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BOOK REVIEW

CONSTITUTIONAL ADVANCEMENT IN A FROZEN CONTINENT: ESSAYS IN HONOUR OF GEORGE WINTERTON

BY H P LEE AND PETER GERANGELOS (EDS)

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Professor George Winterton lost his long, difficult and brave battle with cancer in November 2008. He was a true giant of Australian constitutional law scholarship and the academy more generally. This volume, originally conceived as a festschrift to celebrate his retirement as Professor of Constitutional Law at the University of Sydney, now stands as a fitting tribute to Professor Winterton's brilliant academic legacy and the deep and loving regard in which he was held by so many students, colleagues and friends.

This much is made clear in the heartfelt and illuminating contributions at the beginning of the book. Sir Gerard Brennan writes a wonderful Foreword that is both a personal tribute to Professor Winterton and pithy summation of the theme and substance of the book. There are also three personal reflections from Rosalind Dixon[1] (a former student of Professor Winterton), Julian Lesser[2] (a republican adversary) and Lawrence Maher.[3]

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[1] 'George Winterton: A Friend to Students and Foreign Law', xxi.

[2] 'My Mate in Empire: George Winterton and the Republic Debate', xxix.

They highlight Professor Winterton's mastery of, and passion for, constitutional law, and how these were brought to bear in his teaching, scholarship and engagement with the great political and constitutional issues of the day. Fittingly, the introductory section of the book is closed with an obituary written by Robert French, the current Chief Justice of the High Court of Australia. Apart from detailing the many and impressive milestones in Professor Winterton's personal and professional career, it also has a special — indeed personal — resonance. Both men were law graduates from the University of Western Australia and had worked together in establishing the Aboriginal Legal Service for Western Australia in the 1970s. The Chief Justice recalls their final conversation when, amongst other things, they spoke about the reasoning of his Honour in the *Tampa* case[4] when a member of the Federal Court and specifically their disagreement as to whether the Crown's prerogative powers limit the executive power of the Commonwealth.[5] That issue, indeed the scope of the executive power of the Commonwealth more generally, was one of Professor Winterton's abiding scholarly interests. In this regard his landmark text — *Parliament, The Executive and The Governor-General* —remains the most impressive, coherent and accessible treatment of this notoriously complex area of Australian constitutional law.[6]

The main body of the volume consists of 13 chapters and is organised around the theme that constitutional advancement has occurred in Australia notwithstanding how few formal amendments have been made to the text of the Australian Constitution since federation. Indeed the difficulty of effecting constitutional change through the referendum process is underlined by the fact that only 8 of 44 proposals have been agreed to by the Australian people. As reflected in the title of the book, it was this paucity of formal constitutional change that led Professor Geoffrey Sawer famously to observe that Australia was 'constitutionally speaking ... the frozen continent.'[7] It is also worth noting at the outset that the *consequence* of the constitutional advancement described throughout the volume has been a dramatic centralising of legislative, executive and even judicial power with the Commonwealth. Most, though not all, of the contributors accept the inevitability, if not desirability, of this development.

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[3] 'George Winterton: A Singular, Gifted Scholar', xxxviii.

[4] *Ruddock v Vadarlis* (2001) 183 ALR 1.

[5] 'A Voice Not Stilled: An Obituary in Recollection of George Winterton', xlix, l.

[6] George Winterton, *Parliament, The Executive and The Governor-General* (Melbourne University Press, 1983).

[7] Geoffrey Sawer, *Australian Federalism in the Courts* (Melbourne University Press, 1967) 208.

Professor Winterton was of a similar mind:

> The States' financial and constitutional positions are weaker, both the product of the Constitution's provisions (including, importantly, s 109) and High Court interpretation. The latter has undoubtedly favoured the Commonwealth since the Engineers case, but is a product of the constitutional text as well as the political and economic history of Australia — war, depression, economic development, the growth of a national economy, and 'globalization' — not a relentless High Court drive for centralization, as some have suggested.[8]

In chapter 1, John Williams gives a fascinating insight into the drafting process for section 128 of the Constitution and considers whether the framers realised that the amendment process they settled on would prove so difficult to satisfy. (They probably did not.)[9] Striking an appropriate balance between stability and change and the principles of federalism and democracy was no easy matter. But, as the rest of the volume so amply demonstrates, constitutional advancement — *indeed fundamental constitutional change* — has nevertheless taken place.

The vehicle has been judicial interpretation of the Constitution, specifically the constitutional judgments of the High Court. To some extent, this is unremarkable. The application of a fundamental law of government – expressed in broad and open-ended language - to changing social, economic and political circumstances will inevitably yield new constitutional insights and meaning. However, as Sir Anthony Mason notes, 'there are very important limits to the capacity of judges to achieve legitimate constitutional change by means of interpretation, even if these limits are difficult to articulate.'[10]

In any event, in chapter 2, in a characteristically erudite and tightly reasoned contribution, Geoffrey Lindell outlines how and why the intergovernmental immunity doctrine has advanced *the* defining characteristic of the Constitution: the federal principle. It's a masterly and wide-ranging contribution that argues for a conception of the doctrine that recognises that '[n]either the States nor the Commonwealth should be seen as subordinate to, or subjects of, each other having regard to the federal nature of government in Australia.'[11] The chapter also contains a searching critique of the reasoning in

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[8] George Winterton, 'The High Court and Federalism: A Centenary Evaluation' in Peter Cane (ed), *Centenary Essays for the High Court of Australia* (Lexisnexis Butterworths, 2004) 219–220.

[9] Ch 1, 17–20.

[10] Ch 13, 283.

[11] Ch 2, 50.

Austin v Commonwealth (and so *Clarke v Commissioner of Taxation*) where the High Court collapsed the well-established two-limbed intergovernmental immunity test into a single discrimination inquiry.[12] It merits close attention.

H P Lee then turns to consider the democratic and constitutional responses to imminent national security threats.[13] He does so, mainly, by assessing the High Court's commitment to the rule of law as evidenced in its review of Australian terrorism legislation, most notably its preventative detention and control order regimes.[14] Lee is far from impressed with the Court's commitment to the rule of law in the post 9/11 context. In his view, the general historical trend of the courts deferring to the judgment and wisdom of the elected arms of government must not be at the expense of fundamental constitutional principle. Lee posits that the gold standard in this regard is the *Communist Party Case*.[15] So, whilst it may be perfectly proper to countenance an expanded scope for the defence power during the so-called war on terror – indeed this is constitutional advancement through judicial interpretation par excellence – the *Communist Party Case* is for Lee 'a constant clarion call to the judiciary to maintain constitutional fidelity, especially in troubled times.'[16]

In Chapters 4, 5 and 6 we encounter fascinating and comprehensive overviews of the constitutional jurisprudence pertaining to the environment,[17] industrial relations[18] and native title.[19] In these contributions — written by Peter Johnston, George Williams and David Hume, and Chief Justice French respectively — the propensity for and extent of constitutional advancement (or at least change) through judicial interpretation in Australia becomes startlingly clear.

As Johnston points out, 'whether the *Constitution* has been or will continue to be adequate in furnishing government with the means to address constantly emerging environmental problems'[20] is a contemporary issue of *national* significance. That is especially so in the absence of an express legislative power in the *Constitution* over the environment. However, the financial near-hegemony of the Commonwealth and an expansive judicial construction of the corporations and external affairs powers in particular has led Johnston to

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[12] Ibid 34–40.

[13] Ch 3.

[14] Ibid 66–77.

[15] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

[16] Ch 3, 78.

[17] Ch 4.

[18] Ch 5.

[19] Ch 6.

[20] Ch 4, 79.

conclude, correctly in my view, that formal constitutional amendment is neither wise nor necessary to meet these considerable and ongoing environmental challenges.

The extent to which judicial interpretation has centralised legislative power over industrial relations is generally well known amongst constitutional lawyers, especially in light of the recent and high profile *Work Choices* litigation in the High Court.[21] Nevertheless, the chapter by George Williams and David Hume underlines the fact that this 'constitutional advancement' is one of our more astonishing constitutional narratives. The framers did in fact provide the Commonwealth with an express power over industrial disputes, but only those with an interstate dimension. That federal limitation was gradually eroded by the High Court relaxing the notion of what constituted a 'dispute' and permitting their 'manufacture' across State borders. However, it was arguably the *Engineers*[22] decision in 1920 that is the key to understanding the inexorable march of the Commonwealth in the field of industrial relations and many other fields besides. In any event, the expansive construction of the external affairs and corporations powers noted earlier also provided the Commonwealth with the constitutional means effectively to take over industrial relations free from any federal limitation. This is something the Commonwealth failed to do — three times! — through the formal amendment process. Williams and Hume rightly conclude on a cautionary (maybe rueful) note: 'The degree of change suggests that the future development of Commonwealth power in this area should be carefully scrutinised lest it exceed its natural and proper limitations as expressed in the text of the Constitution.'[23]

The recognition of native title was, strictly speaking, a common law development. But in dispensing with the shibboleth that Australia was 'terra nullius' at the time of European settlement, the High Court's decision in *Mabo v Queensland (No 2)*[24] corrected the historical record and in a very real sense re-laid our constitutional foundations. In his panoramic overview, Chief Justice French in chapter 6 traces the development of the law of native title and explains why its recognition and protection will always provide significant challenges for the courts and, more importantly, the first Australians who seek to *reclaim* the land that *is* their cultural and spiritual essence.

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[21] *New South Wales v Commonwealth* (2006) 229 CLR 1.

[22] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

[23] Ch 5, 125.

[24] (1992) 175 CLR 1.

The rights jurisprudence of the High Court is considered next. In chapter 7 Keven Booker and Arthur Glass have written a nuanced and solid defence of the High Court's judicial interpretation of the express rights provisions in the *Constitution*. And even though '[t]heir text, context and special history have produced a body of law of a largely technical and somewhat disparate character',[25] it's been far from a 'frozen continent' from an express rights perspective in the view of these authors. Human rights can no doubt be better protected in Australia. However, the authors argue (convincingly, in my view, with the possible exception of recent section 117 case law[26]) that this is *not* the result of poor methodology or decision-making by the High Court in its express rights jurisprudence.[27]

Nicholas Aroney, on the other hand, is highly critical of the Court's derivation of an implied constitutional freedom of political communication. In chapter 8 Aroney picks up and expands upon a theme familiar in his scholarship: the claim that the implied freedom did not logically or of necessity emerge from the text and structure of the constitutional text — as the separation of powers did — but from extra-constitutional notions.[28] He argues that in deriving a constitutional implication from extra-constitutional notions, the Court subverts democracy, the rule of law and the *Constitution* itself.[29]

Chapter 9 is especially poignant. Peter Gerangelos writes on 'Parliament, the Executive, the Governor-General and the Republic: The George Winterton Thesis'. This is a contribution that was originally planned in collaboration with Professor Winterton. At the heart of the chapter is Winterton's core argument regarding the scope of the executive power of the Commonwealth and how it ought to be measured.

> [A]part from 'executing' the Constitution and the laws of the Commonwealth, the government is limited to those powers falling within the Crown's prerogative powers.[30]

So far this view has not found favour with the High Court, which considers that the terms of section 61 itself — not the content of the prerogative in Britain — form the relevant constitutional touchstone in this regard. That proposition is of course question-begging, but what has become clear from the

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[25] Ch 7, 172.

[26] See *Sweedman v Transport Accident Commission* (2006) 226 CLR 362.

[27] Ch 7, 172.

[28] See Nicholas Aroney, *Freedom of Speech in the Constitution* (Centre for Independent Studies, 1998).

[29] Ch 8, 184 and 187.

[30] Ch 9, 193–4.

case law is that section 61 (at the least) provides the Commonwealth with the 'capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation.'[31] Professor Winterton was rightly concerned about the scope of this implied nationhood power if its existence means that the Commonwealth government 'can undertake (without legislative authority other than appropriation of the necessary funds) any activity which is considered appropriate for a national government.'[32] However, it might be argued that this more open-ended conception of Commonwealth executive power is appropriate, if not necessary, to meet the exigencies of modern government and is precisely the kind of beneficial constitutional advancement by judicial interpretation that is otherwise celebrated in the volume. But 'the Constitution was not inscribed upon a *tabula rasa*'[33] and Winterton well understood that 'Ch II ..., including s 61, cannot be interpreted sensibly without reference to the Crown's prerogative powers'.[34] Moreover, there is a significant upside for constitutional government in Australia if the depth of Commonwealth executive power is measured against the prerogative. As a creature of the common law, it is subject to legislation and therefore parliamentary control:

> It is desirable that executive action be subject to legislation, especially under a system of responsible government: this promotes accountability to Parliament, giving Parliament authority to examine executive action; it strengthens the rule of law by subjecting executive action to judicial review...; and it enhances democratic government since legislation requires greater democratic input than executive action.[35]

The balance of the chapter outlines a series of invaluable reform proposals pertaining to Chapter II of the Constitution - 'The Executive Government' - that are considered in the context of Australia becoming a republic. These proposals are sensible, minimalist and would serve to strengthen the fundamentals of constitutional government in Australia, most notably responsible and representative government and the rule of law.

As Peter Gerangelos rightly concludes:

> Whatever the future may hold for an Australian republic, the Winterton thesis on the executive power of the Commonwealth, and the Winterton

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[31] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338, 397 (Mason J).

[32] Ch 9, 193.

[33] Ibid 197.

[34] Ibid.

[35] Ibid 198.

> draft itself, will remain at the very centre of all future deliberation, if not the cornerstone of fundamental constitutional change in 'the frozen continent'.[36]

In chapter 10, Fiona Wheeler makes a strong, indeed compelling, argument that the High Court's jurisprudence on the constitutional separation of judicial power has largely met the many regulatory challenges of modern government whilst remaining doctrinally sound. It has done so mainly through its progressive and flexible conception of 'federal judicial power', an approach that has *always* characterised its Ch III jurisprudence, according to Wheeler.[37] Interestingly, and contrary to HP Lee's earlier chapter, Wheeler uses the controversial High Court decision in *Thomas v Mowbray*[38] (the control order case) to illustrate and underline her thesis and to warn that 'in the absence of a Bill of Rights, attempts to project 'rights' arguments onto Ch III that lack a clear foundation in the relevant constitutional language and context should be resisted.'[39]

Chapters 11 and 12 engage more directly with the theories and methods of constitutional interpretation that drive constitutional advancement in a frozen continent. In the former, Jeffrey Goldsworthy lays down a strong interpretive challenge to the High Court: 'The time for theoretical timidity is long gone. If it is not yet possible to articulate the principles, broader doctrines and over-arching theories that should guide interpretation, it never will be.'[40] To this end, Goldsworthy refines and forcefully restates his argument that 'the theory [of] 'moderate originalism' provides a tolerably accurate account of the Court's traditional approach to constitutional interpretation.'[41] Although a theory of some complexity, its essence is that it 'denies that the pre-existing meaning of the Constitution can be deliberately changed without a formal constitutional amendment, [but] the meaning or operation of constitutional law can legitimately evolve over time.'[42] There are four ways this constitutional advancement can occur whilst remaining faithful to the original intended meaning of the *Constitution* — the touchstone of the theory's legitimacy.[43] The claim of moderate originalism is, then, that it provides for constitutional advancement by a *legitimate* process of interpretation (not

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[36] Ibid 221.

[37] Ch 10, 229–30.

[38] (2007) 233 CLR 307.

[39] Ibid 243.

[40] Ch 11, 247.

[41] Ibid 247-8; see also Jeffrey Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25 *Federal Law Review* 1.

[42] Ibid 250.

[43] See ibid 250–3.

judicial amendment) and in doing so it accords with the fundamental principles of federalism, democracy and the rule of law.[44]

Leslie Zines, on the other hand, picks apart the constitutional jurisprudence of the Gleeson High Court and the interpretive methodology of the Chief Justice in particular. In a fascinating chapter, Zines subjects to critical scrutiny the regular, often extra-curial, pronouncements made by Gleeson CJ that a 'strict and complete legalism' is the only legitimate way to determine constitutional disputes.[45] This approach was evident early in his tenure as Chief Justice when he joined the majority in *Re Wakim,*[46] the High Court decision that invalidated key aspects of the popular and functional judicial cross-vesting scheme.[47] Zines, however, then goes on to demonstrate convincingly that 'when his judgments as a whole are examined, it is clear that Murray Gleeson was one of the least legalistic of the judges of his court.'[48]

> He was not a strong adherent of the principle of original meaning, he saw fundamental rights and freedoms as a strong factor in statutory interpretation and, in many cases, had open regard to social consequences and policy considerations in his interpretation of the Constitution.[49]

So, whilst Justice Gummow may have been 'the most influential judge in constitutional cases'[50] on the Gleeson Court, 'it can be said that Gleeson CJ's judgments (whether we agree with them or not) often stand as models of clear concise reasoning and open regard for social considerations and human rights.'[51] According to Zines, '[t]hese are not qualities that have ... characterised the Gleeson Court as a whole.'[52]

The final chapter, written by Sir Anthony Mason, contains a number of entertaining and illuminating reflections on the various forms of constitutional advancement described throughout the volume. He rightly points out that no contributor denies the legitimacy of constitutional advancement through judicial interpretation. But, as the chapters by Aroney and Goldsworthy (and to a lesser extent Williams and Hume) suggest, the real interpretive question

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[44] See Jeffrey Goldsworthy, 'Interpreting the Constitution in its Second Century' (2000) 24 *Melbourne University Law Review* 677.

[45] Ch 12, 269.

[46] (1999) 198 CLR 511.

[47] Ibid 270.

[48] Ibid 271.

[49] Ibid.

[50] Ibid 282.

[51] Ibid.

[52] Ibid.

is whether the High Court has on occasion crossed that, admittedly fuzzy, line that divides legitimate constitutional interpretation from illegitimate judicial amendment. In this regard, the chapter takes issue with both Aroney's illegitimacy claim[53] and the substance of (if not the need for) Goldsworthy's all-embracing interpretive theory of 'moderate originalism'.[54] This may come as no surprise. Sir Anthony wrote the leading judgment in one of the seminal implied rights cases[55] and, as Chief Justice of the High Court, presided over an era of, arguably, unprecedented constitutional advancement through judicial interpretation.[56] However his criticisms bear close scrutiny and those regarding the origins of the implied freedom of political communication are particularly compelling in my view. The chapter concludes with some pertinent observations regarding the problematic nature of the *Kable* principle and the likelihood of more High Courts cases where the impugned legislation seeks to modify the manner in which the courts exercise judicial power. Sir Anthony warns that 'at some point, stripping the courts of their usual characteristics associated with due process and procedural fairness results in bodies in whom jurisdiction is invested ceasing to satisfy the requirements of Ch III, in particular s 71.'[57]

The scholarship in *Constitutional Advancement in a Frozen Continent* is wide-ranging, challenging and of the highest quality. H P Lee and Peter Gerangelos are to be congratulated for editing a volume that manages to do justice to the memory of a brilliant scholar and their close friend.

> George Winterton has passed from our midst. But his voice has not been stilled. His intellectual legacy means that it will be heard in our lecture halls and constitutional debates and will make its contribution to the development of our nationhood for many years to come.[58]

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[53] Ch 13, 292–3.

[54] Ibid 284–5, 286–92.

[55] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

[56] See Jason Pierce, *Inside the Mason Court Revolution: The High Court of Australia Transformed* (Carolina Academic Press, 2006).

[57] Ch 13, 298.

[58] Robert French, 'A Voice Not Stilled: An Obituary in Recollection of George Winterton' lii.