

Review Essay

French R., Lindell G., and Saunders C., (eds.) *Reflections on the Australian Constitution* (Leichhardt, Federation Press, 2003)

Reviewed by J. Ford

If the unexamined life is not worth living, an unexamined national life leaves us unable (especially in ‘troubled times’¹) to decide what is most worth preserving, what requires changing. Reflections on Australia’s constitutional history enable informed, forward-looking discussion about whether the Constitution adequately represents or serves a 21st Century Australia. What do we see when we look in our constitutional mirror?² Is it a familiar journeyed face, stable yet adaptive, the ‘best constitution in the world’?³ Or is the image of a sparse, inscrutable visage, not openly portraying the political reality of the modern democracy it represents, a face set in an old-fashioned pose of largely unfettered parliamentary power, its innocuous expression masking a potential (if not a past) of subtly but progressively undermined civil liberties?

Reflections is a collection of thirteen essays commissioned to mark the 2001 centenary of federation. The essays were written in a year, we will recall, which was remarkable in other respects, ones which coloured the image in the glass: border control and the *MV Tampa* incident,⁴ the attacks of September 11 in the United States, and responses to threats that these events were seen to represent. These issues have continued to affect Australian constitutional discourse, in particular on issues of the source and scope of law-making power directed towards ensuring national security,⁵

¹ The phrase ‘The Australian Constitution in Troubled Times’ was chosen for the title of the Annual Public Law Weekend (Centre for International and Public Law of the Australian National University, with the Australian Association of Constitutional Law), Canberra, 7-9 November 2003.

² Helen Irving, ‘Reflection depicts a Portrait of Long Ago’ *The Australian*, 11 April 2001. See also H. Irving (ed) *Unity and Diversity: A National Conversation* (ABC Books, 2001).

³ A claim made by the campaign for a ‘No’ answer in the referendum on Constitutional Alteration (Establishment of a Republic), 1999.

⁴ See *Victorian Council for Civil Liberties v Minister for Immigration and Multicultural Affairs* (2001) 110 FCR 452; *Ruddock v Vardalis* (2001) 110 FCR 491.

⁵ Arguably, the combined effect of existing available sources of legislative power will be sufficient to ground legislative measures reasonably appropriate and adapted to dealing with terrorism: the defence power (s 51(vi)); the external affairs power (s 51(xxix)); the ‘incidental power’ (s 51(xxxix)); the implied ‘nationhood’ power, if it exists other than in the executive’s inherent powers including to act to

and the proper limits of the executive power.⁶ Wider phenomena, not unrelated, also cast their light: patterns and trends of resorting to comparative constitutional and international jurisprudence, a global move to constitutionally-grounded governance structures at many levels, and increased faith in federal constitutional structures as a means of securing functional, peaceful and inclusive political solutions: in Afghanistan, Iraq, and the European Union. One value of *Reflections* is that many of the essays seek to engage with some of these wider issues, from an Australian perspective.

This review is an opportunity to observe that the demonstrated ability of the existing, largely unchanged framework to accommodate a century of change suggests that 21st Century desires and demands can likewise be accommodated. However, if there is to be no textual reform (and as we move on in time from what was originally constituted), the degree of perceived constitutional legitimacy becomes relative to the extent to which the people understand, recognise and accept the manner and institutions of constitutional development, in particular the interpretative role and approach of the High Court. I comment further on this below.

Publications consisting of assorted essays are often unsatisfying. This collection is, in my opinion, one to be recommended. There is no pretension to thematic unity and systematic treatment: this is explicitly a collection of reflective commentaries. What is lost in comprehensiveness is gained in rich and diverse retrospective and prospective contributions, by some of the most prominent figures in current Australian constitutional law, on many of the most significant constitutional questions facing contemporary Australia, including the following:

maintain the Constitution (s 61); and powers referred to the Commonwealth by the States (s 51(xxxvii)), in addition to concurrent State powers used cooperatively. How might sections 114 and 119 of the Constitution potentially be implicated? See, on the modern defence power and non-state actors in a 'lukewarm war', John Williams, 'Civil Liberties, the Australian Constitutional Experience, and Troubled Times', unpublished paper, n 1 above, [available at www.law.anu.edu.au/cipl/index.htm]. The temptation towards providing for broad executive powers against the terrorist threat might raise implications of the same sort as informed the issues in the *Communist Party case* (1951) 83 CLR 1 (although the grounds of possible invalidity are likely to be different).

⁶ For a recent special issue survey of the executive power, see (2003) 31 *Federal Law Review*.

- The decisions in *Wakim*⁷ and *Hughes*⁸ and related hurdles to establishing a constitutionally sound framework for intergovernmental cooperation. Is it necessary, **Sir Anthony Mason** asks, to attempt to amend the Constitution so as to expressly provide for and legitimate cooperative State-federal legislation? It seems perfectly consistent with (and indeed implicit in) a federation that each form of government might be able to agree to confer powers on the other, as **Professor Leslie Zines** argues, and ‘extraordinarily unlikely’ that the framers assumed such joint machinery impossible.⁹
- Surely among the most significant and interesting constitutional cases of recent times are *Sue v Hill*, and the ‘overruling’ of *Re Patterson: ex parte Taylor* in *Shaw v The Minister*.¹⁰ If not already highly important domains, societal and legal notions of belonging, of being Australian, of citizenship and alien-ness, will assume a high constitutional profile in an increasingly mobile, globalising world. A number of the papers engage with the issues, although they pre-date *Shaw*.¹¹
- These cases also illustrate the utility and relevance of the enduring debate about the date and manner of Australia’s acquisition of independence. In successive chapters, and in their attempt to resolve this uncertainty, **Professors George Winterton and Geoffrey Lindell** clear the decks for legally-oriented discussion of the republic issue. In what is probably the clearest available discussion of the issue, Winterton argues that, although resulting from a process of evolution, legislative independence was achieved on 11 December 1931 with the enactment by the British Parliament of the

⁷ *Re Wakim; ex parte McNally* (1999) 198 CLR 511.

⁸ *R v Hughes* (2000) 202 CLR 535.

⁹ In his chapter, Brian Opeskin (noting that the Constitution’s provision for such intergovernmental relations are ‘fairly meagre’, and how inadequate the description of ‘dual federalism’ is to the present complex, intermixed situation), reflects on globalised forces such as financial markets as catalysts to the use of reciprocal adjustment of legislative powers through reference.

¹⁰ *Sue v Hill* (1999) 199 CLR 462; *Re Patterson; Ex Parte Taylor* (2001) 207 CLR 391 (cf *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178); *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 203 ALR 143. The majority in *Shaw* did not see *Patterson* as containing any binding statement of constitutional principle, and preferred the *Nolan* decision that *Patterson* had purportedly overruled. See also *Re Minister; ex parte Te* (2002) 193 ALR 37.

¹¹ For example, in his chapter ‘The Constitution and the People’, Justice French discusses ‘pressing questions in today’s world about what it is to belong to the Australian community’. Winterton and Lindell consider, mostly in passing, the issues raised in *Sue v Hill* and *Patterson*, above n 10.

Statute of Westminster. From that date, the Commonwealth had the capacity (if not the will) to assert its independence and sever the ties that bound it to Britain. Though previously reluctant to accept a definitive date,¹² Lindell is now persuaded by Winterton's 1931 suggestion: the potential or capacity of the Australian polity to end this arrangement, and not the arrangement itself, was indicative of legal independence.¹³

- What is the overall character of our federation? An enduring issue, of considerable prospective importance, relates to the 'federal-State balance', in particular the vertical fiscal imbalance: the States' dependence on funds collected and allocated by the federal government. Leslie Zines' contribution examines the extent to which the Constitution departed originally from the 'classic model' of 'federal in the strict sense', and he tracks changing understandings of 'federalism' thereafter, in relation to the steady centralisation of power by the Commonwealth over the States. Zines details how this has occurred: by direct legislation (supported by an expansive interpretation of legislative powers) and by the influence that derives from much greater financial resources.¹⁴
- Three of the most valuable chapters deal extensively with what 'globalisation' might mean or portend for Australian constitutional law. These pieces chart the influence and effect in Australian constitutional law of comparative jurisprudence and international norms, in particular those of human rights law. **David Jackson QC** considers the effect of international human rights on our constitutional jurisprudence. If a clearer majority enabled an Australian

¹² G. Lindell, 'Why is Australia's Constitution Binding? – The Reasons in 1900 and Now, and the Effect of Independence' (1986) 16 *Federal Law Review* 29. Lindell's essay in *Reflections* really is a set of further reflections on Winterton's argument and related issues, enriching the former's discussion. He rues the untidy, fragmented 'constitutional triangle' that founds Australia's independence (the *Statute of Westminster*, the *Australia Acts* 1986 (Cth and UK) and the federal and state constitutions).

¹³ While Winterton is unequivocal in asserting the 1931 date, so that Australia has 'long been independent,' he remarks that Australia 'will not be constitutionally free-standing' and its independence 'will not be complete', until it becomes a republic. This ambiguity perhaps reflects the fact that the notion of 'independence' is not a solidary one, for example, the ability to legislate free from any Imperial fetters is a somewhat different notion from the perceived independence of Australia in the eyes of the international community. The High Court has resisted attempting to define a precise date: *Shaw*, above n 10.

¹⁴ Sir Anthony Mason's overview chapter contains a familiar comprehensive retrospective account of the manner by which the balance of power has (been) shifted towards to the federal government.

political party pursuing strong anti-terrorist measures to forgo negotiated bi-partisan passage of Bills, would existing constitutional law adequately protect civil liberties? Is a constitutional amendment expressly protecting rights or liberties necessary, is it wise? Jackson opines that the existing legal infrastructure is capable of advancing international human rights, although he expects future Commonwealth endeavours to enact rights-protective legislation. **Professor George Williams**, surveying the impact of international law, asks whether our constitutionalism will remain inward-looking. Or, if it is to come to embody or be influenced by international standards, what is at stake in the manner in which this transformation might occur? **Brian Opeskin's** catholic account of constitutional law in a global era describes how, to the extent that there has been any marked constitutional response to globalisation at all (for example, an increased recourse to comparative law), that response has unsurprisingly not been particularly coherent.¹⁵

- Federalism and constitutionalism are hot topics internationally. Faith abounds in federal models of government as the solution for ethnically and religiously complex countries such as Iraq and Afghanistan. In his chapter, a global perspective on the phenomenon of constitutionalism, renowned European constitutional lawyer **Thomas Fleiner** describes the modern era as the 'age of the constitution'.¹⁶ Fleiner's identification of the challenge as being 'using constitutions to secure peace' should however make us wary: constitutional instruments are not to be 'used' to dogmatically and prematurely impose frameworks of government that will themselves end up as triggers of dispute. More important to securing peace is the process of negotiated federation and compromise. While the resulting instrument is important, it is really this process that builds and constitutes the peaceful new nation, as our own

¹⁵ An instrument that serves to constitute a nation is inevitably inward looking, as Opeskin notes. Might globalisation lead to localised demands to 'internationalise' constitutions (for example, a Bill of Rights for Australia), or will it lead to reflex, inward turning reactions seeking to enshrine autochthonous values and features, seen to be threatened? Both forces will probably compete.

¹⁶ Fleiner also notes the increased 'constitutionalisation' of affairs at an international level.

federation history reminds us.¹⁷ It is interesting that as one of the most successful federations,¹⁸ Australia is centralising at a time when related but devolved entities governed by consensual decision-making are becoming fashionable, over single block nation states. It will be interesting to see whether the need for coordinated responses to economic, security, health and other issues strengthens the centralisation tendency in federations.

- There has been an increased recent interest in Australia in the relationship between the common law and the Constitution, including emphasis on the evolution of a single body of Australian common law, the proper extent to which the common law should influence constitutional interpretation, and development of the common law by reference to constitutional values or norms, including implied freedoms.¹⁹ **Christos Mantziaris** usefully (but rather long-windedly) explores a method by which common law understandings of executive activity and power can be received into the study of constitutional law. Looking much more squarely at the future, and in perhaps the most compelling of all the contributions, **Professor Cheryl Saunders** suggests that, given the apparently insurmountable hurdles to comprehensive constitutional reform, common law constitutional principle offers a way around the stalemate between polarised accounts of the Constitution: strongly positive accounts ('the best constitution in the world') and strongly critical ones (the Constitution does not reflect or clearly protect our existing democracy or human rights).²⁰ While this debate is healthy in some respects, in other respects it is debilitating and impedes rational discussion of change. Saunders documents how the written and unwritten elements of the system have been perceived to be in tension and have each

¹⁷ See e.g., H. Irving and J. Ford 'Transitional Iraqi Assembly a Necessary Compromise' *Sydney Morning Herald* opinion, 24 November 2003. H. Irving, *To Constitute a Nation: a Cultural History of Australia's Constitution* (Cambridge University Press, 1999).

¹⁸ This is of course a loaded statement, depending on how one defines 'success'. If the purpose of federation was primarily to create a single nation, success is evident. On another view, if the federated entities were not intended to become dependent agencies of the federal unit, arguably our federation is unbalanced.

¹⁹ See e.g., A. Stone 'Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication' (2001) 25 *Melbourne University Law Review* 374; G. Taylor 'Why the Common Law should be only Indirectly Affected by Constitutional Guarantees: A Comment on Stone' and Stone 'A Reply' (2002) 26 *Melbourne University Law Review* 623 & 646.

²⁰ Professor Saunders accepts that it may be an oversimplification to describe two opposing dominant accounts: the pattern of opinion and disagreement is 'complex and diverse'.

inhibited the development of the other. Saunders suggests that in order to realise the full potential of the existing Australian constitutional system, the hybrid (Anglo-American) nature²¹ of the Constitution should be acknowledged, accepted and celebrated, and the written and unwritten elements be seen as a components of a more cohesive whole.

- Two of the essays by non-law scholars add to the breadth and inclusiveness of the publication, although it might not have suffered greatly without them.²²

The organising principle said to inform the essays is the Constitution's accommodation of change through the 20th Century. The attempt has not simply been to describe the manner by which, as a matter of fact, a largely unchanged text has provided an adaptive, successful framework for a hundred years and more of government. Instead, the project has been (as the editors describe it) to draw out 'the legacies of the choices made' in the process of those necessary accommodations. In this the essays are partly successful: most of the essays attempt to tie evaluations on the experience of the first one hundred years of federalism to the challenges and possibilities of the 21st Century. The dominant prospective impression from the essays is that Australia's constitutional face will probably look much the same in the future. The balance of opinion is that the process and effects of globalisation may not mean that constitutional amendment is necessary: cooperating federal and State legislatures are seen as capable of dealing (reasonably) with whatever economic and security demands arise. Assuming there is no internal popular demand, for example, for a republic, the Constitution will continue to evolve in accommodation of forces of change.

²¹ That is, 'a written Constitution in culture fashioned by an unwritten one': a federal system based the separation of powers in a written instrument (taken from the United States), mixed with a Westminster system of responsible government based in common law constitutional principles and convention.

²² **John White**, a distinguished Australian scientist, explores whether, given the pervasive influence of science and technology, the constitutional silence on these subjects can be maintained. Should we enshrine science in the Constitution, so that it can more directly be an enabling document for innovation and so national wealth creation? White identifies the need for open, accountable science and more coordination in national scientific policy. Although it is not entirely clear where this call leaves the States in a policy field marked by 'centrifugal tendencies', the contribution is a good reminder, in a publication of this sort, that science and technology are as much drivers of social change as politics, diplomacy and law. Historian **John Waugh's** brief discussion of s 64 of the Constitution alerts one to shortcomings in the historical method often adopted by constitutional lawyers. The public record of the Convention debates tells only part of the Federation story. A complete understanding requires us to look beyond these formal conversations to the broader legal and societal context in which the debates took place.

What might be the legacy of this capacity to handle change? The essays do not generally follow this through. To a lay person it might be remarkable that (for example) our federal nature has changed without any relevant alteration to the Constitution, or that we acquired legal independence without change to the governing instrument. How satisfactory is it that all change manifests behind the façade of an unchanging Constitution? Of course, the purpose of written constitutions is not to change with the wind but to be an anchor in that past when the basic structures and values for the society's future were validly set down.²³ Non-structural change is usually anticipated (and the process for engineering more profound change is set down). But the manner in which any change is received is significant. In his essay, Sir Anthony Mason notes that the success of the Constitution 'has been largely due to the foresight of the framers in leaving much to the Parliament and to the High Court by way of interpretation'. However, as time goes on, the judicial change-by-interpretation mechanism becomes a problematic feature: it is open to perception as an ultimately undemocratic means of constitutional development, and it raises problems of legitimacy for the Court and for the entire constitutional framework. It might be argued that a more sophisticated theory of constitutional democracy informs our Constitution: at federation and in an ongoing way the people have expressed acceptance of the role of the Court as the primary vehicle for development. It is likely, however, that many people in Australia simply do not understand that, despite the overwhelming rejection of changes in constitutional referenda, today's functioning federation is, as a result of judicial interpretation, a rather different one to what the text, if the public could indeed digest it, would reveal.

The editors' introductory essay notes that a primary change in values discernable in the first centenary of federation is the emphasis on people rather than governments: the idea that democratic participation (and human rights protection) has become indispensable to notions of constitutionalism. **Justice Robert French's** essay examines the notion of the people as the ultimate repository of sovereignty, and the way in which the original and ongoing support of the Australian people themselves figures in and grounds the Constitution's authority and legitimacy.

²³ Opeskin, citing Justice McHugh's quote in *Re Wakim*, above n 7, 549, of Judge Easterbrook's description.

Whether or not popular support was or has become the legal, technical reason for the Constitution's formal legitimacy, is perhaps not the most significant issue, although it would constitute a reassuring and symbolic legal fact. Instead, what is interesting is the extent to which popular acceptance of our constitutional framework underlies its empirical legitimacy and so its effectiveness as a constituting structure, and the quality of that popular acceptance.

It is true that Australia has a relatively stable federal history and our federation has not yet suffered any 'seismic convulsions'.²⁴ Times are not so troubled that this picture is likely to shatter or tear. However, it is important to reflect on the capacity of our institutions to cope with profound challenges. One possible crisis is that the public perceives, in a political 'hard case', that the meaning of their Constitution and federation is shifting beneath them, and that the Court is heavily 'implicated' in this process, in a way that lawyers accept but that the public might not understand. The Chief Justice has recently remarked upon the importance of the High Court's approach to the exercise of judicial power in protecting its reputation for legitimacy, so as to avoid any possibility of 'constitutional disintegration'.²⁵ Rather than drastic challenges, the future threat to constitutionalism in Australia is more likely to be a mass inability to understand, identify with, and care about the Constitution and the Court, and so an inability to make reasonably informed and rational decisions about proposed changes, or to have a longer-term, institution-affirming perspective in hard case political judgments of the *Bush v Gore* (Florida vote count)²⁶ variety.

The primary danger, then, is not of precipitous change (as might result from weak constitutional legitimacy in a new democracy), but rather that the Constitution's uncertainty and obscurity precludes the prospect of significant constitutional reform. That is to say, the 'inaccessibility of the Australian Constitution is a serious defect in our constitutional arrangements'.²⁷ Aside from the increased public engagement

²⁴ The Hon. Chief Justice Murray Gleeson, 'The High Court of Australia: Challenges for its New Century' unpublished address to the 2004 Constitutional Law Conference, Parliament House, Sydney, (Gilbert & Tobin Centre for Public Law, University of New South Wales), 20 February 2004, 13.

²⁵ *Ibid*, 13.

²⁶ *Bush v Gore* 531 US 98 (2000).

²⁷ The Hon. Justice Ronald Sackville, 'The 2003 Term: the Inaccessible Constitution' unpublished address, 2004 Constitutional Law Conference, above n 24, 2, 27. Justice Sackville argues that the lack of public dialogue may be 'simply because there is less to talk about' in the absence of a Bill of Rights, constitutional cases are not likely to spark the sort of community interest that US Supreme Court cases

around the time of the centenary of federation, there is probably a lack of ongoing public discussion or ‘sustained dialogue’ about our constitutional development.²⁸ For one thing, at the same time as efforts to educate the public about the Court’s role in the constitutional scheme, the focus should be shifted, as George Williams notes in his essay, away from judicial adaptation of the Constitution to the idea that political institutions and the community must play a larger role in constitutional development. It may be that unless we engage in the Constitution ‘in a manner unparalleled since its creation’, we may find that we no longer recognise our constitutional selves.²⁹

Two concluding thoughts are prompted by the following passage, quoted in one of the essays:

[A]s the people change, so does their written constitution change also. Many see in it new lights and with different eyes; events may have given unexpected illumination to some of its provisions, and what they read one way before, they read in a different way now.³⁰

First, the passage should remind us that what, as lawyers, we see in the ‘constitutional mirror’ (and particularly how we are able to see in the text the hidden annotations of a century’s interpretation) might not represent the reflection that the public sees. This is not to suggest that wholesale constitutional change is needed, only that the public are entitled to a clear vision of the Constitution and a justified comprehension of its manner of development. This enables rational participatory discourse on our federation and democracy, including decisions on whether constitutional change is needed and the proper role of the judiciary.

Secondly, as core values are perceived or portrayed to be at risk, some might yearn to see illuminating the Constitution some reflections of an attempted embodiment of our national spirit or sentiment. It may be that the public wishes an

on constitutional guarantees do (at 24). Federal Courts and the High Court in particular have taken steps to improve community understanding of their role, and public digestion of judgments: Gleeson CJ, above n 24, 1-4. Should the Court consciously transform judgment style (in constitutional cases), orienting it to public readers? Publications such as these are also helpful: C. Saunders *Its Your Constitution Governing Australia Today* (2nd ed, Federation Press, 2003); H. Irving, *Five Things to Know about the Australian Constitution* (Cambridge University Press, forthcoming, August 2004).

²⁸ Sackville J, above n 27, 27.

²⁹ Irving, above n 2.

³⁰ Justice French, citing A. Inglis Clark’s quote of American jurist Judge Cooley in Inglis Clark, *Studies in Australian Constitutional Law* (1901, Legal Books (repr), 1977), 27.

attempt to reduce to written form much that is now unwritten, to capture constitutionally much that is presently left to Parliament. The lesson of the first one hundred years, captured in the essays in *Reflections*, might be that while the Constitution may not be uplifting to the reader,³¹ it is a functional legal instrument of government, and in any event one might find much that is musical in the silentness of duty. This ‘age of constitutionalism’ might lead to a focus on amending and filling out the written instrument, and a paradoxical public resistance to democratic institutions, in the attempt to put certain things beyond the political which in fact should remain open for contestation in the democratic arena. This focus on the Constitution, rather than on constitutionalism manifested in the institutions we already have, would perhaps be unfortunate: a great deal of scope exists to improve the quality of the democratic experience within the vibrant and resilient institutions as currently set up under the written and unwritten Constitution. In these spaces, while they debate any formal change to the Constitution, the people can seek to continuously reconstitute themselves in their ideal image, and any-angled light can congregate endlessly.

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³¹ ‘To read the Australian Constitution is not to experience a significant sense of moral uplift’: Justice French, *Reflections*, introduction to chapter 5.

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