

2009

## **Beyond the Text: A Vision of the Structure and Function of the Constitution**

*Stephen Gageler, Solicitor-General of Australia*

### Introduction

Like John Adams, Stephen Gageler is a highly skilled lawyer, who, from modest beginnings in Sandy Hollow (a small town in the Upper Hunter region of New South Wales), has achieved success in public office, becoming the Commonwealth of Australia's ninth Second Law Officer and the 49th appointment to the High Court.<sup>1</sup>

In an interview published in the *Sydney Morning Herald* shortly after his appointment as Commonwealth Solicitor-General,<sup>2</sup> Gageler eschewed the term 'judicial activism' labelling it as a 'term of abuse'. Instead, he candidly described himself as a 'realist', in so far as he was willing to acknowledge that 'it's a nonsense to say a judge doesn't make the law'. Rather, 'the question is how they should make the law ... I think a cautious incremental approach to the law is appropriate'.

It is this realism that informs the subject of Gageler's address, as he searches for a coherent account of constitutional development premised on the structure and function of the Constitution as maintained and nurtured through the exercise of judicial power.

For Gageler 'the text is not determinative'. But nor is it indeterminate. He rejects the rigid demarcation between interpretivist – confining any exercise of judicial power to the application of the text as properly construed – and originalist – rooted in invocations of the framers' intent – modes of constitutional interpretation. Gageler's conceptualisation of the interpretative underpinnings of Australian constitutional jurisprudence is far more nuanced. For him, constitutional law 'is

<sup>1</sup> He was appointed Commonwealth Solicitor-General on 1 September 2008.

<sup>2</sup> 'The boy from Sandy Hollow', the *Sydney Morning Herald* (online), 10 January 2009 <<http://www.smh.com.au/news/national/the-boy-from-sandy-hollow/2009/01/09/1231004286973.html>>.

This is a preview. Not all pages are shown.