

* LL.B., M.A. (Sheff.), Lecturer in Law, Macquarie University.

FOOTNOTES

- 1 P.78.
- 2 P.60.
- 3 P.61.
- 4 See e.g. Samuel Thorne, "Tudor Transformation and Legal Change" (1951) 26 *NYU L Rev* 10.
- 5 See e.g. R.H. Tawney, *The Agrarian Problem in the Sixteenth Century* (1912).
- 6 Robert W. Gordon, "Critical Legal Histories" (1984) 36 *Stan L Rev* 57.
- 7 *Id.*, 65.
- 8 P.55.
- 9 D. Kennedy, "The Structure of Blackstone's Commentaries" (1979) 28 *Buffalo L Rev* 209.
- 10 P.57.
- 11 P.7.
- 12 *Ibid.*
- 13 P.86.
- 14 P.88.
- 15 (1847) 2 SCR App 30.
- 16 P.4.
- 17 P.v.
- 18 *Ibid.*
- 19 See e.g. Karl Renner, *The Institutions of Private Law in Relation to their Social Function* (1949, English trans., O. Kahn-Freud (ed.)).
- 20 P.v.
- 21 For comparative studies, see e.g. Barrington Moore Jnr, *The Social Origins of Dictatorship and Democracy* (1967); Robert Brenner, "Agrarian Class Structure and Economic Development in Pre-Industrial Europe" Feb. 1976, *Past and Present*, 30.

Australian Federal Constitutional Law, by COLIN HOWARD LL.M. (Lond.), Ph.D. (Adelaide), LL.D. (Melb.), Hearn Professor of Law, Faculty of Law, University of Melbourne. (The Law Book Company Ltd, Sydney, 3rd ed. 1985), pp.i-lxxviii, 1-611 with Table of Cases, Table of Statutes, Bibliography, The Commonwealth of Australia Constitution Act and Index. Cloth recommended retail price \$49.50 (ISBN 0 455 20573 6). Paperback recommended retail price \$39.50 (ISBN 0 455 20574 4).

These are times of ferment in legal academia. Standard doctrinal analysis, which all but occupied the field a decade ago, is now retreating before the onslaught of all sorts of fancy new techniques . . . New ideas are spreading across the empire of doctrinal analysis.¹

[T]he work of the [United States] Supreme Court is the history of relatively few personalities . . . The fact that they were "there" and that others were not, surely made decisive differences. To understand what manner of men they were is crucial to an understanding of the Court.²

Exciting, innovative and dynamic are epithets which cannot be hurled with glee at exegeses of the Australian Constitution.³ *Australian Federal Constitutional Law*⁴ is not an exception. In approach, if not always in results, *Australian Federal Constitutional Law*, a legal⁵ treatise emanating from the mind and pen of Professor Colin Howard,⁶ is remarkably similar to other expositions extolling federal constitutional law in Australia.⁷ Methodological orthodoxy haunts almost every page.

Substantive perspectives in *Australian Federal Constitutional Law* also offer no more than a view of traditional constitutional law terrain. Topics presented encompass the usual textbook litany. Following a very brief discourse on the making of the Constitution, some introductory remarks on High Court techniques – interpretation, precedent, characterisation and severance – structural, institutional and power questions concerning the Commonwealth Parliament and Executive are addressed. Federalism aspects of legislative power – the constitutional competence of Commonwealth laws to bind States and State laws to bind the Commonwealth – are examined separately from issues of separation and checks and balances between legislative, executive and judicial power in the Commonwealth arena. Specific and detailed attention is devoted to several Commonwealth legislative powers and prohibitions – trade and commerce, taxation, acquisition of property, corporations, defence, external affairs, territories and Commonwealth places. These represent the most familiar and traversed territory of Australia's constitutional landscape. Quantitatively their articulation represents the substance of *Australian Federal Constitutional Law*.

Textual prospects for the future – the processes of constitutional amendment – are synthesised in the concluding chapter. For some, including Professor Howard, utilisation of amendment procedures to constitutionalise cherished substantive values would negate a sense of present parochialism. Others entertain different notions of the length, scope, durability and ageless quality of written⁸ constitutions.⁹ Divergent opinions concerning the matters canvassed in *Australian Federal Constitutional Law* should, however, engender delight, not regret. If that occurs, Professor Howard's efforts will have contributed to the nurturing of a more stimulating, even enlightened, constitutional discourse.

What is missing? *Australian Federal Constitutional Law* does not endeavour to be an exhaustive treatment of the Constitution or of those aspects which it expressly dissects. New and current constitutional conundrums are affected. In the field of Commonwealth legislative power some notable omissions include the constitutional warrant for legislation with respect to the people of any race – section 51(xxvi) – matters referred by State Parliaments to the Commonwealth Parliament – section 51(xxxvii) – and the request power in section 51(xxxviii). Their elevation to more than passing references may now be warranted. Varied concerns such as the off-shore constitutional settlement,

proposals for a reference of powers pertaining to family law disputes and realisation of constitutional autochthony and autonomy are predicated upon successful utilisation of these sources of parliamentary authority.¹⁰ If lawyers are no longer to live in the past but can be tempted to visualise the future, less traditional legislative powers should become a regular feature of constitutional law books.

Professor Howard has also chosen not to include a large segment of constitutional law pertaining to the federal judiciary.¹¹ Given present concerns and controversies about Federal and State courts — their structural and jurisdictional relationship¹² — the substitution of a chapter on the Commonwealth Parliament and Executive, about which relatively more ink has been spilt, perhaps wasted, for an excursion into the realm of federalism aspects of judicial power may devalue the usefulness, if not the prestige, of *Australian Federal Constitutional Law*. Similarly, federal ramifications — the “breadth” of power in Professor Winterton’s apt phrase¹³ — of Commonwealth Executive authority are not pursued. Is the justification that Federal constitutional law does not subsume State constitutional law? On one view State constitutions are, by virtue of section 106 of the Australian Constitution, inherently creatures or emanations of Federal constitutional law.¹⁴ Majority endorsement of such a proposition may arouse expectations that future editions of Professor Howard’s treatise should include more than fleeting allusions to State constitutional law.¹⁵

Biographical detail and analysis does not occupy even an obscure place in *Australian Federal Constitutional Law*. To the extent that a relationship can or should be postulated between individual judges and their decisions in constitutional law cases, readers interested in acquiring a knowledge of the Australian Constitution and its judicial manifestations ought to be exposed to the increasing accumulation of biographies of Justices who have occupied a seat on the High Court.¹⁶ No attempt need be made to descend to the depths of legal realism by postulating that all constitutional law succumbs to personality. The opposite extreme of logical and doctrinal purity devoid of subjective nuance, towards which *Australian Federal Constitutional Law* might be viewed as venturing, should also be avoided. Qualitative improvement could be obtained by overtly recognising the interplay of constitutional texts, precedents and personalities.¹⁷

Professor Howard moves closest to embracing general themes and premises when presenting an overview of constitutional interpretation. Enunciation of High Court decisions and interpretative techniques is his forte. Simply and straight-forwardly *Australian Federal Constitutional Law* catalogues and criticises judicial rules and theories of constitutional interpretation — “impartial legalism”, usage of history, progressive and plenary word meanings. Other interesting and provocative questions are eschewed. For example, without elaboration recognition is accorded to the circumstance that “[t]he process [of

interpretation of the Constitution] is not confined to the High Court but most of it takes place there.”¹⁸ Immediate issues left untouched include: What non-judicial persons or institutions engage in constitutional interpretation? When does that occur? Do judicial and non-judicial interpretation principles differ? If so, why? Do they have a reciprocal influence? Which does or ought to prevail? These, of course, do not terminate the interpretative issues which ought to be injected into narratives on Australian constitutional law.¹⁹ At least as a beginning consideration of the vast array of hermeneutical possibilities would not be devoid of rewards.²⁰

Laconic is not an apt description of Professor Howard’s contribution to the wealth of jurisprudence surrounding the pivotal events of 1975 – Senate and Supply, double dissolution and dismissal of Commonwealth Ministers, including the Prime Minister – and other matters – House of Representatives and Senate elections, casual Senate vacancies and territorial senators – which directly touched, concerned and, perhaps, contributed to the constitutional imbroglio. In *Australian Federal Constitutional Law* Professor Howard’s sympathy, bias and ideological commitment on these issues are not surreptitiously smuggled into the commentary.²¹ They unabashedly radiate.²² Thus, even for the uninitiated, there should be no danger of a distorted picture masquerading as reality. Sawyer’s precision²³ and Winterton’s detail²⁴ are not duplicated. Instead, insofar as they pertain to the Constitution, the institutional and structural dimensions of the Commonwealth Parliament and the office and powers of the Governor-General are commented upon in almost narrative form. Those seeking perceptive, succinct and intensive analysis of specific topics, presentation of more general and fundamental principles, premises and themes and their relationship with particular issues and evaluation of differing viewpoints will have to utilise Professor Howard’s bibliography to garner other literature from library shelves.²⁵

Questions of legislative²⁶ federalism are constitutionally most sensitive when Commonwealth laws “bind” the States and State laws “apply” to the Commonwealth. *Australian Federal Constitutional Law* traces, historically and descriptively, permutations in each direction. A sinuous spectrum from applicability to inviolability is clearly recognisable as Professor Howard recounts the saga of familiar cases – *Engineers*, *State Banking*, *Cigamic*, *Bogle*, *Payroll Tax* and *Franklin Dam*.²⁷ Principles and exceptions – criteria detailing the scope and limits of this portion of constitutional power – are simply and straightforwardly set forth.

A similar quality pervades the discussion of separation of powers – legislative, executive and judicial – under the Australian Constitution. Rules and doctrines concerning delegation of legislative power to the executive and constitutional restraints on the capacity of individuals and institutions to possess and exercise judicial and non-judicial federal

powers are exposed. Checks and balances do not, however, occupy a prime focus in *Australian Federal Constitutional Law*. If this was remedied, especially in the context of judicial²⁸ power and Professor Howard's conclusion that "a strict distinction is drawn between federal judicial power and the other powers of the Commonwealth",²⁹ acquisition of a further dimension would be obtained. The constitutional ability of the Commonwealth Parliament and Executive to regulate High Court and Federal Court jurisdiction, appoint and remove judges, enforce judicial decrees and provide money for court staff and functions are not matters of insignificance.³⁰ Their utilisation in other federations should warn Australian constitutional lawyers not to rest too quickly or easily with expositions of dogmatic and unqualified statements of strict separation and independence.³¹ Confrontation "between federal judicial power and other powers of the Commonwealth" will quickly render asunder any such notions.³²

Recitation of High Court cases – facts and decisions – with frequent quotation from opinions constitutes the substance of the foray by *Australian Federal Constitutional Law* into Commonwealth legislative powers and relevant constitutional prohibitions. From this source Professor Howard extracts succinct propositions of law without conveying the different impression that unanimity, certainty or precision prevail.³³ In this milieu *Australian Federal Constitutional Law* is an excellent beginner's primer. Scholars and practitioners may clamour for more. From their perspective black letter law does not always suffice. Given Professor Howard's eminence as an academic constitutional lawyer they might have hoped for greater attention to nuance and explication of intriguing syntheses from the Constitution's text, judicial opinions and secondary materials.

Professor Howard has, of course, in *Australian Federal Constitutional Law* chosen not to write that book. Whether he should do so can easily be answered in the affirmative. If he acquiesces, Australian constitutional law will be incurably enhanced. Enticing this possibility is an alluring prospect. Usual touchstones of success – influencing and moulding students' minds – can, therefore, be only a penultimate test. Demise and replacement of *Australian Federal Constitutional Law* will constitute its ultimate accolade.

James A. Thomson*

* B.A., LL.B. (Hons)(W.A.), LL.M., S.J.D. (Harvard), Barrister and Solicitor of the Supreme Courts of Western Australia and Victoria, Lecturer (part-time) in Constitutional Law, University

of Western Australia.

FOOTNOTES

- 1 G. Miller, "A Rhetoric of Law" (1985) 52 *U Chi L Rev* 247 (reviewing J.B. White, *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community* (1984)). See also note 20 *infra*.
- 2 F. Frankfurter, "Mr. Justice Brandeis and the Constitution" (1931) 45 *Harv L Rev* 33 (emphasis in original) (footnote omitted). Frankfurter quoted Holmes' remark about Chief Justice Marshall: "A great man represents a great ganglion in the nerves of society or, to vary the figure, a strategic point in the campaign of history, and part of his greatness consists in his being *there*." Holmes, "John Marshall" in *Speeches by Oliver Wendell Holmes* (1913) 87, 88 (emphasis in original). Frankfurter considered that "[p]eople ha[d] been taught to believe that when the Supreme Court speaks it is not they who speak but the Constitution, whereas, of course, in so many vital cases, it is *they* who speak and *not* the Constitution." Letter, 18 Feb. 1937, Frankfurter to Roosevelt in Freedman (ed.), *Roosevelt and Frankfurter: Their Correspondence 1928-1945* (1967) 383 (emphasis in original). It is therefore essential to recognise that although "[j]udicial exegesis is unavoidable . . . the ultimate touchstone of constitutionality is the Constitution itself, and not what [Justices of the Supreme Court] have said about it." *Graves v. New York* 306 US 466, 491-492 (1939) (*per* Frankfurter J.).
- 3 Commonwealth of Australia Constitution Act 1900, 63 & 64 Vict. c. 12. Several bibliographies are noted in J. Thomson, "A Torrent of Words: A Bibliography and Chronology of the Franklin Dam Case" (1984) 15 *F L Rev* 145 n.1.
- 4 C. Howard, *Australian Federal Constitutional Law* (3rd ed. 1985) [Hereinafter cited as *Australian Federal Constitutional Law*]. See also (1st ed. 1968) (2nd ed. 1972). For a critical assessment of the 3rd edition see G. Brandis, "Book Review" (1985) 15 *Qld L Soc J* 288.
- 5 Despite the predominant focus of Australian constitutional law literature on judicial (especially High Court) interpretation of the Constitution, see note 7 *infra*, it should be emphasised that "[t]he study of Constitutional Law is allied not merely with history, but with statecraft, and with the political problems of our great and complex national life." J.B. Thayer, *Cases on Constitutional Law with Notes* (vol. 1) (1895) v. There are some deviations from a judicial focus. See e.g. G. Sawyer, *Australian Federal Politics and Law 1901-1929* (1956); G. Sawyer, *Australian Federal Politics and Law 1929-1949* (1963); L.J.M. Cooray, *Conventions, The Australian Constitution and the Future* (1979); M. James (ed.), *The Constitutional Challenge: Essays on the Australian Constitution, constitutionalism and parliamentary practice* (1982); R.D. Lumb, *Australian Constitutionalism* (1983); M.J. Detmold, *The Australian Commonwealth: A Fundamental Analysis of its Constitution* (1985).
- 6 For biographical details see "Howard, Colin" in W.J. Draper (ed.), *Who's Who in Australia* (25th ed. 1985) 429. Professor Howard's extensive foray into constitutional law, in addition to three editions of *Australian Federal Constitutional Law*, includes *Cases and Materials on Constitutional Law* (1979) [with C. Saunders]; *The Constitution, Power and Politics* (1980); *Australia's Constitution* (rev. ed. 1985); "Public law and common law" in D.J. Galligan (ed.), *Essays in Legal Theory* (1984) 1; "The Blocking of the Budget and Dismissal of the Government" [with C. Saunders] in G. Evans (ed.), *Labor and the Constitution 1972-1975* (1977) 251; "Submission to Victorian Delegation to the Constitutional Convention" (9 Nov. 1972 unpub. 25 pages) [with G. Evans] summarised in Australian Constitutional Convention, *Summary of Submissions from Interested Persons and Bodies* (Nov. 1974) 15-18; "Constitutional Amendment: Lessons From Past Experience" (March 1973) 45 (1) *AQ* 35; "The Constitutional Crisis of 1975" (March 1976) 48 (1) *AQ* 5; "Constitutional Amendment and the Office of Governor-General" (Dec. 1976) 48 (3) *AQ* 55; "A Further Comment on the Dissolution of the Australian Parliament on 11 November 1975" (1976) 57 *The Parliamentarian* 235; "What Should Be Done About Our Constitution?" (1977) *Oracle* [Monash Uni. Law Students Magazine] 55; "Section 57 of the Constitution" in Standing Committee "D", *Third Report to Executive Committee* (3 Feb. 1978) 21 in *Proceedings of the Australian Constitutional Convention* (1978); "Working paper on Section 92 of the Constitution" in Standing Committee "A", *Second Report to Executive Committee* (21 April

- 1978) 27 in *Proceedings of the Australian Constitutional Convention* (1978); "Constitutional Amendment and Constitutional Reform in Australia" [with C. Saunders] in R.L. Mathews (ed.), *Public Policies in Two Federal Countries: Canada and Australia* (1982) 69; "Book Review" (1981) 27 *A J Pol & Hist* 96; "External Affairs Power of the Commonwealth" (1983) 60(4) *Current Affairs Bull* 16; "The Federal Fiscal Imbalance" (1984) 61 *Reprint Series* (ANU Centre for Research on Fed. Financial Relations); "But did Sir Garfield do his duty?" (1984) 58 *L Inst J* 136; "Sir Garfield's New Tune" *National Times*, 14-16 June 1976, 7; "Political Persecution of Murphy should cease" *Age* 7 Sept. 1984, 10 [*Sydney Morning Herald* 10 Sept. 1984, 9]; "Parlt's options closed off" *Sydney Morning Herald* 2 Nov. 1984, 13; "Is the jury system really necessary for justice?" *Age* 31 July 1985, 13; "Murphy" (1985) 59 *L Inst J* 895.
- 7 E.g. W.A. Wynes, *Legislative, Executive and Judicial Powers in Australia* (5th ed. 1976) [reviewed by M. Coper in (1976) 1 *UNSWLJ* 370]; Z. Cowen & L. Zines, *Federal Jurisdiction in Australia* (2nd ed. 1978); P.H. Lane, *The Australian Federal System* (2nd ed. 1979); R.D. Lumb & K.W. Ryan, *The Constitution of the Commonwealth of Australia Annotated* (3rd ed. 1981); P.H. Lane, *A Manual of Australian Constitutional Law* (1984); [reviewed by J. Thomson in (March 1985) 12 (2) *Brief* 26]; H.E. Renfree, *The Executive Power of the Commonwealth of Australia* (1984); H.E. Renfree, *The Federal Judicial System of Australia* (1984) [reviewed by J. Thomson, "Two arms of government" (1984) 68 *Aust Book Rev* 34].
- 8 Do written documents constitute the totality of a "Constitution"? See e.g. T. Grey, "Do We Have an Unwritten Constitution?" (1975) 27 *Stan L Rev* 703.
- 9 See e.g. R. Davis, "Re-writing the Constitution: An Irrelevant Debate" (1983) 37 *Inst Pub Affairs Rev* 20; R. Davis, "Evaluating Australia's Constitution" (1983) 37 *Inst Pub Affairs Rev* 83; D. Dawson, "The Constitution - Major Overhaul or Simple Tune-up?" (1984) 14 *MULR* 353. Compare R. Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (1977) 373-396.
- 10 See e.g. R. Cullen, *Australian Federalism Offshore* (1985); Australian Constitutional Convention, *Official Record of Proceedings* (vol. 1) (1983) 207-222; R. Jennings, "The Imperial Connection: Residual Constitutional Links" in C. Saunders (ed.), *Current Constitutional Problems in Australia* (1982) 68, 71-72. See also *Australian Federal Constitutional Law*, pp. 583-584.
- 11 "The major change in [the 3rd.] edition is the omission of federal jurisdiction . . ." *Australian Federal Constitutional Law* p.v. Compare C. Howard, *Australian Federal Constitutional Law* (2nd ed. 1972) 191-249. Contrast P. Hanks, *Australian Constitutional Law* (3rd ed. 1985) xi ("there is now less emphasis on institutional material . . . [and] this third edition contains no intensive discussions of the institutions of executive government.") Some aspects of judicial power are covered in *Australian Federal Constitutional Law*, pp. 238-281. Only fleeting attention is devoted to the question of the constitutional warrant for judicial review. See *id.*, p.19 n.5, 92. Professor Howard considers that "judicial review is not an essential feature of the Australian Constitution if by that expression is meant the written document. The constitution says nothing whatever on the point. The High Court simply assumed at the outset of its existence that it had the power . . ." C. Howard, "Public law and common law" in D. Galligan (ed.), *Essays in legal theory: A collaborative work* (1984) 1, 26.
- 12 See e.g. Judicature Sub-Committee of the Australian Constitutional Convention, *Report to Standing Committee on an Integrated System of Courts* (Oct. 1984).
- 13 G. Winterton, *Parliament, The Executive and The Governor-General: A Constitutional Analysis* (1983) 29.
- 14 Both sides of the debate are in *W.A. v. Wilsmore* [1981] *WAR* 179, 183-184. See also proposed s.108A(4)(a) in the Constitution Alteration (Interchange of Powers) 1984. This interchange of powers proposal failed to satisfy the referendum requirements of s.128 of the Australian Constitution. Commonwealth of Australia Gazette No. S21 (31 January 1985).
- 15 *Australian Federal Constitutional Law*, pp.1 n.3, 41, 169, 550. For a plethora of references see J. Thomson, "State Constitutional Law: Gathering the Fragments" (1985) 16 *UWALR* 90; J. Thomson, "State Constitutional Law: American Lessons for Australian Adventures" (1985) 63 *Tex L Rev* (forthcoming).
- 16 See e.g. E. Neumann, *The High Court of Australia: A Collective Portrait 1903 to 1972* (2nd ed. 1973) [listed in *Australian Federal Constitutional Law*, p.xliv]; J. Bennett, *Keystone of the Federal Arch: A Historical Memoir of the High Court of Australia to 1980* (1980) 140-145; R. Joyce, *Samuel Walker Griffith* (1984); J. Reynolds, *Edmund Barton* (1948); Z. Cowen, *Isaac Isaacs* (1967); L. Crisp, *The Unrelenting Penance of Federalist Isaac Isaacs* (1981); J. Rickard, *H.B. Higgins: The Rebel as Judge* (1984); K. Tennant, *Evatt: Politics and Justice* (1970); Z. Cowen, *Sir John Lathan and Other Papers* (1965) 3-60; D. Marr, *Barwick* (1980). Jurimetric

- analysis also provides insights. E. Neumann, *supra*, 128-129; A. Blackshield, "Judges and the Court System" in *Labor and the Constitution*, note 6 *supra*, 105. For Professor Howard's view see C. Howard, "Book Review" (1972) 18 *A J Pol & Hist* 156.
- 17 See e.g. J. Singer, "The Player and the Cards: Nihilism and Legal Theory" (1984) 94 *Yale L J* 1. See also note 20 *infra*. For further elaboration of and references concerning the preceding paragraphs in the text see J. Thomson, "Book Review" (1984) 10 *Syd L Rev* 469; J. Thomson, "The Teaching of Constitutional Law: Are the Materials Adequate?" (1985) 15 *UWALR* 418.
 - 18 *Australian Federal Constitutional Law*, p.6.
 - 19 See e.g. R. Lumb, "Problems of Characterisation of Federal Powers" [1982] *ACLD* 45; L. Zines, "The State of Constitutional Interpretation" (1984) 14 *Fed L Rev* 277; A. Mason, "Book Review" (1983) 6 *UNSWLJ* 234, 235-237; J. Thomson, "Principles and Theories of Constitutional Interpretation and Adjudication: Some Preliminary Notes" (1982) 13 *MULR* 597; J. Thomson, "Constitutional Interpretation: History and the High Court: A Bibliographical Survey" (1982) 5 *UNSWLJ* 309. Professor Howard has suggested that "if the High Court were accustomed to discerning and deciding public law questions within a specifically public law framework of ideas [such a framework would provide a much greater incentive than the judiciary has at present for thinking in terms of the function and purpose of institutions. Correspondingly it would counteract the traditional scholastic tendency to concentrate on minutely literal interpretation of words taken out of context. Attention might then be directed at last to the public role which the constitution ought to play and to the great assumptions of history upon which it rests." C. Howard, "Public law and common law", note 11 *supra*, 28.
 - 20 See e.g. "Symposium: Law and Literature" (1982) *Tex L Rev* 373; "Interpretation Symposium" (1985) 58 *S Calif L Rev* 1; J. Schelly, "Interpretation in Law: The Dworkin Fish-Debate" (1985) 73 *Calif L Rev* 158; T. Phelps & J. Pitts, "Questioning The Text: The Significance of Phenomenological Hermeneutics for Legal Interpretation" (1985) 29 *St Louis U L J* 353. See also "Symposium" (1979) 6 *Hastings Const L Q* 403; "Symposium: Judicial Review Versus Democracy" (1981) 42 *Ohio St L J* 1; "Symposium: Constitutional Adjudication and Democratic Theory" (1981) 56 *NYU L Rev* 259. See also "Critical Legal Studies Symposium" (1984) 36 *Stan L Rev* 1; D. Kennedy & K. Klare, "A Bibliography of Critical Legal Studies" (1984) 94 *Yale L J* 461; A. Hutchinson, "From Cultural Construction to Historical Deconstruction" (1984) 94 *Yale L J* 209 (reviewing J.B. White, note 1 *supra*).
 - 21 See e.g. *Australian Federal Constitutional Law*, p.76 ("more appropriate", "misuse"), p.77 ("heart of the problem"), p.90 ("drive the then government from office"), p.93 ("hope"), p.94 ("serious indictment of Australian constitutional maturity"), p.97 ("far more rationally"), p.121 ("improprieties"), p.136 ("one of the most able men"), p.137 ("wrong", "abrupt, unseemly, unnecessary and novel"). Others vehemently disagree with Professor Howard's constitutional and ideological propositions. See e.g. G. Barwick, *Sir John Did His Duty* (1983) [reviewed by J. Thomson in (1983) 6 *UNSWLJ* 255]; G. Barwick, "Sir Garfield v. Gareth Evans" (1985) 29 (1 & 2) *Quadrant* 3; G. Barwick, "The Economics of the 1975 Constitutional Crisis" (1985) 29 (3) *Quadrant* 37; D. Markwell, "The Dismissal: Why Whitlam Was To Blame" (1984) 28 (3) *Quadrant* 11; D. Markwell, "The Economics of the 1975 Crisis" (1985) 29 (6) *Quadrant* 4; D. Markwell, "On Advice from the Chief Justice" (1985) 29 (7) *Quadrant* 38; D. Markwell, "The Dismissal" (1985) 29 (10) *Quadrant* 5.
 - 22 This need not be a defect. For example, Professor Tribe commences his constitutional law treatise by indicating: "It should be plain . . . that I do not shrink from offering forthright opinions in this book. For me, the morality of responsible scholarship points not at all to the classic formula of supposedly value-free detachment and allegedly unbiased description. Instead such morality points to an avowal of the substantive beliefs and commitments that necessarily inform any account of constitutional arguments and conclusions. I am convinced that attempts to treat constitutional doctrine neutrally elide important questions and obscure available answers. Therefore the reader will find this book taking explicit positions on the most troublesome problems in constitutional law. To understand the structure of those problems, as it is set forth here, and to understand the principles that bear on the solutions, one need not share my views — either about the proper role of judges or about the correct resolution of substantive constitutional controversies. Because such views are openly presented, and because I believe that contrary views are fairly considered, the decision to forego an illusory neutrality can enhance the value of the book to all readers, who whether they agree, dissent, or wonder at any given point will know more of the values that may have influenced a particular judgment, which at bottom can never stand solely on a neutral base."

- L. Tribe, *American Constitutional Law* (1978) iv.
- 23 G. Sawyer, *Federation Under Strain: Australia 1972-1975* (1977).
- 24 G. Winterton, note 13 *supra* cited in *Australian Federal Constitutional Law*, pp.vlx, 62, 111-114, 116, 119, 121, 137-138. Professor Howard described Dr Winterton's book as "meticulously thorough and extensive research." C. Howard, "Eccentric System of Governing" *Age* 21 May 1983, 13 (Saturday Extra).
- 25 *E.g. Australian Federal Constitutional Law*, pp.xliii-li, 137 n.20. Compare the discussion of similar topics in P. Hogg, *Constitutional Law of Canada* (2nd ed. 1985) 189-213. It is instructive to compare all aspects of the treatises written by Professors Howard, Hogg and Tribe (note 22 *supra*).
- 26 There are federalism dimensions of executive power — G. Winterton note 13 *supra*, 29-31, 34, 38-47 — and judicial power — A. Rogers, "State/Federal Court Relations" (1981) 55 *ALJ* 630; M. Byers, "Federal and State Judicatures" (1984) 58 *ALJ* 591; P. Bator, P. Mishkin, D. Shapiro and H. Wechsler, *Hart and Wechsler's: The Federal Courts and the Federal System* (2nd ed. 1973) xix ("The jurisdiction of courts in a federal system is an aspect of the distribution of power between the states and federal government.").
- 27 *Australian Federal Constitutional Law*, pp.143-229. For a comparative dimension see *e.g. Garcia v. San Antonio Metropolitan Transit Authority* 105 S Ct 1005 (1985).
- 28 Legislative and executive checks and balances are also embodied in the Constitution. See *e.g.* ss 5, 28, 56-60, 65, 66; G. Winterton, note 13 *supra*, 93-110. See generally the plethora of references in J. Thomson, "Executive Power, Scope and Limitations: Some Notes From A Comparative Perspective" (1983) 62 *Tex L Rev* 559, 562-564.
- 29 *Australian Federal Constitutional Law*, p.238 (footnote omitted). See also *id.*, p.28.
- 30 See *e.g.* ss 73, 76, 77, 72, 61, 81, 83 of the Constitution.
- 31 See *e.g.* C. Swisher, *The Taney Period 1836-64* (vol. 5 of the Oliver Wendell Holmes Devise History of the Supreme Court of the United States) (1974) 841-854; C. Fairman, *Reconstruction and Reunion: 1864-88* (vol. 6 of the Oliver Wendell Holmes Devise History of the Supreme Court of the United States) (1971) 459-487; G. Gunther, "Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate" (1984) 36 *Stan L Rev* 895; W. Leuchtenburg, "The Origins of Franklin D. Roosevelt's 'Court-Packing' Plan" [1966] *Sup Ct Rev* 347; M. Parrish, "The Great Depression, The New Deal, and the American Legal Order" (1984) 59 *Wash L Rev* 723, 728-735.
- 32 For examples of such conflicts prior to 1901 see references in J. Thomson, "Removal of High Court and Federal Judges: Some Observations concerning Section 72(ii) of the Australian Constitution" (June 1984) *ACL* 36033, 36042 n.13. For a post-1900 proposal to "pack" the High Court see B. Galligan, *The Politics of Judicial Review* (forthcoming-tentative title), ch.4: "High Court Reconstruction Overruled".
- 33 *E.g. Australian Federal Constitutional Law*, pp.328-329. Despite the changes in judicial approaches to section 92 of the Constitution, which Professor Howard discusses, since the 2nd edition (1972), the formulation of propositions, including proposition 6, on page 286 of the 2nd edition and pages 328-329 in the 3rd edition (1985) remains the same.

Product Liability in Australia, by S.W. CAVANAGH, LL.B. (Syd.), LL.M. (Lond.), Barrister-at-Law, Lecturer-in-Law, University of New South Wales and C.S. PHEGAN, B.A., LL.M. (Syd.), Barrister-at-Law, Associate Professor in Law, University of Sydney (Butterworths Pty Ltd, 1983), pp. i-xxxvi, 1-267, with Table of Cases, Table of Statutes and Index. Recommended retail price \$39.50 (hard cover) (ISBN 0 409 49101 2).

"Product liability" is not so much a discipline, as an aggregation of several disciplines; it involves the law of torts, contracts, conflict of laws, limitation of actions, and a variety of statutes, including the Trade