-Catholic liberals (although not liberals of Clark's kind) were responsive to the argument — the distributive justice argument — that Catholics should receive, from public funds allocated to elementary schooling, a proportionate share calculated by reference to the number of Roman Catholics in the community. Prior to the debate on the Education Bill supporters of 'Payment by Results' offered a wide variety of arguments, several of which were to recur in the actual debates.

In 'Denominational Education' Clark considers only three arguments, implying that others were subsidiary. These three might be called — though Clark does not use these terms — (i) the 'Catholic conscience' argument, (ii) the 'equity argument' and (iii) the 'inequity argument'. Though distinct in concept, in practice they often overlapped.

According to the first, given that Catholic parents could not in conscience allow their children to be instructed in secular knowledge in *non-Catholic* schools, the schools to which they *could* in good conscience send their children should be publicly funded to the extent that they also demonstrated proficiency in providing secular instruction.⁹

The 'equity argument' was broadly as follows. Assuming that it was the duty of the State to make financial provision for elementary secular education, denominational schools, to the extent that they provided good secular elementary education according to the standard set by the State, should be as eligible to be funded as were State schools. This, claimed a letter-writer supporting this form of State aid to church schools, was in accord with the 'just principle of equal remuneration for equal work'.¹⁰

The 'inequity argument' is often called the double-taxation argument. In the words of one letter-writer, it was unfair that Catholics had to 'pay school fees to the Catholic teacher, besides paying their quota of taxes for the support of State schools'.¹¹

It was the immediate and remote implications of the 'Payment by Results' system for the body politic which Clark discussed among his like-minded acquaintances. In the process he offers the clearest

8 Davis, *State Aid and Tasmanian Politics*, pp. 24-46, offers a useful summary of how they did so.

9 Based on speeches in the Second Reading and Committee debates, House of Assembly; and testimony by Frs J Sheehy and R Kelsh, Royal Commission on Education, 1883, *TPP (LC)*, Paper 9.

10 *Mercury*, 15 August 1885.

11 *Mercury*, 4 July 1885. Other arguments used by denominational school interest are briefly summarised in Ely, 'Clark and Church-State Separation', p. 278.

statement we have of what he considered proper and improper relations between Churches and the State. In particular, he explores the threat a church — and he mainly means the Roman Catholic one — can, if not vigilantly confined to what he saw as its proper place, pose for civil and religious liberty. ‘Cry, Danger!’ is his paper’s tenor.

The group Clark addressed was possibly the coterie of kindred spirits sometimes called the Minerva Club, which regularly met on Saturday night at Clark’s Battery Point home, ‘Rosebank’.¹² ‘Possibly’ is safer than ‘certainly’, since we cannot be sure Minervaites were completely of one mind on the issue of the proper form of Church-State relations.

The ‘Payment by Results’ controversy was only one of several issues likely to arise in debates on the forthcoming Education Bill. From 1863 to 1884 ‘public schools’, as they were called, were administered by a Central Board composed of citizens of standing. Day-to-day supervisory responsibility was devolved to Local Boards. The Central Board was a statutory body not accountable to the legislature but to the Executive Council, and Inspectors reported to the Central Board. This Board administered an annual grant, reporting to parliament annually. The Report was printed in the Parliamentary Papers. Parliament could in practice influence the Central Board, which it funded, but there was no Education Department and no Minister of Public Instruction. That remodelling on these lines was the way of the future, however, was signalled by an Act of 1884 which abolished the Central Board, as from 31 December 1884, and transferred administrative authority to the Chief Secretary. The chief purpose of the 1885 Act was to bring the administration of Tasmanian elementary education into line with that in most mainland colonies by creating a Minister and Ministry of Public Instruction. In principle, but not always in practice, this was to mean administrative centralisation, with parliament presiding at the apex. A chain of command was to run from parliament, to the Minister, to inspectors and local Boards of Advice (which replaced Local Boards), and, through these, to teachers. In the event, the ‘Payment by Results’ agitation, in contrast to these other envisaged re-shapings, failed decisively. ‘Payment by Results’ found little support from the government of the time, led by the outspoken secularist Adye Douglas, and went down in the House of Assembly by twelve votes to three.

Clark would doubtless have been gratified by the statement of Attorney-General Dodds during the Second Reading:

12 Ely, ‘Clark and Church-State Separation’, pp. 279-80.

Why should not the Protestant, Roman Catholic, Wesleyan and other denominations agree to their children sitting side by side on the school forms together? Why should the State assist in educating [children] to the belief that they were to be separated in after life on account of their differences of belief? The State ought not to assist in the perpetuation of differences of this character.¹³

Attention should be drawn to three elements in what might be called the context of controversy of Clark's paper. First, Clark refers a few times to the 'alleged grievance' of Catholic parents. This phrase echoes the terms of reference of the Victorian Royal Commission on Education (sometimes called the Rogers-Templeton Commission) of 1882-4.¹⁴ In the wording of the Governor's formal commission, one of the Commission's task was to inquire into and report on 'the alleged grievance of a portion of the population'.¹⁵ As the Third and Final Report of June 1884 makes clear, the aggrieved party in question was Roman Catholic parents, whose complaint was that the State did not pay the salaries of teachers in Catholic schools. An important part of 'Denominational Education' was an almost verbatim quotation from this Report.

Second, in January 1884, the Victorian Royal Commission's Chairman, John Warrington Rogers, who was well-known in Tasmania, having been Solicitor-General there many years earlier, took leave of absence from the Commission to take up an Acting-Judgeship in the Tasmanian Supreme Court. Rogers, despite his absence, remained Chairman, and in that capacity submitted a Report. He recommended funding denominational elementary schools on the basis of 'payments by results'. This came to be called a Minority Report, although, for reasons to be made clear in a moment, Rogers contested that designation. There is no basis for saying that Rogers, while in Tasmania, took steps personally to assist the Catholic agitation in that colony. Clark, in his capacity as barrister, possibly had dealings with him; and possibly too, given the smallness of Hobart society, pertinent conversations as well.¹⁶

Third, the absent Rogers was not alone among the Victorian Commissioners in supporting payment to teachers in Catholic

13 *Mercury*, 27 August 1885.

14 Third Report of the Rogers-Templeton Royal Commission. *Victorian Parliamentary Papers*, 1884, vol. 3, Paper 47.

15 *Ibid.*

16 On Rogers, see article by Henry Finlay, *Australian Dictionary of Biography*, vol. 6.

denominational schools on the basis of 'Payment by Results'. In the meeting of the Commission on 26 June 1884 at which final decisions were made as to what the Commission would and would not recommend, six Commissioners voted against recommending 'Payment by Results' to denominational schools, while five were for it. Given that Rogers, in his absentee report, also favoured remedying the 'alleged grievance', his presence would have meant a tied vote, with complications bound to ensue. So the win to the Church-State separationists, as Clark would have interpreted this result, was the classic 'close run thing'. Ripples from controversy in the Victorian epicentre, and the kind of reminder which the presence for a time of Rogers represented, gave Clark ample incentive to concentrate his mind on issues posed by 'Payment by Results', and also reason not to take for granted that the cause of the Catholic lobby in Tasmania was hopeless.

Denominational Education

Andrew Inglis Clark

It is certain that at a not very distant date in the future the legislature of Tasmania will have to deal with the claims of one or more of the theological sects that have adherents amongst us for a separate grant of money for the maintenance of separate schools for the education of the children of the resident members of the several sects in the name of which those claims will be made. In the neighbouring colonies of New South Wales and Victoria these claims have already been made and have taken their place among the most prominent political questions of the day. The proposal made by the sects demanding separate grants is that the amount of the grant should in each case be proportioned to the number of children annually instructed in the denominational schools up to a fixed standard of purely secular knowledge and the name given to the proposal is 'Payment by Results'.

The argument put forward by those demanding this system of education is shortly as follows. They say that they believe that a serious if not irreparable injury is done to the moral and spiritual nature of every child that is educated in only secular knowledge and in a school where all theological questions totally ignored, and that while the state only requires a certain proficiency in purely secular knowledge in return for the money expended by it in providing schoolhouses and teachers for that purpose it ought to be willing to contribute proportionately to the support of any school producing the required proficiency in such knowledge in a given number of children and that by so contributing the state would enable the claimants to maintain schools in which their children could be educated without suffering the injury otherwise inflicted upon them and

at the same time receive in return everything that the public school is maintained for. In other words the claimants for separate grants say that they cannot send their children to the schools provided by the state without perpetrating a violation of their consciences and that if in order to avoid this evil they erect and maintain schools of their own for the education of their children in combined secular and theological teaching then they are unequally and unjustly treated by the state if they are taxed to support the purely secular schools and are refused any contribution to the support of their own. As thus stated the question propounded is a purely political one and ought to be considered and discussed altogether apart from the question of the necessity or desirability of accompanying or supplementing the intellectual training with a development of their religious faculties. And as a purely political question the task it imposes upon the opponents of the proposal is to reconcile the refusal of it with the two fundamental principles of true political freedom, viz the inviolability of the human conscience and equality of burdens and privileges by all classes and institutions within the jurisdiction of the state.

With regard to the first of these principles (that is) the inviolability of the conscience, I think that no one will dispute the position that it is an essential ingredient in any adequate conception of perfect liberty of thought and action; but there may be cases in which the conscience of one or more individuals must be temporarily violated in order to preserve the remaining elements of political freedom for the future enjoyment of the very persons whose personal liberty of thought and action may be for the time being curtailed as well as for all the other members of the community. Such may be the case when in a time of great danger of conquest and domination by a hostile state certain individuals who have religious objections to all warfare and physical resistance to enemies may be compelled either to contribute to the necessary funds for keeping a defending army in the field or to actually serve as soldiers in the midst of it. A violation of the consciences of some members of the community may also be justified when the course of action which they say their consciences dictate to them is fraught with actual or threatened danger to their neighbours and other citizens who may come in contact with them, for example when on alleged grounds of religious scruples certain people claim the right to exempt themselves from necessary sanitary precautions against infectious diseases. The principle upon which such violations of conscience as these are committed and justified is the safety and benefit of the community as a whole as against the absolute liberty of opinion and conduct on the part of a mere section of the community accompanied with danger or evil to the whole. Is this principle in any way invoked in the settlement of the question of denominational education? If it is, it must receive paramount recognition in dealing with the question. But if it is in recognition of that fundamental principle that we claim to refuse payment by results, it is incumbent on us to prove the danger or the detriment that would accrue to the state upon acceding to the demand for it.

I have taken up this alleged aspect of the controversy first, because I would like very much to hear it discussed upon the assumption that the grievance which the Roman Catholics allege they suffer under a purely secular system of

education conducted by the state is a real and substantial grievance to them and is as capable of being as entirely removed by legislation as were the grievances suffered by protestant¹⁷ dissenters under the Test Act and the Corporation Act and the Conventicle Act and other similar laws against liberty of thought and action which were proved to be totally unnecessary for the safety or benefit of [the] state and which have therefore been abolished. At the same time I think that it is perfectly open to discuss the preliminary question of the reality and substantiality of the alleged grievance. Not that I think that it is open to us to charge those who allege the existence of the grievance with the assertion of a deliberate falsehood for political or [religious?] purposes; because however much we may feel tempted to make such a charge, if we once allow ourselves to deal with the question from that standpoint we shall be introducing a method of argument that will endanger the legitimate rights of every minority and place an obstacle in the way of the removal of every genuine and remediable grievance. But the question which I think that we can fairly put in reference to the reality and substantiality of the alleged grievance is this:— Is the danger or disadvantage which the children of Roman Catholic parents are exposed to if they are sent to purely secular schools provided by the state any different in its character from the danger or disadvantage which a strict and pious Roman Catholic must always feel that his children are exposed to by the absence in every other institution provided and conducted by the state of that recognition of the teaching [of the] Roman Catholic religion and of the authority of the Roman Catholic Church which would be present in every similar institution provided and conducted by [a] purely Roman Catholic community. In other words does the alleged justification of the demand of the Roman Catholic portion of the population in a protestant country for separate schools assisted by the state for the education of their children logically carry with it a similar justification for the at present unmade demands for a separate university and other charitable institutions for the reception of Roman Catholic inmates all similarly assisted or supported by the state? In short does the alleged justification for the demand for denominational education logically carry with it a demand that the state should restore to the Roman Catholic portion of the population the whole of that portion of its revenue which it derives from them as citizens to be expended by them in establishing and maintaining a social organization sufficiently separate from the state to permit it to be sufficiently permeated with Roman Catholic teaching and influence to provide the requisite salvable conditions for the souls of its members which it is the alleged mission of the Roman Catholic Church to create in the world?

If all these as yet unmade demands are logically involved in the alleged justification of the demand for denominational education, then the state on the very first principle of political science must refuse it; because the concession of it would be a recognition of the propriety of an imperium in imperio, and a divided sovereignty is simply political emasculation and asthenia. But no such consequence was involved in the repeal of the punitive and prohibitory

17 In this essay Clark consistently writes 'protestant' with a lower case 'p'. The possible significance of this is discussed in the last section of this paper.

legislation directed against protestant dissenters. In fact the great difference between the two cases is that the demand of the protestant dissenters when suffering under the repealed legislation I have referred to was to be relieved of all separate recognition by the state and to be treated simply as units of the one social organism to which all ordinary legislation related but the demands of the claimants for denominational education is exactly the reverse and is a demand for separate recognition and for special treatment as units of another organism apart from the state.

In this view of the case separate grants by the state in aid of denominational schools upon the principle of payment by results must necessarily amount to state endowment of particular forms of religion. This is bluntly [denied?] by Roman Catholics and they are accustomed to attempt to rebut the assertion by the following argument. 'In a strictly Roman Catholic family', they say, 'everything is subordinated to the inculcation of the Roman Catholic Church, it being the first object of the parents to make their children good Catholics, and that if any assistance by the state for the maintenance of Roman Catholic schools in which these children are taught the rudiments of secular knowledge as well as the elements of the Roman Catholic religion is an endowment of that religion, then the provision by the state of purely secular schools at which the children of strict Roman Catholic parents are instructed in the first elements of secular knowledge is also an endowment of the Roman Catholic religion because the state thereby assists the parents of such children to train and equip for the occupancy of various positions and the performance of various functions in the community a number of persons in whom the doctrines of the Roman Catholic Church have been carefully and deeply implanted, and that as a natural consequence that church must be greatly strengthened by the process.'

I shall not attempt to answer this argument as I prefer to hear it discussed and answered in the discussion that will follow the reading of the paper. I have extracted it almost verbatim from an article which appeared in the Melbourne Review for last January and which is entitled 'Those Catholic Claims'. I feel bound to admit that the article is on the whole a very able defence of the demand for separate schools on the part of those religious denominations that desire them; but the argument trenches to a large extent upon what I have already stated to be quite a separate question from the one I have attempted to discuss in this effort, viz the desirability of training the religious as well as intellectual faculties of children. I wish especially to steer clear of that question tonight and to discuss the demand for denominational education upon the system of payment by results purely as a political matter, because I believe that it is only in its political aspect that it can be entertained by the legislature of any colony like Tasmania which has expressly abolished state aid to religion.

There are a number of arguments which are no doubt familiar to you all in connection with this subject which I have not touched upon; but many of them will I think be admitted to be subsidiary and not go to the heart of the controversy. My object has been to endeavour to open a debate which will go right to the heart of the controversy and which will have the effect of preparing us all for action when it arises in Tasmania with clear convictions to stand upon.

Protecting Civil Society from Excessive Claims in the Name of Religion, with some help from Political Science

This section title is, I think, a fair summary of what Clark hoped he was helping to achieve. The argument of 'Denominational Education' has a dual focus. It is of interest both for what it reveals about his concept of the proper relation between Church and State, and as an application of 'political science'. I also seek to display the comfortable fit between Clark's ideas and political science categories.

Clark nowhere, as far as I can discover, defines political science, but I suppose it meant for him a systematic study of political processes and institutions — a study with an empirical descriptive and analytic side, and probably a normative one, too. Clark's 'Why I am a Democrat' and 'Machinery and Ideals in Politics' would probably have been seen by him, and would be classified today, as exercises in political science combining descriptive, analytic and normative aspects.

How often, other than in 'Denominational Education', did Clark use the term 'political science' (or close synonyms)? Only once, as far as I can tell from an a cursory survey of his published and unpublished writings. That was in 'Machinery and Ideals in Politics'. In that essay he commended the Hare scheme of proportional representation, declaring that it's superiority had been 'long ago recognised by discriminating students of political science.' Clark's hope in 'Denominational Education' is to demonstrate, as beyond reasonable doubt, the civic undesirability of 'Payment by Results'. The aim in the 'Denominational Education' is to *commend*, and in the 'Machinery' essay to *criticise*; but in each case support by 'political science' is invoked. That of course implies nothing as to the actual merits of Clark's arguments in either case, but does suggest he was not unsophisticated in arts of persuasion.

Be that as it may, in 'Denominational Education' Clark sets up certain political-science hoops for the 'Payment by Results' scheme to jump or wriggle through, to be eligible for consideration by the legislature.

The first hoop or test is the requirement that the proposal be 'purely political'. This at least means that the proposed reimbursement for secular education services can be assessed without

reference to theological or religious considerations.¹⁸ Clark provisionally accepts that it can, in order to allow argument to proceed.

That brings one immediately to two further hoops. The proposal needed to be consistent with the two fundamental principles of true political freedom:

The second is 'the inviolability of the human conscience'.¹⁹

The third is the 'equality of burdens and privileges by all classes and institutions within the jurisdiction of the state.'²⁰

On its face the 'Payment by Results' proposal, seen in light of the arguments advanced in support of that proposal noted in the Introduction, steps through these hoops too.

If these three hoops are negotiated, or it is at least plausible to say they have been, the onus of demonstrating that the legislature should, nevertheless, resist the demand for 'Payment by Results' rests, Clark allows, with that proposal's critics.

18 Clark does not mention John Locke, but here, and later in this section, he expresses a view practically equivalent to Locke's claim that the Commonwealth is a society of men 'constituted for preserving and advancing their civil goods'. See R Klibansky & J Gough (eds), *John Locke: Epistola de Tolerantia, A Letter on Toleration*, Oxford, 1968, p. 65. (Hereafter: Locke: *A Letter on Toleration*.) This is the so-called 'First Letter on Toleration.' Although this view, and some noticed later, can fairly be called Lockean, Locke's ideas were widely current, and Clark may have formed or appropriated them in a multitude of contexts. That said, it would surprise me if an avid reader such Clark was not directly acquainted with Locke's main writings.

19 Locke, *A Letter on Toleration*, pp. 125-7, 141-9.

20 Clark's phrase is close in substance, and partly terms, to remarks by Bentham in Pamphlet 44, 1823, *Leading Principles of a Constitutional Code for Any State*, reproduced under this title in J Bowring (ed.), *The Works of Jeremy Bentham*, vol. 2, Edinburgh, 1843, pp. 271-2.

Lastly, as to equality. In the instances of *subsistence*, *abundance* and *security*, the title of the object to the appellation of an instrument of felicity, is stamped, as it were, upon the face of it — designated by the very name. Not so in the case of equality. In the idea of equality, that of distribution is implied. Distribution is either of *benefits* or *burdens*. ... In proportion as equality is departed from, inequality has place: and in proportion as inequality has place, evil has place.

The natural equality of all men is asserted by Locke in *Of Civil Government: Second Treatise*, Introduction by R Kirk, Chicago, 1953, ch. 2, sections 4 and 5. It is of interest that a question set by Clark in the 1905 'Theory of Law and Government' paper at the University of Tasmania was: 'In what sense does Locke declare that "all men are by nature equal"?'

The fourth hoop is intimately related to the first three. The fourth hoop might be called (though Clark does not do so) the *salus populi suprema lex* test ('The well-being of the people is the highest law').²¹ He gives examples of situations in which the test should be applied. In times of grave military peril there may be circumstances when conscientious objectors to military service may properly be conscripted. In places where there is serious risk of infectious disease spreading, sanitary precautions may be enforced on those who protest them on the basis of religious scruple. The 'safety and benefit of the community as a whole' overrides 'absolute liberty of opinion and conduct'.²² In a civil community this requirement, which Clark called a 'principle', is 'paramount'. If 'danger or detriment' of this magnitude flowed from the proposal to fund denominational schools by the system of 'Payment by Results', that proposal should be rejected. But to reiterate — and this reflects Clark's belief that inviolability of conscience was 'an essential ingredient in any adequate conception of perfect liberty of thought and action' — the onus was on any claiming that danger to 'prove' it.

Clark thinks he can do so. He argues that the proposal, if implemented, would form the basis for subverting the sovereignty of the State, thereby undermining the civil society project as such. What was involved, he considered, was no less than 'the first principle of political science'.

Clark argued that if 'payments by result' was accepted by the legislature *on the basis of the parental conscience argument used in its support*, a principle of legislative action would have been endorsed which undermined the basis for legislatively resisting *further* lay Catholic demands, also urged on the plea of burdened conscience, that the State subsidise *other* institutions of that church, such as Catholic hospitals and universities. The legislature would, thereby have recognised *in principle* 'the propriety of an *imperium in imperio*, and a divided sovereignty is simply political emasculation and asthenia.'²³ In effect, although he does not say so explicitly, he is also denying that the 'Payment by Results' issue was 'a purely political one'. He implies, therefore, that not even the first hoop had been negotiated.

21 The term and the idea are used by Locke. See *Essay Concerning the True Original, Extent and end of Civil Government*, in E Barker (ed.), *Social Contract: Essays by Locke, Hume and Rousseau*, London, 1971, p. 93.

22 The same principle, in different words, is expressed by Locke in *A Letter on Toleration*, pp. 109-111.

23 Similarly, Locke, *A Letter on Toleration*, pp. 131-135.

Clark draws the threads of his argument together in words which practically reproduce those of the 1884 Victorian 'Final Report of the Royal Commission on Education'. Clark said:

In this view of the case separate grants by the state in aid of denominational schools upon the principle of payment by results must necessarily amount to state endowment of particular forms of religion.

The words of the Victorian Report were: '... any payment by the State to Roman Catholics towards the education of their children would be tantamount to endowment by the State of that particular form of religion.'²⁴ These words of the Commissioners, taken in isolation, can be read as implying that funds in support of the education of Catholic children in *any* schools (state and denominational) were an endowment of that form of religion. However, when the words are read in context it is clear that only Catholic denominational schools were meant. The corresponding words of Clark are free of this superficial ambiguity.

The Fairfield Defence of Catholic Claims

Charles Fairfield was the author of the January 1885 article in the *Melbourne Review* supporting claims by Catholic parents for State financial aid for denominational schools. Fairfield attacked the conclusion of the Commissioners that payment by the State to Catholics towards the education of their children 'would be tantamount to endowment by the State of that particular form of religion'. Fairfield's argument, which Clark summarised, has been aptly called (although not by Clark) a *reductio ad absurdum*. That is how it was described in a *Mercury* letter of 23 July 1885, written under the pseudonym KAPPA, which severely criticised financing denominational schools on the system of 'Payment by Results'. We can be sure Clark did not write this letter, but read it with interest, because in the Clark Papers there is a reply to a congratulatory letter written by Clark to KAPPA, C/- the *Mercury*. (KAPPA was in fact a State School teacher, Samuel Lovell.²⁵)

Fairfield's argument was reproduced by Clark only in part. Fairfield had framed his argument on the basis of reading the

24 Third Report of the Rogers-Templeton Royal Commission. *Victorian Parliamentary Papers*, vol. 3 (1884), Paper 47, p. 483.

25 Lovell's letter is discussed in Ely, 'Clark and Church-State Separation', pp. 275-6.

Victorian Commissioners as meaning — when they said that State payments towards the education of Catholic children amounted to endowment of the Catholic religion — that funding by the State of instruction of Catholic children in *either* State *or* Catholic schools was an endowment of their religion. That misunderstanding is verbally intelligible. But it is perverse when the Commissioners' words are read in context. This makes clear they were referring only to education of Catholic children in Catholic schools. The misreading enabled Fairfield to conclude (this is the *reductio* in his argument) that the logic of the Commissioners' argument was, that no Catholic children should 'receive any secular education from the State at all', and even that all Roman Catholics should be deported. The wording of the Commissioners was certainly careless. But Fairfield's misreading was exotic.

Clark sidestepped possible verbal embroglios by reshaping Fairfield's argument as a criticism of what the Commissioners actually proposed, when their words are read in context — that is, that the State in funding *Catholic schools* on the basis of 'Payment by Results' endowed their religion. Clark's effort to reshape Fairfield's argument lacked economy and elegance, issuing in one of his monster sentences (174 words). It may be helpful to set it out as propositions.²⁶

- 1 In a strict Roman Catholic family the first object of the parents is to make their children good Catholics.
- 2 If State funding of Catholic schools which instruct in *both* secular knowledge *and* elements of the Roman Catholic religion is an endowment of that religion, then the provision by the State of purely secular schools attended by the children of strict Catholic parents also endows the Roman Catholic religion.
- 3 This follows because State schools, in providing secular knowledge to children of strict Roman Catholic parents, help the parents of those children to train and equip, for performing various functions in the community, persons in whom the doctrines of the Roman Catholic Church are deeply implanted.
- 4 The Catholic Church is thereby greatly strengthened.
- 5 This is tantamount to saying that the State, by providing secular instruction to such children in its elementary schools, thereby endows the Roman Catholic religion.

26 The quotation marks surrounding the Fairfield sentence in Clark's paper might mislead modern eyes. They represent, in statement form, Clark's reconstruction of Fairfield's argument. In fact some, but some only, of Fairfield's words are used.

While it is clear Clark expected his listeners to say what they thought mistaken in the restated argument, his tortuous reconstruction may have made his listeners' task needlessly difficult. That said, the general drift of Clark's earlier argument, summed up in his statement in the second-last paragraph that Tasmania 'has expressly abolished state aid to religion', and in the call-to-action in the paper's final sentence, place it beyond doubt that it was the fifth claim (above) which Clark wanted to see discussed and refuted.

One cannot say for certain what Clark himself would have considered a telling rebuttal. However, it would be surprising if Clark did not think that in the earlier part of his paper he had offered a basis for refuting Fairfield's claim. One possibility for this role is what Clark said about the relief granted to English Protestant dissenters, early in the nineteenth century, by abolishing the Test Act, the Corporation Act and the Conventicle Act, removing penalties and prohibitions these imposed, and thereby treating Protestant dissenters 'simply as units of the one social organism to which all ordinary legislation related'. The basis for these repeals, according to Clark, was that these laws were considered 'unnecessary for the safety or benefit of [the] state'. Clark clearly allows — and it would be absurd to deny — that civic parity thereby gained was regarded by dissenters as religiously beneficial to them. But that the legislation confers parity in this respect does not make it an endowment of their religion, and Clark comes close to making this precise point. While dissenters demanded civic parity, he says,

the demands of the claimants for denominational education is exactly the reverse and is a demand for separate recognition and for special treatment as units of another organism apart from the state.

In this view of the case separate grants by the state in aid of denominational schools upon the principle of payment by results must necessarily amount to state endowment of particular forms of religion.

Spelling this out, it was not the beneficial effect as such, whether financial or other, which constituted endowment of a form of religion. What had this effect was separate recognition and special treatment as a unit or an organism apart from the State, constituting thereby an *imperium in imperio*. While the right of Catholic parents to have their children receive secular instruction in State Schools (and *a fortiori* the right of Catholic children themselves to receive this benefit) can properly be affirmed on the ground of civic equity, the simple recognition of that right cannot, as such, properly be called

endowment of whatever happens to be their religion. This, at any rate, is my suggestion as to the telling rebuttal Clark had in mind.

While this exercise is speculative to an extent, it is historically useful as bringing more firmly into firmer focus the question of precisely what Clark did, and did not, mean by 'endowment' of religion.

Clark as a Hard Liberal

In discussing Clark's 1888 Memorandum on the Chinese Question I found it useful to distinguish, among those in favour of legislation restricting immigration of Chinese to Tasmania, between what I called hot and tepid restrictionists. Attorney-General Clark (as by then he had become) could be called a hot restrictionist, and his premier, Phillip Oakley Fysh, a tepid one. These are of course terms which need to be given a meaning. A hot restrictionist means one who saw considerable danger in Chinese immigration, while a tepid one saw little. Motives and perceptions in each case could vary considerably. In each case economic, social, cultural and political motives, or some mix, of these as well as opportunism, could be involved.

Liberal idioms were pervasive, and pervasively cross-hatched, in colonial political discourse: dichotomies of liberty and equality, were typically melded with dichotomies of individualism and collectivism, of nationalism and imperialism, of joys of conscience and the sadnesses of reasons of state, of free trade and protectionism, of entropy and evolution, of inertia and progressivism. Shifting the metaphor, these mixings were the main wefts and woofs of late nineteenth and early twentieth century liberalism.

When I call Clark a 'hard' liberal I refer mainly to his deep belief that the so-far-realized liberal political order — evolving towards true freedom of the individual, civic and religious, and the sovereign independence of each civil society — was a fragile plant, vulnerable to subversion from within and perils from without. This sense of fragility is clear in 'Denominational Education'; in his 1888 Memorandum on Chinese immigration;²⁷ in his vehement denial, in 'Why I am a Democrat', 'that the triumph of democracy would regenerate humanity and expel evil from the world'; in his avowal of the need, in civil society, for 'fundamental laws for the protection of the natural rights of the individual beyond the reach of the majority of the hour'; and in his fighting words of protest in a 1901 paper, 'The Preamble to the Constitution of the Commonwealth of Australia', at the

27 Reproduced elsewhere in this book.

'recognition' of deity that document contained. 'To require a single citizen'

or a minority of citizens to expatriate themselves in order to escape from membership of a nation or community which by a vote of a majority of its members undertakes to make a corporate confession of any religious doctrine or belief is to use political, and consequently physical, force in the name of religion as clearly and directly as it was at any time used for the burning or expulsion of heretics.

A sense of the vulnerability of the form of Church-State separation established in Tasmania is evident in Clark's keen watchfulness in regard to 1889 draft legislation to establish the University of Tasmania. Clark was closely involved in and supportive of these steps, but also watchful to secure that the new foundation not fall under church dominance.²⁸ The Bill was drafted by a Hobart lawyer, J B Walker, under instruction by the Council of Education. It was to be presented to the House of Assembly by the Minister of Education, B S Bird, a former Congregationalist minister. However Clark, then Attorney-General in the Fysh ministry, made himself an interested party and emphatically asserted that the Bill should include two provisions to ensure that the University was of a secular character. One clause, which provided that no religious tests be imposed, was accepted without demur by the Council of Education and, later, the legislature. However Clark's other requirement, directed to preventing the risk of clergy-dominance of the University Council, ran into trouble in both the Council of Education and the House of Assembly. Clark proposed that the Bill stipulate that no more than four ministers of religion be members of the University Council at any one time. A window into Clark's thinking is J B Walker's 1893 recollection of the explanation Clark offered. The limitation on numbers

was strongly objected to by members of the Council of Education, but Mr Clark refused to modify it in spite of remonstrances addressed to him by several including myself. His ground was that the Church had too much

28 Clark's efforts in this direction are also discussed by Richard Davis in his essay in this volume 'Andrew Inglis Clark and the University of Tasmania.' This has produced some repetition of the material we use in scene-setting. That is untidy, but seems unavoidable; for we 'read' Clark's involvement differently in important respects. Davis sees Clark as falling into inconsistency on Church-State and religious liberty issues. I do not.

control of education and had exercised a narrow and pernicious influence upon it.²⁹

The limitation was strongly resisted in the House of Assembly, and survived by only nine votes to eight, but thenceforward was not challenged. In the debate Clark amplified his reasoning. His aim was not prohibition. He did not object in principle to clergy, as persons, belonging to the Council, provided they were not present as representatives of religious denominations. But given that clergy would form a large part of the Senate of Graduates (of whom in the colony there were few other than clergy) he thought it likely this would be reflected in the election to the Council of a large number of clergy. Clark does not say why he objected to this, but it is not hard to guess the reason. A possible outcome, should there be no restriction in clergy numbers, would be clericalisation of the ethos of the infant university, and this might, in turn, create opportunities for quasi re-establishment of religion in some elements of the colony's life.

From what has been shown earlier of Clark's anxious concern to nip recalcitrant clericalism in the bud one could almost have predicted that the prospect of clerical dominance of the University Council would alarm him. The main difference from the 'Payment by Results' controversy may have been that this time it was the prospect of not Catholic but Protestant (especially Anglican) sacerdotalism that alarmed him. In the 1900 'Preamble' essay noted above, Clark makes clear that, in his view, there had been a repeated tendency in several historic Protestant churches to act 'in violation of the fundamental principle upon which they were established', illustrating thereby Milton's allegation that 'New Presbyterian' was but 'Old Priest writ large'.

J B Walker suggested, and Richard Davis in a paper in this volume on Clark and the University of Tasmania agrees with him, that Clark, in seeking to set a limit on the number of clerical members at any one time on the University Council, was inconsistent with his own secular principles. The nature of the asserted inconsistency is not explained, but is, perhaps, that the quota discriminates on the basis of something like a religious test. I suspect Clark would have agreed that it did, but would not have been troubled by this. Without liberal qualms, I suspect, he would have defended the quota on the basis of there being

29 Walker was a pious and scholarly Congregationalist, later active in the life of the university. See his 'University of Tasmania II Notes to serve as material for a history of the establishment of the University of Tas[mania], 1893, pp. 46-7. University of Tasmania Archives, UT 12/24.

a real danger that, without it, churches were likely to exercise a narrow, ecclesiastical and pernicious influence on a civic educational institution. That is, he could have adapted, without significant alteration, the civic peril argument of 'Denominational Education'.

A 30 July 1897 debate in the House of Assembly shows a similarly vigilant Clark. The House was debating a Resolution (not a Bill) in support of free rail passes, which at the time were given only to children attending State primary schools, being made available to *all* children attending primary schools. This was a reformulation of an earlier motion in support of extension of free rail passes to children attending Catholic schools. The debate proceeded, however, as if the earlier formulation (which referred only to children attending Catholic schools) remained the real one. In the outcome, the Resolution was agreed to by a majority, but no substantive Bill was later brought forward. Clark's contribution to the debate was brief, but make clear that, on the question of State Aid to church schools, he was of the same mind as a dozen years earlier. Two extracts make the point succinctly:

John Henry: ... The principle of our State school system was that the State schools should be secular and compulsory ... This motion was the thin edge of the wedge ...

Clark: Hear, hear. Old friends.

...

Rev. J Woollnough: ... The State should thank private effort for doing its work — at less cost than it can do it itself — and support it accordingly.

Clark: The cat is out now. We know what we have to meet.³⁰

Any attempt to summarise the qualities, complexities, and contrarities of Clark's liberalism is risky. Yet it is tempting to see in them an uneasy combination of two dispositions, each deep enough to be called fundamental. First, Clark never abandoned, or even looked like doing so, the view that human nature was deeply flawed — a view learned, or more likely strengthened, during his membership from 1870 as a full (that is baptised by immersion) member of Hobart's Calvinistically-inclined³¹ Harrington Street Particular Baptist Chapel. The Chapel practiced closed communion, and Chapel minutes show Clark to have been decidedly of the theologically-rigorist party.³²

30 *Mercury*, 31 July 1897. Woollnough was an Anglican.

31 See Baptist Union papers, University of Tasmania Archives, BU 13/9, Fourth and Eighth articles of the title deed of the Chapel.

32 See Ely, 'Inglis Clark's Religious Liberalism' above. See Baptist Union Papers, BU 13/9. These contain a copy of the Title Deed of Harrington Street Baptist

Second, in seemingly deep contrast, from around the time of Clark's 1874 editorship of *Quadrilateral*, his Papers recurrently disclose a tempered, yet irrepressible, optimism as to the long-term prospects for human reason and human nature.

Are there, nonetheless, continuities behind the contrast? It is tempting to say Yes, to suggest that the Clark of the late 1860s and early 70s was a hard-line yet anxious rigorist Baptist in much the same way he became a hard-line yet rigorist anxious progressive liberal. Some of his poems confirm and add emotional resonance to this duality of pessimism and optimism — melancholy and exultation alternating uneasily.

*'... out of this nettle, danger, we pluck this flower, safety.'*³³

Federation as Opportunity

Clark by 1890 had long been an ardent federationist, seeing in federation of the Australian colonies an opportunity to transform, by constitutional creativeness, what he hoped would become a distinctive Australian civil society. But his federalism was far from unconditional: there were, for him, acceptable and unacceptable federal ways forward. For instance, he regarded federation packages put forward in the referenda of 1898 and 1899 as, in some ways, seriously flawed. He believed the federal constitutional structure which he foreshadowed at the Australasian Federation Conference of 1890, and embodied in a detailed draft in 1891, had the potential, *provided* it was entrenched in a written instrument of paramount legal force in Australia, to remedy serious procedural and structural weaknesses in the institutions of Australian colonial self-government — especially Clark's *bêtes noires*, responsible government and the culture of the imperial cringe. This made Clark a radical reformer in a double sense, in respect to content and form. The content was the constitutional structure itself,

chapel, which shows the adoption, on 17 September 1860, of 'close communion principles'. They also contain minutes of the Harrington Street Baptist Chapel, pertinently those for 27 April 1871 (Clark complains of lack of proper order in government of the Chapel, and quotes at length from writings of 'an intelligent Scottish Baptist minister'), 8 February 1872 (Clark was among the minority who voted against allowing a Churches of Christ minister [who was not a Calvinist] to use the baptistry for baptism and public testimony), 11 April 1872 (The dispute over allowing chapel facilities to the Churches of Christ minister continues. Moved by Clark 'that the Church be dissolved'. This was agreed unanimously), 12 April 1872 (Minutes confirmed. Keys, etc, handed to trustee). Minutes end.

33 Shakespeare: Hotspur's speech, *Henry IV, Part I*, Act Two, Scene vii.

designating legislative, executive and judicial powers and functions on Federal and State levels respectively; the form was the *entrenchment* of the Constitution as a written instrument, consensual in origin and operation, paramount in force legally and subjectively, and legally difficult (although not impossible) to alter.

Paramountcy in force 'subjectively' needs to be explained. The reference is to what would now be called political culture. Federalism is legalism, as Dicey claimed, and as Clark seemingly agreed.³⁴ Federal structures are, inevitably, formidably complex. Coping with this complexity fosters and depends on a deeply routinised culture of deference to legality.

Should these requirements of content and form be satisfied, *Australian* life could never be the same. Clark, and those such as Griffith who in general or in principle welcomed his draft constitution at the 1891 Convention, and built on those foundations, altered decisively in the long term the horizons of Australian civic possibility and danger. Clark, as original compiler of what became the formative draft, and close student of often startling evolutions of the history of the United States, knew better than most what was at stake, in both the immediate and longer term.³⁵ While ordinary colonial legislation could, for the most part, be repealed as readily as placed in the statute books, being subject only to prerogative powers of disallowance or reservation rarely used in practice, one of the most evident facts about the envisaged Australian constitution was that it was intended to endure. Once the federal constitution was in place, extended formal processes would be involved in adding any new section or removing an old one. The hurdle to constitutional change to be leapt in Clark's 1891 draft under clause 93 (approval by a majority of provincial [State] parliaments) was not as high as that eventually set up, but still likely to be formidable. It is perhaps a measure of the importance to Clark of church-state issues that he sought to entrench *two* clauses relating to religion in his 1891 draft. Given what we know of his views as to the importance of religion to humanity and especially the danger it yet might pose to a civil polity, that perhaps should not surprise.

One clause, number 81, related to the provinces [States]:

34 See the 1903 University of Tasmania Constitutional Law paper set by Clark, reproduced in this volume.

35 That a written, comprehensive and overriding federal constitution was enduringly in prospect goes far to explaining why Clark accepted a judgeship in 1898, soon became a prolific constitutional scholar and deeply aspired to a High Court judgeship. He knew where he wanted, eventually, to be in the larger scheme of things.

No province shall make any law prohibiting the free exercise of any religion.

Several points are worth noting by way of background. First, *All* executive and legislative powers of the provinces are defined by Clark's draft Federal Constitution (clauses 67 to 81). Second, while provincial [State] legislatures are empowered to alter their Constitutions (clause 76), this is subject to the procedure for Constitutional change laid down in clause 93. Once in, therefore, clause 81 would be hard to remove. Third, clause 81 is in a class of its own in regard to provincial legislative power, being the only express prohibition relating to a matter which does not fall under a head of federal power. Clause 81 reaches towards the idea, expressed categorically in his 1901 essay on the recognition of God in the Constitution's preamble, probably written in 1901, that religion is or ought to be outside the purview of a provincial (or State) legislature.³⁶

The second clause relating to religion in Clark's draft (clause 46) was an express prohibition on the Federal legislature.

The Federal parliament shall not make any law for the establishment or support of any religion, or for the purpose of giving any preferential recognition to any religion, or for prohibiting the free exercise of any religion.

Again, several points are worth noting. Inspection of this clause makes clearer why it was suggested in the preceding paragraph that clause 81 did no more than 'reach toward' complete removal of religion from purview of the provincial legislature. A provincial legislature constitutionally prohibited from legislatively impeding the

36 Clark offered an explanation of the effect of clause 81 in a public address in Hobart on 15 June 1891 which I find puzzling. If the clause was adopted, Clark said, the effect would be to secure to citizens 'in every sense of the word, freedom of conscience, freedom of opinion, freedom of worship, freedom to prosecute immorality, or anything likely to injure the morals or safety of the community'. Clark, in his speech, had just referred to, and clearly had in mind, the 1878 United States Supreme Court case in which Mormons, pleading protection of the free exercise clause in the First Amendment in the Territory of Utah, resisted prosecution for polygamy, on the basis that this was permitted in their church's scriptures. Clark clearly was thinking of, and applied to the State (or Province) by parity of reasoning, the finding of the Court that, by virtue of the First Amendment, 'Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order' [*Reynolds v United States*: 98 US 145 (1878)] I find puzzling Clark's implication that, *had* there been no First Amendment, there would have been no ground whatever for Congress to outlaw polygamy. I suspect misreporting by the *Mercury* of 16 June 1891.

free exercise of religion is not, taking these words at face value, thereby impeded from legislatively establishing, supporting or preferentially recognising some religions. Had clause 46 eventually been given constitutional effect, it would have *sufficed* to make it extraordinarily difficult for the Federal legislature from making laws to either help or hinder any religion.

One can only say 'sufficed', however, because it is hard to find in Clark's draft a head of Federal legislative power to form a basis for legislating in respect of religion *at all*. Possibly this was why the 1891 drafting sub-committee removed clause 46 from the draft it put before the Convention: it prohibited an Act beyond power anyway.

Clark's clause 81 fared better. It formed part of the draft eventually approved by the 1891 Convention, and survived during the Federal Convention deliberations of 1897-98 until, in an extraordinarily tangled debate in February 1898, it fell victim to a surge of 'state's rights' anxiety.³⁷

While not a member of the 1897-98 Convention Clark was a deeply interested observer from afar. The sustained campaign from March 1897 to have God 'recognised' in the Constitution's preamble alerted him, if he needed alerting, to the possibility that federally, as well as on the colonial level, it was not just God, but churches and religion, for whom special recognition was thereby sought in the Commonwealth. However Clark, although not a Convention member, had a formal opportunity to have a say on the Constitution generally and the religious issue in particular. The draft Federal Constitution issued by the Adelaide 1897 session of the Convention was to be submitted to the colonial legislatures for comment, this being required under colonial Enabling Acts. Clark had been overseas during the Adelaide meeting but by July and August, when the Tasmanian legislature conducted its review, had returned to his place in the House of Assembly as Attorney-General in the Braddon government.

Perhaps Clark would in any circumstances have responded to the opportunity to steer the Convention towards what he considered the right track in Church-State matters. It was rarely his disposition to be backward in such matters! However two circumstances would have stimulated his proactivity. One has been noted in the preceding paragraph — the 'recognition of God' campaign. At Adelaide an unsuccessful bid to insert a reference to God in the preamble failed. Churches, Methodists and Presbyterians being specially active, responded with indignant petitioning on His behalf; however this was countered by comparably strenuous petitioning that the preamble

37 See the summary of the debate in Ely, *Unto God and Caesar*, pp. 60-68.

'remain as framed'. The second circumstance was noted in the previous section — the 30 July 1897 Resolution in the House of Assembly which, in substance, supported provision of free rail passes to children in Catholic as well as State schools. Clark's response will be recalled: 'Old friends. ... The cat is out now. We know what we have to meet.' A safe inference is that, for Clark in August 1897, the issue of whether links between Church and State should or should not be restored was unhealthily alive.

On 'recognition' Clark was one of the minority of members of the House of Assembly on 19 August who unsuccessfully opposed it. His speech was a shade, but only a shade, conciliatory. He might have supported 'recognition', he said, were the feeling for it universal, but that was far from the case: in his view, those who were opposed, together with those who were indifferent, formed a majority. However a constitutional principle is at least hinted at in Clark's stipulation that, for 'recognition' to be acceptable, support for it needed to be *universal*. Implicit is the principle that, whenever proposals are made that confessional or quasi-confessional religious affirmations form part of a civil constitution, respect for the wishes of a minority which objects to their presence should always override respect for the wishes of a majority which desires their inclusion. Acknowledgment of God in a 'true and proper sense could come only from individuals'. 'Recognition', he protested, practically compelled 'a minority to stand before the world as having desired it also ... From a religious standpoint it would be irritating; he would think his worship had been violated and desecrated.'³⁸ As noted earlier, the same view was affirmed in Clark's (probably 1901) essay on recognition of deity in the preamble. Clark was consistent in such matters. Perhaps it was some consolation to Clark, in 1897, that the 'recognition' proposal was defeated in the Legislative Council.

On Church-State relations Clark proposed an amendment to what had been clause 81 in his original draft, and which stood in the current draft as Section 109. His proposal was to add to the words 'No State shall make any law prohibiting the free exercise of any religion' the words 'nor appropriate any portion of its revenue or property for the propagation or support of any religion.' His explanation of the amendment to the House was brief and blandly allusive, as if, perhaps, he wished it to slip through without possums being stirred. In the event, none were, and the amendment passed on the voices. However

38 Parliament of Tasmania, *Debate on the Draft Commonwealth Bill*, 1897, Hobart, 1897, pp. 266-7.

the Legislative Council, as if to preserve a reputation for even-handed contrariness, rejected Clark's amendment.

Since the Federal Convention on 3 September resolved to consider amendments to the draft proposed by only one House, this ensured Clark's amendment to Section 109 would be considered. Clark, as Tasmanian Attorney-General, had prepared a Memorandum for the Convention explaining each proposed Tasmanian amendment. In relation to Section 109 he would now need to be somewhat more forthcoming than he was to the House of Assembly about the rationale and effect of the section, as amended.

In its present form Section 109 secures religious equality for all the citizens of a State, so far as it prevents the State from placing the adherents of any form of religion under any disadvantage or restriction in the exercise of it in comparison with adherents of other forms of religion; but it does not secure perfect religious equality to all the citizens so far as the granting of any special privileges or favours or endowments to particular forms of religion is concerned. And the object of the amendment is to secure perfect religious equality in both directions, by preventing any particular benefit or support being given to any form of religion.³⁹

The effect plainly would have been altogether to remove forms of religion, as such, from the purview of provincial legislatures: in no way were forms of religion to be aided or impeded. In the event the Convention not only declined to accept Clark's amendment, but omitted Section 109 altogether. The result, as John La Nauze, sardonically remarked, was that 'the States were left free, if they wished, to legislate for religious intolerance.' Clark's bid to constitutionally entrench freedom of and from forms of religion in the States failed. From the nettle danger, this time, no flower, safety, could be plucked.

A final word. To Clark as would-be friend of civil society, that result was obviously disappointing. But in what precise ways so? To explore that question offers some basis for wondering if Clark's explanatory Memorandum on the proposed addition to Section 109 is seriously incomplete in his *own* terms. He refers in that Memorandum to equality, but not to liberty. That puzzles. Manifestly, if one takes words in their ordinary sense, freedom of and from religion were part of what Section 109, as proposed to be amended, was 'about' — civic

39 A Inglis Clark, Proposed Amendments to the Draft of a Bill to Constitute the Commonwealth of Australia (1 September 1897) (Records of the Australasian Federal Convention 1897-1898: National Archives of Australia, AA 1971/506, item series 12/9, F162).

equality in regard to the *free* exercise of any form of religion was arguably the point of the original clause, while *freedom* for *all* from *any* civic complicity in the granting of any special privileges or favours or endowments to any form of religion was the point of the words to be added. Some support for this dual-value reading (liberty plus equality) can be found, as it happens, in Clark's 1885 essay. In 'Denominational Education' Clark had referred to 'the two fundamental principles of true political freedom': the 'inviolability of the human conscience' and 'equality of burdens and privileges'. Securing that 'inviolability', *and* securing religious equality in the civic domain, are more naturally read as the double point of the Section as Clark wished to amend it.

'a protestant country'

This is how Clark, in 'Denominational Education', describes Tasmania. The description is offered without accompanying explanation or qualification, which tends to imply that he did not expect it to be questioned. He also wrote, in the same essay, that the Tasmanian legislature 'has abolished state aid to religion'. A reader today might well ask whether both statements can be true.

Nowhere else among the voluminous Clark Papers, as far as I can tell, is this characterisation of Tasmanian society repeated. However in 'The Preamble to the Constitution of the Commonwealth of Australia', probably from 1901, he refers to the 'essential principle and spirit of Protestantism', and does so in what probably can be read — although this seems to me not certain — in a self-identifying way.

The essay on Clark's religious liberalism in this volume is a slightly revised version of a paper by Ely which formed part of the 1995 *An Australian Democrat*. That book appeared before the Preamble essay had come to light. Research for that paper disclosed many Clarkean affirmations expressed in religious or quasi-religious terms. Nowhere, however, did Clark call himself a 'Protestant'. Instead, to cite typical instances, he called himself an 'intelligent theist'; said he believed in the 'Evolution of Spirit'; and declined 'to identify the Church in any age, or any branch of it, with Christianity'. He warmly endorsed, and by implication saw himself as part of, a 'universal Church of Conscience and Commonwealth of Righteousness' within which 'no separation of Christian, Greek or Jew' is recognised, and in which 'whatsoever things are lovely, whatsoever things are honest, whatsoever things are pure' are celebrated. Clark deplored spiritual bondage imposed by the papacy

in medieval times and more recently, and he regretted the bibliolatry of the Reformation.

To inquire whether a bridge can be found between Clark's statement in the Preamble essay on the essential spirit and principle of Protestantism, and the religious or quasi-religious statements noted in Ely's 1995 essay, it is necessary to explore, further, what Clark said in the Preamble essay. Without doubt he there refers to Protestantism normatively as well as descriptively. His severe criticism of Australia's Presbyterians, Wesleyans, Baptists and Congregationalists, and of the historic Protestant churches generally, is for repeated violation of 'the fundamental principle upon which they were established'. What was this?

The fundamental doctrine of Protestantism is the essentially and absolutely individualistic character of relations of each human soul to its creator. Protestantism does not recognize any corporate righteousness whereby any man shall be accepted by God in consequence of inclusion in any church or other community or organization of men, and it therefore does not recognize any power or authority in any majority of men to impose any confession or declaration of religion or belief upon a minority of the same nation or community. ...

Every Protestant Church ought in conformity with the fundamental principle of Protestantism to be a voluntary association of persons whose common opinions and sentiments upon the question of religion bring them together.

The definition of a church in the second paragraph above closely resembles that given by John Locke in his *Letter on Toleration*,⁴⁰ and possibly was drawn directly or indirectly from it. Clark does not, as it happens, refer to Locke in the Preamble essay; but he does firmly endorse the statement by John Fiske, an admirer of Locke, that it has taken three centuries, since Luther's time, 'to unfold all the logical implications of Protestantism,' the main one of which

was the right of each individual to decide for himself what theological doctrines he can or can not accept, what theological observances he shall or shall not adopt, and generally in what way he is to worship God.⁴¹

Truly *protestant* Protestantism, thus understood, is a matter of civic and associational form more than propositional or confessional content. The test of this is that it is not difficult to convert religious

40 Pp. 71-73.

41 John Fiske, 'The Origins of Protestantism', in *Excursions of an Evolutionist*, London, 1884, p. 265.

and quasi-religious statements and presuppositions in the 1885 essay into the 'true' Protestantism of the Preamble essay, and vice versa. In other words, the problem of bridge-finding dissolves in face of the relation of virtual identity — that is, there ceases to be any bridge to find. It is interesting, though, that practically all the core concepts in the quotation from the Preamble essay recur in the following extract from Clark's 1900 published essay 'Natural Rights', the only significant variation — but one whose meaning might be pondered — is that a religious dimension is not noted:

Both logically and historically civil society finds its foundation in the rational and moral nature and capacities of men, and its final claim to exercise authority over the individual is ethical. ... [P]olitical philosophers may fairly claim to use the expression 'natural rights' to designate that sphere of personal action which must be held inviolate from the coercive intrusion of any other individual or the State in order to permit every man to live the most truly human life which his nature and his capacities make possible for him in the social environment in which he is found.⁴²

So, 'a protestant country'? When Clark used this phrase with neither explanation nor discussion in 'Denominational Education', that tends to imply he did not consider the claim contentious. Perhaps Clark was in part alluding to the repeal of the Conventicle, Test and Corporations Acts (which of course he notes in 'Denominational Education'), which became part of Tasmanian law under the Australian Courts Act of 1828 (UK), or to the Catholic Emancipation Act of 1829 (UK), which was re-enacted by the local Legislative Council in 1830. These went some way to securing practical religious liberty and civic equality for Tasmanian voluntary religious associations, although they did not, of themselves, subvert statutory recognition of the religion of the Church of England and perhaps, in some contexts, of the religion of the Church of Scotland. In the Australian colonies, it was only during the middle third of the century that the claim to *distinctive* legal recognition, made by a single church, or by a class or group of churches, came to be decisively abandoned.⁴³

42 A Inglis Clark, 'Natural Rights', in *Annals of the American Academy of Political and Social Science*, July 24, 1900, pp. 48-9.

43 See J R T Border, *Church and State in Australia, 1788-1872*, London, 1962; J Barrett, *That Better Country, The Religious Aspect of Life in Eastern Australia, 1835-1850*, Melbourne, 1966; Gregory, *Church and State*, chs 1-3; R Ely, 'Church and State', *The Oxford Companion to Australian History*, Melbourne, 1998, pp. 124-5. It was established in the 1860s in a series of English cases, arising from appeals from the colonies, that the Crown had no power to create an ecclesiastical tribunal and jurisdiction, by Letters Patent, in a colony with an

Perhaps Clark's expression 'protestant country' — significantly, perhaps, without capitalising the 'p' — was little more than a shorthand written expression of the perception by many liberals, including Clark and many of his friends, of an evolutionary trend inherent in the nature of things towards separating Church and State, and was considered to be, in that sense, descriptive and theologically neutral — although of course some Catholics and others would not have seen it as such.

It is of interest that precisely this neutral sense of the term 'Protestant' was offered by Fiske in the essay noted a little earlier, an essay which Clark admired:

It would not be correct ... to describe Protestantism — any more than it would be correct to describe Christianity — as a system of doctrines ... Viewed in the light of its own historic genesis Protestantism may be described as that kind of religious polity which is based upon the conception of individual responsibility for opinion.⁴⁴

independent legislature. *Re Natal [Bishop]* [1864], 3 Moo. PCC [NS] 115 at 154. See also *Long v Bishop of Capetown* (1863) (1 Moo. [NS] 411; *Bishop of Natal v Gladstone* (1866) (LR 3 eq. 1), and *Bishop of Capetown v Bishop of Natal* (1869) (6 Moo. PCC [NS] 203). These decisions were in substance anticipated in a decision of the New South Wales Supreme Court. *ex parte George King* (1861) 2 Legge 1307.

44 'The Origins of Protestantism', p. 266.