

Sawer's¹ *Australian Constitutional Cases*, by L. Zines² and G. J. Lindell.³ Law Book Company Limited, 1982, xxxv+774 pp. \$49.50 (cloth), \$37.50 (paper).

[I]t is as important to a judge called upon to pass on a question of constitutional law, to have at least a bowing acquaintance with Acton and Maitland, with Thucydides, Gibbon and Carlyle, with Homer, Dante,

¹ Emeritus Professor Geoffrey Sawer. For biographical details see generally, (1980) 11 *Fed. L.R.* 259-282. In addition to Professor Sawer's writings cited *id.* 272-282 see, e.g., "National Status of Aborigines in Australia" in *Report of Select Committee of House of Representatives on the Voting Rights of Aborigines* F8478/61. (Appendix III at 37) (1961); "Grant of Franchise to Aborigines by the Commonwealth" *id.* Appendix IV at 38; "Taxation in a Federation" in *Federalism and the New Nations of Africa* 261. (D. P. Currie, ed. 1964); "A Guideline or a Straightjacket?" (1966) 10 *Hemisphere* 30; Written and Verbal Evidence on 18 March 1975 in *Senate 1974-1975 Standing Committee on Foreign Affairs and Defence* (Reference: The Role and Involvement of Australia and the United Nations in the Affairs of Sovereign Australian Territories) (Official Hansard Report (145) (1975); "Notes on the Appointments of Judges to the High Court" in *Report From the Select Committee of the [N.S.W.] Legislative Assembly Upon The Appointment of Judges to The High Court of Australia* 27 (1975); "Opinion on the Constitutional Power of the Commonwealth Government to Regulate the Securities Industry in Australia" in *Australian Securities and their Regulation* 227 (Report from the Senate Select Committee on Securities Exchange) (Pt. 1 vol. 3) (1975); "Opinion on *Strickland v. Rocla Concrete Pipes Ltd.*" in *id.* 298; "Remarks on the American Constitution: Its Lessons For Australia" in *Proceedings from the American Connection Seminar* C9 (D. Gibson, ed. 1976); "The Insulation of the Judicial Function [1976] *Aust. Current L. Dig. Dt.* 73; "The Executive Power of the Commonwealth and the Whitlam Government" (unpub. Octagon Lecture) (Uni. of W.A.) (24 pages) (4 June 1976); "New Federalism" (1977) 12 *Politics* 15; "Submission" (unpub.) (3 pages) (20 June 1979) noted in *The Constitutional Qualifications of Members of Parliament* 97 (Report of Senate Standing Committee on Constitutional and Legal Affairs) (1981); "Work Style and Ranking of High Court of Australia" (26 May 1980) *Canberra Times* 15 (Supp. on High Court 1); "Australia's Courts and Their British Connection" *id.* 21 (Supp. 7); "Repugnancy and Inconsistency of Legislation" [1980] *Cambrian L.R.* 101; "Book Review" (1981) 12 *Fed. L.R.* 1 (Supp.); "Conventions Governing the Appointment and Dismissal of Ministers of the Crown in the Constitutional System of the Commonwealth of Australia" in *Fourth Report of Standing Committee "D" to Executive Committee of Australian Constitutional Convention* (Appendix D) (vol. 2) (1982); "The Patriation of the British North America Act 1867" (1982) 2 *Canada Today* 2; "Fixed Term Parliaments: A Background Paper" in *Fixed Term Parliaments* 41 (A. C. Thom and A. Lynch, eds. 1982); "The Balance of Federalism" (18 May 1982) *West Australian* 8; "The External Affairs Power of the Commonwealth and *Koowarta's Case*" (1982) 54 *Aust. Q.* 428; "The Importance of *Koowarta's Case* in the Field of Human Rights" (1982) 1 *Human Rights* 6; "The Double Dissolution: Looking at The Documents, Past and Present" (9 Feb. 1983) *Canberra Times* 2; "The Administration of Morals" in *Legal Change: Essays In Honour of Julius Stone* 88 (A. R. Blackshield, ed. 1983); "The Constitutional Crisis of Australian Federalism" in *Australian Federalism: Future Tense* 94 (A. Patience and J. Scott, eds. 1983); "Ministerial Responsibility and Quangos" (1983) 43 *Aust. J. Pub. Admin.* 73; "Makarrata" (unpub. submission 20 Oct. 1981) 2 pages noted in *Two Hundred Years Later* 168 (Report by Senate Standing Committee on Constitutional and Legal Affairs, 1983).

² Robert Garran Professor of Law (Aust. Nat. Uni.), Professor Zines has written extensively on Australian constitutional law. See, e.g., "Sir Owen Dixon's Theory of Federalism" (1965) 1 *Fed. L.R.* 153; "Executive Discretion and the Adequacy of Judicial Remedies to Uphold the Constitution" (1971) 4 *Fed. L.R.* 236; "The Australian Constitution" in *Australian Law: An Introduction for Senior Students* 11 (P. Biskup, ed. 1974); *Australian Securities and their Regulation*, *supra* n. 1 at 253, 312; "The Australian Constitution 1951-1976" (1976) 7 *Fed. L.R.* 89; "The Double Dissolutions and Joint Sitting" in *Labor and the Constitution 1972-1975: Essays and Commentaries on the Constitutional Controversies of the Whitlam Years in Australian Government* 217 (G. Evans, ed. 1977); "The Growth of Australian Nationhood and its Effects on the Powers of the Commonwealth" in *Commentaries on the Australian Constitution: A Tribute to Geoffrey Sawer* 1 (L. Zines, ed. 1977); *Federal Jurisdiction in Australia* (Z. Cowen and L. Zines, ed. 1978); *The High Court and the Constitution* (1981); "Advice re Constitution, Sections 75 and 76: Jurisdiction of the High Court" in *Judicature Committee Report to Standing Committee "D"* 39 (1977) in *Proceedings of the Australian Constitutional Convention and Standing Committee Reports* (1978); "The High Court and the Constitution: The Search for Objective Criteria" in *Law Making in Australia* 207 (A. Erh-Soon Tay and E. Kamenka, eds. 1980); "Representation of Territories and New States in the Commonwealth Parliament" in *Fourth Report of Standing Committee "D"*, *supra* n. 1 at Appendix H.

³ Senior Lecturer in Law (Aust. Nat. Uni.). For some of Lindell's writings on Australian constitutional law, see e.g., *Justiciability of Political Questions under the Australian and United States Constitutions* (1972) (LL.M. thesis) (2 vols) (Adelaide University); "Judicial Review and the Composition of the House of Representatives" (1974) 6 *Fed. L.R.* 99; "Duty to Exercise Judicial Review" in *Commentaries on the Australian Constitution*, *supra* n. 2 at 150; "Applicability in Australia of Section 3 of the Act of Settlement 1701" (1980) 54 *A.L.J.* 628; "Fixed Term Parliaments: the Proposed Demise of the

Shakespeare and Milton, with Machiavelli, Montaigne and Rabelais, with Plato, Bacon, Hume and Kant, as with the books which have been specifically written on the subject.⁴

Seven hundred and fifty three pages of text constitute the fourth edition of what will henceforth be known as *Sawer's Australian Constitutional Cases*.⁵ The overwhelming bulk of material in "this case book"⁶ consists of extracts from opinions delivered in the High Court and Judicial Committee of the Privy Council.⁷ With the omission of decisions "primarily concerned with federal jurisdiction, the acquisition power and immigration power",⁸ this edition of Professor Sawer's pioneering⁹ constitutional law case book continues the same coverage of topics as the previous three editions and as is to be found in other standard case and text books.¹⁰

Early Federal Election" (1981) 53 *Aust. Q.* 15; "An Analysis of the Effect on the Australian Constitution and System of Government of Two Specific Proposals Made at the Hobart Session of the Australian Constitutional Convention in October 1976" in *The Senate and Supply: Special Report of Standing Committee "D"* 74 (1977) in *Proceedings of the Australian Constitutional Convention and Standing Committee Reports*, *supra* n. 2 "Admiralty and Maritime Jurisdiction: Necessity for Retaining Section 76(iii) of the Commonwealth Constitution" in *Fourth Report of Standing Committee "D"*, *supra* n. 1 at Appendix C; Lindell and Finn, "The Accountability of Statutory Authorities" in *Senate Standing Committee on Finance and Government Operations: Statutory Authorities of the Commonwealth* (5th Report) (Appendix 4, p. 173) (1982); Explanatory Paper: Constitutional Recommendations: Report of Senate Standing Committee on Constitutional and Legal Affairs on the Constitutional Qualifications of Members of Parliament (Feb. 1983); "Conventions of the Constitution: Certain Powers of the Governor General" (Structure of Government Sub-Committee of the Australian Constitutional Convention) (Oct. 1983).

⁴ Hand, "Sources of Tolerance" in *The Spirit of Liberty: Papers and Addresses of Learned Hand* 51, 63 (I. Dilliard, ed. 1952). Judge Hand continued: "For in such matters everything turns upon the spirit in which he approaches the questions before him. The words he must construe are empty vessels into which he can pour nearly anything he will. Men do not gather figs of thistles, nor supply institutions from judges whose outlook is limited by parish or class. They must be aware that there are before them more than verbal problems; more than final solutions cast in generalizations of universal applicability. They must be aware of the changing social tensions in every society which make it an organism: which demand new schemata of adaptation; which will disrupt it, if rigidly confined."

⁵ Hereinafter cited *Sawer's Cases*. See also, G. Sawer, *Cases on the Constitution of the Commonwealth of Australia: Selected, Annotated and Indexed* (1948) (525 pages of text); G. Sawer, *Cases on the Constitution of the Commonwealth of Australia: Selected and Annotated* (2nd ed. 1957) (615 pages of text) (3rd ed. 1964) (661 pages of text) (2nd Cumulative Supplement, 1973). See generally, McEvoy, "Book Review" (1982) 8 *Adel. L.R.* 220.

⁶ *Sawer's Cases v.*

⁷ Privy Council opinions are at pages 241, 246, 312, 601 and 614 of *Sawer's Cases*. See generally A. R. Blackshield, *The Abolition of Privy Council Appeals: Judicial Responsibility and "The Law for Australia"* (1978); Blackshield, "The Last of England: Farewell to their Lordships Forever" (1982) 56 *Law Institute J.* 779.

⁸ *Sawer's Cases v.* Such material is not, however, entirely absent. See, e.g., *Sawer's Cases* 536, 600 (federal jurisdiction), 755 (acquisition), 16, 519 (immigration).

⁹ In the Foreword to the 1st edition, Chief Justice Latham wrote: "Associate Professor Sawer has rendered a most valuable service in preparing this, the first case-book on Australian Constitutional Law." Latham, "Foreword" in G. Sawer, *supra* n. 5 at vii (emphasis added). This foreword was reproduced in the 2nd and 3rd editions but not, regrettably, in the 4th. The omission is regrettable because the Chief Justice reminded students that "[t]he Commonwealth Constitution is expressed in general language. It would be impossible to foresee and to provide in a Constitution for every case which might arise." *Id.* at vi. A similar point is tucked away in the editorial notes to the 4th edition which indicates "the difficulties associated with the interpretation of necessarily general and abstract language found in a constitutional document. . . ." *Sawer's Cases* 162. Chief Justice Latham also makes the point that non constitutional cases "represent the great bulk of the work of the [High] Court". G. Sawer, *supra* n. 5 at vi (1st ed.). See generally, G. Sawer, *Australian Federalism in the Courts* 53-54 (1967).

¹⁰ P. H. Lane, *A Digest of Australian Constitutional Cases* (2nd ed. 1982); P. H. Lane, *A Student's Manual of Australian Constitutional Law* (2nd ed. 1980); P. H. Lane, *The Australian Federal System* (2nd ed., 1979); W. A. Wynnes, *Legislative, Executive and Judicial Powers in Australia* (5th ed., 1976); C. Howard, *Australian Federal Constitutional Law* (2nd ed., 1972). Compare earlier works, e.g., A. I. Clark, *Studies in Australian Constitutional Law* (1901) (2nd ed., 1905); W. H. Moore, *The Constitution of the Commonwealth of Australia* (1902) (2nd ed., 1910). Compare annotations of the Commonwealth Constitution, e.g., J. Quick and R. R. Garran, *The Annotated Constitution of the Australian Commonwealth*

Commencing with the majority judgment in the *Engineers' Case*, opinions are reproduced concerning the scope of and implied limitations upon legislative power under the Commonwealth Constitution. The opinions highlight, if they do not always coherently and consistently set forth, reasons and doctrines alluded to by the High Court in determining whether and, if so, in what circumstances, Commonwealth and State laws can validly apply to and be enforced against other governments in the Australian federation and their instrumentalities.¹¹

Although various judicial principles of interpretation are interwoven throughout these opinions,¹² there is, in keeping with traditional expositions of Australian constitutional law, particular prominence given in this case book to principles of characterization¹³ and progressive interpretation.¹⁴ Other aspects of the interpretative process are relegated to a more secondary position.¹⁵ Extracted cases also encompass parliamentary authority to appropriate, spend and grant moneys and familiar topics of Commonwealth legislative power; notably, taxation, overseas and interstate trade and commerce, external affairs, corporations, defence, marriage, industrial disputes and the territories.¹⁶ Judicial encounters with constitutional provisions which constitute express restrictions or prohibitions on these and other legislative powers are also reproduced. Again the old favourites reappear. A number of opinions highlighting the judicial quagmire of s. 92 decisions,¹⁷

(1901 rep. 1976); Attorney-General's Department, *The Australian Constitution Annotated* (1980) [1976-1979 Cumulative Supplement (1980)]; R. D. Lumb and K. W. Ryan, *The Constitution of the Commonwealth of Australia Annotated* (3rd ed., 1981). Cf. e.g., P. Hanks, *Fajgenbaum and Hanks' Australian Constitutional Law* (2nd ed., 1980) and the critical review by Walker in (1982) 9 *Syd. L.R.* 720; C. Howard and C. Saunders, *Cases and Materials on Constitutional Law* (1979) which has been criticised for "the omission of freedom of interstate trade as a topic". Booker, "Book Review" (1980) 11 *Fed. L.R.* 109.

¹¹ *Sawyer's Cases* 1-57. For a comparative survey, see, e.g., C. H. H. McNairn, *Governmental and Intergovernmental Immunity in Australia and Canada* (1978) reviewed by Katz in (1980) 9 *Syd. L.R.* 222 and Simmonds in (1978) 57 *Can. Bar R.* 143.

¹² See, e.g., *Sawyer's Cases* 2, 6-7. Indeed, the editorial notes make it clear that the *Engineers' Case* "establishes the principles governing the interpretation of the Constitution" and that it "occupies a unique place in Australian constitutional interpretation". *Id.* 14.

¹³ See, e.g., *id.* 58-75 and also at 27-29.

¹⁴ *Sawyer's Cases* 76-78.

¹⁵ See, e.g., *id.* 14-15, 17-29 (federal premises and implications), 16 (Constitutional Convention Debates and draft Bills) 78-79 (inter-relationship between heads of Commonwealth legislative power) 139 (restrictions on and grants of legislative power); 767 (index — "interpretation"). See generally, Thomson, "Principles and Theories of Constitutional Interpretation and Adjudication: Some Preliminary Notes" (1982) 13 *Melb. U.L.R.* 597.

¹⁶ In addition to express legislative powers in ss. 51 and 122 reference is also made to implied legislative power inherent in the fact of nationhood. See, e.g., *Sawyer's Cases* 146-147, 155-156, 161, 163, 509-511. For reference to s. 52, see *id.* 55, 182.

¹⁷ S. 92 "has given rise to more puzzling substantive problems, and more frequent and acute differences of opinion, and more overrulings, explicit or disguised, than any other main topic". G. Sawyer, *supra* n. 9 at 174. See also, Sawyer, "Constitutional Law" in *The Commonwealth of Australia: The Development of its Laws and Constitution* 71, 76 (G. W. Paton, ed. 1952) [vol. 2 of *The British Commonwealth: The Development of its Laws and Constitutions* (G. W. Keeton, gen. ed.)] quoted in *Buck v. Bavone* (1976) 135 C.L.R. 110, 134 (Murphy, J.). Sir Robert Garran considered s. 92 as "the most troublesome provision of the Constitution". He "imagined[d] a law student approaching the study of the Constitution for the first time. He buys his law books, opens his notebook and begins with a historical survey" of s. 92 in the federal conventions and its interpretation in the High Court and Privy Council. "The student [then] closes his notebook, sells his law books, and resolves to take up some easy study, like nuclear physics or higher mathematics." R. R. Garran, *Prosper the Commonwealth* 184, 413-415 (1958). "[T]he present position regarding [section 92] is inherently unstable." Crommelin, "Sections 90 and 92 of the Constitution: Problems and Solutions" in *Current Constitutional Problems in Australia* 37, 42 (C. Saunders et al., 1982). For an historical overview, see M. Coper, *Freedom of Interstate Trade Under the Australian Constitution* (1983).

one judgment from a s. 99 case, some s. 90 opinions and a judgment on the establishment clause of s. 116 are included. Also set forth are the mandatory cases on problems of inconsistency between Commonwealth and State legislation and the question of the delegation of Commonwealth legislative power.

A new aspect is the inclusion of judicial exegesis upon some of the Constitution's electoral and parliamentary requirements which are necessarily connected with, though prior to, the enactment of Commonwealth legislation. These cases in some respects illustrate that old wine can be poured into new bottles.¹⁸ Hopefully, however, they will also do more. For example, they might be used as vehicles to enter and stimulate, in the Australian context, discussion concerning the judicial role under a written constitution which also establishes parliamentary and executive branches of government.¹⁹

The remaining cases extracted in *Sawer's Australian Constitutional Cases* are primarily concerned with one facet of the federal judiciary. It may, therefore, be somewhat surprising to discover that judicial power, its definition, content and independence, has led even s. 92 in litigation statistics.²⁰ Some doubts and divisions of opinion, however, remain.²¹ Even so, because the Australian constitutional system is one in which the judiciary claims to be the guardian of the Constitution,²² such uncertainties may be a source of relief rather than regret.

What then, if anything, is missing? Obviously given the vast number of issues that, since 1901, have required some consideration of the Constitution for their resolution, it would be impossible for one case book to be exhaustive of all views and opinions held or advanced in judicial and other forums. Given this fact and commercial realities of law book publishing, the authors do not and could not be expected to purport to be comprehensive. Nevertheless, at least two matters might have been added, perhaps at the expense of omitting some pages of the present text.

Executive power under the Commonwealth Constitution, although touched upon in several places in this case book,²³ does not command anywhere near the equivalent attention that is devoted to legislative and judicial power. In view of the possibility that a Commonwealth government may not have a majority in the Senate, resort to the use of executive

¹⁸ For example, responsible government, *Sawer's Cases* 722; inter-relationship of grants of Commonwealth legislative powers, *id.* 726-728; federal premises and implications, *id.* 730.

¹⁹ See already, e.g., Coper, "The Agony of Judicial Choice: Representation of the Territories in the Federal Parliament" [1978] *Aust. Current L. Dig.* DT 1. See also, Coper, "Book Review" (1976) 1 *U.N.S.W.L.J.* 370 esp. at 371 n. 12; Coper, "Freedom of Trade in India and Australia: Introductory Thoughts on the Nature of Judicial Choice" (1970) 10 *Jaiapur L.J.* 1; M. Coper, *supra* n. 17 at 285-296; Lumb, "Problems of Characterization of Federal Powers" [1982] *Aust. Current L. Dig.* at 45.

²⁰ S. 92 "is second . . . to judicial power as a source of constitutional cases. . . ." G. Sawer, *Australian Federalism in the Courts*, *supra* n. 9 at 174.

²¹ For example, *Sawer's Cases* 612, 625, 638, 660. See also, Campbell, "The Choice between Judicial and Administrative Tribunals and the Separation of Powers" (1981) 12 *Fed. L.R.* 24 esp. at 26-48.

²² For example, *Sawer's Cases* 752.

²³ For example, *id.* 761 (index).

power may become more frequent and important to implement policies and schemes which are otherwise within the scope of Commonwealth legislative power.²⁴ If this does not eventuate, the fact that it is a major component of the governmental structure established by the Constitution and that its functions and powers are to be exercised in accordance with constitutional grants and restrictions, should supply sufficient justification for devoting more space and attention to the executive government of the Commonwealth.²⁵

The second omission could be easily remedied by the inclusion of a bibliography. Eleven books are detailed in the list of abbreviations and a number of academic contributions are included in and at the end of editorial notes, which accompany nearly all of the major case extracts. A few additional pages devoted to a select bibliography would make this material more accessible and usable. As well, it would be a relatively simple device by which to establish a general framework, of which the aspect of judicial decisions merely forms a part. The bibliography could be divided into several categories. There might be included reference to several other bibliographies,²⁶ secondary, and perhaps primary, material concerning the historical evolution of the Commonwealth Constitution,²⁷ articles and books dealing with State constitutions,²⁸ case books and treatises from other

²⁴ As to executive action, see, e.g., Gurry, "The Implementation of Policy through Executive Action" (1977) 11 *Melb. U.L.R.* 189; Flint, "The Validity of the Foreign Investment Guidelines" (1977) 4 *Morash U.L.R.* 23, 43-45; Opie, "Commonwealth Power to Regulate Industrial Pollution" (1976) 10 *Melb. U.L.R.* 577, 599-607. As to the relationship between executive and legislative power, see, e.g., Winterton, "The Concept of Extra-Constitutional Executive Power in Domestic Affairs" (1979) 7 *Hastings Const. L.Q.* 1, 19-20 n. 130. See generally, Richardson, "The Executive Power of the Commonwealth" in *Commentaries on the Australian Constitution: A Tribute to Geoffrey Sawer*, *supra* n. 2 at 50; L. Zines, *The High Court and the Constitution*, *supra* n. 2 at 202-219; G. Winterton, *Parliament, The Executive, and the Governor-General: A Constitutional Analysis* (1983); H.E. Renfree, *The Executive Power of the Commonwealth of Australia* (1984); C. Cunneen, *Kings' Men: Australia's Governors-General from Hopetoun to Isaacs* (1984).

²⁵ See, e.g., G. Winterton, *Executive Power: Outline of Materials* i-ii, 1-116 (unpublished) (University of N.S.W. Law School, Public Law 2 — Session 1) (1977); P. Hanks, *supra* n. 10 at 339-433.

²⁶ For example, *Australian Constitutional Law and History: Select Union List* (Commonwealth Attorney-General's Department 1972); "Bibliography" in *The Senate and Supply* (Standing Committee D Special Report to Executive Committee) (Appendix G at 149-150) in *Minutes of Proceedings and Official Record of Debates of the Australian Constitutional Convention 26-28 July 1978* (1978); "Bibliography" in *Constitutional Seminar 63-68* (1977); C. Howard and C. Saunders, *supra* n. 10 at xxvii-xli; Coper, *supra* n. 17 at 892-902; "Bibliography" in *Towards Adaptive Federalism: A Search for Criteria for Responsibility Sharing in a Federal System* 175-216 (Advisory Council for Intergovernmental Relations — Information Paper No. 9) (1981). See generally, Knight, "The Study of Australian Federalism" (1980) 39 *Aust. J. Pub. Admin.* 318.

²⁷ Such materials could be chosen from the bibliographies in E. M. Hunt, *American Precedents in Australian Federation* 270-278 (1930); J. A. La Nauze, *The Making of the Australian Constitution* 355-361 (1972); L. F. Crisp, *The Later Australian Federation Movement 1883-1901: Outline and Bibliography* (1979). For earlier Australian legal history, see, e.g., L. A. Whitfield, *Founders of the Law in Australia* (1971); J. M. Bennett and A. C. Castles, *A Source Book of Australian Legal History* (1979); A. C. Castles, *An Australian Legal History* (1982).

²⁸ Castles, "Limitations on the Autonomy of the Australian States" [1962] *Pub. L.* 175; *The Government of the Australian States* (S. R. Davies, ed., 1960); R. D. Lumb, *The Constitutions of the Australian States* (4th ed., 1977); C. Enright, *Constitutional Law* (1977); P. Hanks, *supra* n. 10. Lumb, "Methods of Alteration of State Constitutions in the United States and Australia" (1982) 13 *Fed. L.R.* 1. In the U.S.A. State constitutions have been "rediscovered". See, e.g., Collins, "Reliance on State Constitutions — Away From a Reactionary Approach" (1981) 9 *Hastings Const. L.Q.* 1; "Developments in the Law — The Interpretation of State Constitutional Rights" (1982) 95 *Harv. L.R.* 1324; Tarr and Porter, "Gender Equality and Judicial Federalism: The Role of State Appellate Courts" (1982) 9 *Hastings Const. L.Q.* 919; Chida, "Rediscovering the Wisconsin Constitution: Presentation of Constitutional Questions in State Courts" [1983] *Wisconsin L.R.* 483. See also, *Royal Commission into the Constitution Act 1934* Tasmania (1982) (transcript of proceedings 3 vols).

jurisdictions,²⁹ comparative constitutional law materials³⁰ and, not least, judicial biographies.³¹

Sawer's Australian Constitutional Cases is symbolic of the continued³² influence on the teaching of constitutional law in Australia of the

²⁹ United States: see, e.g., J. B. Thayer, *Cases on Constitutional Law with Notes* (2 vols. 1895); E. Wambaugh, *A Selection of Cases on Constitutional Law* (4 vols. 1914); G. Gunther, *Cases and Materials on Constitutional Law* (10th ed., 1980) (1983 Supp.); P. Brest and S. Levinson, *Processes of Constitutional Decision-making: Cases and Materials* (2nd ed., 1983); P. A. Freund, A. E. Sutherland, M. D. Howe and E. J. Brown, *Constitutional Law: Cases and Other Problems* (4th ed., 1977) [noted in *Sawer's Cases* xiii] (1979 and 1980 Supps. by H. P. Monaghan); L. H. Tribe, *American Constitutional Law* (1978) (1979 Supp.). See generally Sedler, "Constitutional Law Casebooks: A View from the Podium" (1981) 79 *Michigan L.R.* 1020; Stone, "Towards a Theory of Constitutional Law Casebooks" (1968) 41 *Southern Calif. L.R.J.*; Alexander, "The Province of Constitutional Law Casebook Jurisprudence Redetermined" (1977) 29 *Stanford L.R.* 1299.

Canada: see, e.g., A. S. Abel and J. L. Laskin, *Laskin's Canadian Constitutional Law* (rev. 4th ed., 1975); P. W. Hogg, *Constitutional Law of Canada* (1977) (pp. 477-485 bibliography).

India: see, e.g., M. C. J. Kagzi, *The Constitution of India* (2nd ed., 1967); G. Austin, *The Indian Constitution: The Cornerstone of a Nation* (1972 ed.); C. Jha, *Judicial Review of Legislative Acts* (1974); H. M. Seervai, *Constitutional Law of India: A Critical Commentary* (3 vols., 2nd ed., 1974-1975-1979). See also, C. Hughes, *The Federal Constitution of Switzerland: Translation and Commentary* (1954) (pp. 213-218 bibliography); J. O'Reilly and M. Redmond, *Cases and Materials on the Irish Constitution* (1980); L. A. Sheridan and H. E. Groves, *The Constitution of Malaysia* (1967); S. Jayakumar, *Constitutional Law: Cases from Malaysia and Singapore* (2nd ed., 1976).

³⁰ See, e.g., W. F. Murphy and J. Tanenhaus, *Comparative Constitutional Law: Cases and Commentaries* (1977); M. Cappelletti and W. Cohen, *Comparative Constitutional Law: Cases and Materials* (1979); *Studies in Federalism* (R. R. Bowie and C. J. Friedrich, eds., 1954); *Federalism and the New Nations of Africa*, *supra* n. 1; E. McWhinney, *Judicial Review* (4th ed., 1969); B. O. Nwabueze, *Constitutionalism in the Emergent States* (1973); T. L. Becker, *Comparative Judicial Politics: The Political Functionings of Courts* (1970); H. J. Abraham, *The Judicial Process: An Introductory Analysis of the Courts of the United States, England, and France* (4th ed., 1980); E. McWhinney, *Constitution-making: Principles, Process, Practice* (1981). See also, articles on judicial review in Latin America, Africa, India, Canada, Commonwealth countries and France in (1974) 35 *Ohio State L.J.* 785-926; Kommers, "Comparative Judicial Review and Constitutional Politics" (1975) 27 *World Politics* 282; "Symposium: Conference on Comparative Constitutional Law" (1980) 53 *Southern Calif. L.R.* 401-785; Cappelletti, "The Law-Making Power of the Judge and its Limits: A Comparative Analysis" (1981) *Monash U.L.R.* 15. See also, M. Shapiro, *Courts: A Comparative and Political Analysis* (1981); Kommers, "Comparative Constitutional Law: Casebooks for a Developing Discipline" (1982) 57 *Notre Dame Lawyer* 642.

³¹ Although the statement is made that "there have been many changes to the membership of the High Court" there is no explanation why this might be important and what bearing, effect or relationship it has on "[t]he development of constitutional law during the intervening period" between this 4th edition and the 3rd edition with its 2nd cumulative supplement. *Sawer's Cases v. For biographies of High Court Justices*, see, e.g. E. Neumann, *The High Court of Australia: A Collective Portrait 1903 to 1972* (2nd ed., 1973); P. Elliot, *Composition and Class Background of Justices of the High Court* (unpub. research paper) (Faculty of Law Uni. N.S.W.) (1979); J. M. Bennett, *Keystone of the Federal Arch: A Historical Memoir of the High Court of Australia to 1980* (pp. 140-145 biographical synopsis) (1980); Joyce, "S. W. Griffith: Towards the Biography of a Lawyer" (1974) 16 *Hist. Stud.* 235; Joyce, "Samuel Walker Griffith: A Liberal Lawyer" in *Queensland Political Portraits 1859-1952* at 143 (D. J. Murphy and R. B. Joyce, eds., 1978); J. Reynolds, *Edmund Barton* (1948 rep. 1979); Z. Cowen, *Isaac Isaacs* (1967); L. F. Crisp, *The Unrelenting Penance of Federalist Isaac Isaacs 1897-1947* (1981); N. Palmer, *Henry Bournes Higgins* (1931); P. Coward, *Henry Bournes Higgins and the Australian Constitution* (1975) (LL.M. thesis) (Aust. Nat. U.); L. F. Crisp, *Federation Prophets Without Honour: A. B. Piddington, Tom Price, H. B. Higgins* 59-90, 100-106, 111-114 (1980); K. Tennant, *Evatt: Politics and Justice* (1970); Z. Cowen, *Sir John Latham and Other Papers* 3-60 (1965); D. Marr, *Barwick* (1980). See also the works on jurimetrics listed in E. Neumann, *supra* at 128-129; Blackshield, "Judges and the Court System" in *Labor and the Constitution*, *supra* n. 2 at 105.

³² E.g., "Professor Bailey questioned whether the traditional methods of teaching were the best for students who would be not only practitioners, teachers and judges, but in all likelihood the first generation of Australian textbook writers, and after a visit to the United States in 1937, he departed from custom by asking questions of the class and experimenting with the case book method." R. Campbell, *A History of the Melbourne Law School 1857 to 1973* at 126-127 (1977). See also, Bailey, "Legal Education in the United States" (1938) 1 *Res Judicatae* 293; "Conversation with Sir David Derham: Part 1" (1982) 56 *Law Institute J.* 1024, 1027. On another subject see, Shearer, "The Teaching of International Law in Australian Law Schools" (1983) 9 *Adelaide L.R.* 61.

"Langdellian revolution"³³ heralded in 1871 by Christopher Columbus Langdell who proclaimed a theory of law and legal education:³⁴

Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer; and hence to acquire that mastery should be the business of every earnest student of law. Each of these doctrines has arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases through centuries. This growth is to be traced in the main through a series of cases; and much the shortest and best, if not the only way of mastering the doctrine effectually is by studying the cases in which it is embodied.³⁵

A pedagogical case method approach to law teaching and, in particular, constitutional jurisprudence, is based on the conception of law "as a 'science'", as "court-centred"³⁶ and "as an autonomous and apolitical ordering".³⁷ If any examination is undertaken of the teaching of constitutional law in Australia, such premises should be exposed and discussed.³⁸ If students, and others, concentrate on this fourth edition of Australian constitutional cases, to the exclusion of other primary and secondary materials, in order to acquire an understanding of the Commonwealth Constitution and its judicial interpretation, there may well be a risk that they might come to believe that Langdellian notions of law constitute or correspond to reality.³⁹

³³ Konefsky and Schlegel, "Mirror, Mirror on the Wall: Histories of American Law Schools" (1982) 95 *Harv. L.R.* 833, 837, 838. On the era (1870-1895) Christopher Columbus Langdell was at Harvard, see, A. E. Sutherland, *The Law At Harvard: A History of Ideas and Men, 1817-1967* at 162-205 (1967). See also, Chase, "Book Review" (1983) 67 *Minn. L.R.* 844; R. Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* (1983).

³⁴ See generally, W. Twining, *Karl Llewellyn and the Realist Movement* 10-25, 389-394 (1973). A number of law review articles on the teaching of constitutional law are listed by Haimbaugh, "The Teaching of Constitutional Law in American Law Schools" (1981) 31 *J. Legal Ed.* 38. See generally, "Symposium: Legal Scholarship: Its Nature and Purposes" (1981) 90 *Yale L.J.* 955-1296; "Legal Education: A Symposium" (1981) 55 *Wash. U.L.Q.* 591-910; Note, "Round And Round The Bramble Bush: From Legal Realism To Critical Legal Scholarship" (1982) 95 *Harv. L.R.* 1669.

³⁵ C. C. Langdell, *A Selection of Cases on the Law of Contracts, With a Summary of the Tropics Covered by the Cases* viii (1871) quoted in W. Twining, *supra* n. 34 at 11 and in A. E. Sutherland, *supra* n. 33 at 174 and in Stevens, "Two Cheers for 1870: The American Law School" (1971) 5 *Persp. Am. Hist.* 504, 35-36. In a review of Langdell's case book, Oliver Wendell Holmes formulated his famous aphorism that "[t]he life of the law has not been logic: it has been experience". See generally, Thomson, "Book Review" (1978) 13 *U.W.A.L.R.* 397-398 n. 2; W. Twining, *supra* n. 34 at 15-16, 398-390.

³⁶ W. Twining, *supra* n. 34 at 12.

³⁷ Konefsky and Schlegel, *supra* n. 33 at 841.

³⁸ Professor Twining has commented: "In the light of experience it is easy to see that Langdell's version of 'the case method' was based on sound educational premises: it required the intensive study of legal rules; the method required disciplined participation rather than passivity on the part of students; it was more sceptical and more lively than the dreary rote learning that it in large part replaced; and, in the hands of a good teacher, sustained by the competitive atmosphere of the American law school, it secured many of the values of small-group teaching in a remarkably economic fashion. Finally, the case method involved an important switch from emphasis on learning rules of law to emphasis on skill in 'legal analysis, legal reasoning, legal argument and legal synthesis'." W. Twining, *supra* n. 34 at 13. See generally, *supra* n. 34.

³⁹ A book which allocates nearly all of its pages to cases necessarily omits other sources of constitutional law. For examples of such non-judicial sources see, e.g., Thomson, *supra* n. 15 at 600, n. 12 and also, *Opinions of Attorneys-General of the Commonwealth of Australia with opinions of Solicitors-General and the Attorney-General's Department* (vol. 1: 1901-1914) (P. Brazil and B. Mitchell, eds., 1981). See also *infra* n. 42.

This will surprise those who, although not being fortunate enough to have been taught constitutional law by Professor Sawyer, have read even a small sampling of his writings.⁴⁰ For Professor Sawyer and likewise the current authors of this case book would reject any such theory or conception of constitutional law. On the authority of a former student,⁴¹ Geoffrey Sawyer "was not so much a lecturer as a raconteur" who "gave to dry doctrine its context in the social and economic forces of the day". He was an "outstanding teacher of the law, clothing each dry decision with living relevance and so marshalling the cases that strategic patterns emerged from tactical march and countermarch" giving "to the constitutional law he taught a new relevance, superimposing the curial shape of Australia's federal experiment upon the nation's social and physical landscape".⁴²

The challenge for those endeavouring to gain a similar understanding and perception and who attempt to do so by using *Sawyer's Australian Constitutional Cases* is to draw the general from the particular.⁴³ In doing so, effort in the past has been directed at discovering the relevance to judicial decisions of historical, political, social and economic matters of contextual importance. Although that continues to be important, future discussion and debate concerning Australian constitutional law should also turn its attention to premises, themes and issues which necessarily underlie a constitutional structure and decision-making process. Unfortunately, this case book does not help or engender such a debate.

Law students who might be expected to be primarily, though not exclusively, concerned with judicial processes, ought to address, for example, the fundamental issue of the role of the judiciary under a written constitution. In any such examination, two postulates concerning judicial review are of vital significance; namely, what, if any, constitutional warrant exists for judicial power to determine the constitutionality of legislative and

⁴⁰ "Sawyer does not set great store by traditional jurisprudence for understanding the actual operation of law and the legal system, although he acknowledges that it can further rigorous thinking and has an important normative role. He rightly challenges the contribution of traditional conceptual analysis to a full understanding of legal reasoning. . . . [T]here is still much to be learned about the law and the legal system from historical and comparative studies and from observing, as best one can, what happens in practice. Sawyer's own writings, especially in Australian constitutional law, show how much can be achieved by an approach which, although law-based, draws on whatever knowledge furthers understanding." Cranston, "Lawyer in the Social Sciences" — Geoffrey Sawyer" (1980) 11 *Fed. L.R.* 263, 270. It has been observed that s. 92 cases provide "no better illustration of the fact that constitutional interpretation is not just a game with dictionaries but involves issues rooted in ideological schisms in the Australian community". Booker, *supra* n. 10 at 110. In a non-constitutional context it has also been noted "that legal rules and institutions are influenced by moral, ethical, wider utilitarian, psychological and anthropological as well as economic considerations". Partlett, "Book Review" (1980) 11 *Fed. L.R.* 239, 245.

⁴¹ Sir Ninian Martin Stephen (Judge of Supreme Court of Victoria 1970-1972) (Justice of the High Court 1972-1982) (Governor-General 1982-). For biographical details see, Appointment of Governor-General (Prime Minister's Press release 13 Jan. 1982); Fraser's New Man (17-23 Jan. 1982 *National Times* 13-14); Ceremonial Sitting on the Occasion of the Retirement of the Right Honourable Sir Ninian Stephen, P.C., K.B.E. (11 May 1982 Transcript of Proceedings, 18 pages).

⁴² Stephen, "A Recollection of Geoffrey Sawyer" (1980) 11 *Fed. L.R.* 261-262.

⁴³ On this idea see, Thomson, *supra* n. 35 at 408 n. 77 quoting Freund, "Mr Justice Brandeis" in *Mr Justice 177, 182* (A. Dunham and P. B. Kurland, eds., rev. ed. 1964). See also, P. A. Freund, *Felix Frankfurter: Reminiscences and Reflections* 8 (1982).

executive acts,⁴⁴ and the manner in which that power is and ought to be exercised.⁴⁵

If the text of the Constitution does not explicitly authorise judicial review, how has the High Court reached and justified the conclusion that it possesses and can exercise this power? A few passages in various opinions are reproduced which address this question.⁴⁶ While they conclude that there is constitutional mandate for judicial review, there is less emphasis on the reproduction of material espousing a view that at least certain provisions of the Constitution and actions taken pursuant to them are not subject to judicial review. Determination of constitutionality in these cases does not rest with the judiciary but is rather a matter for other persons and institutions.⁴⁷ The adequacy of the High Court's reasoning and the construction of a coherent constitutional underpinning for the existence of this judicial power to engage in judicial review or decline to do so, are matters which, as much as, if not more than, questions concerning, for example, judicial interpretation of the corporations and external affairs powers, need to be continually and carefully addressed.

Assuming the constitutional legitimacy of the power of judicial review and given its existence as a matter of fact, there arise for consideration questions concerning its exercise. To understand how the Court exercises this power there must be a focus upon matters such as the methods and principles of constitutional interpretation utilised by the Court,⁴⁸ the existence and application of a presumption of constitutionality⁴⁹ and the content and use of standing requirements.⁵⁰ There should also be discussion about how judicial review ought to be carried out.⁵¹ This would require taking into account and evaluating factors and considerations not always evident from reading Australian cases. An obvious example is the relationship between, and the effect of each on the other of, the exercise of judicial

⁴⁴ "The most fundamental question of all . . . is 'the legitimacy of judicial review itself' . . ." R. Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* 351 (1977) quoting Grey, "Do We Have An Unwritten Constitution?" (1975) 27 *Stanford L.R.* 703. This "question has long sparked controversy". G. Gunther, *supra* n. 29 at 15. See generally, J. A. Thomson, *Judicial Review in Australia: The Courts and the Constitution* (1979) (S.J.D. thesis) (Harvard Law School).

⁴⁵ "It would appear to be in the nature of things that there be serious and ongoing debate about the substance and process of constitutional adjudication in the United States". Sager, "Fair Measure: The Legal Status of Underenforced Constitutional Norms" (1978) 91 *Harv. L.R.* 1212. For Australia, see, e.g., Blackshield, "Judicial Innovation as a Democratic Process in Future Questions" in *Australian Politics* 35, 46-48 (1979 Meredith Memorial Lectures) (1979); Stephen, "Judicial Independence — A Fragile Institution" (1982) 13 *Melb. U.L.R.* 334, 339-345. See also *supra* n. 19.

⁴⁶ *Sawyer's Cases* 147-149, 51...1-752, 753. See also, proposed s. 77A(1)(a) and s. 77A(2)(a) of Constitution Alteration (Advisory Jurisdiction of High Court) 1983.

⁴⁷ *Sawyer's Cases* 142, 159, 721, 729, 750, 752, 753. See generally, G. J. Lindell, *Justiciability of Political Questions Under the Australian and United States Constitutions*, *supra* n. 3; Sawyer, "Political Questions" (1963) 15 *U. Toronto L.J.* 49; Thomson, *supra* n. 15 at n. 12.

⁴⁸ See *supra* notes 13, 14, 15.

⁴⁹ *Sawyer's Cases* 507, 511, 512. See also, e.g., *Gazzo v. Comptroller of Stamps (Vic.) ex parte A.G. (Vic.)* (1981) 56 A.L.J.R. 143, 153 (Murphy, J.). Burmester, "The Presumption of Constitutionality" (1983) 13 *Fed. L.R.* 277.

⁵⁰ See, e.g., *Sawyer's Cases* 103, 163-164.

⁵¹ See *supra* n. 45. See also, e.g., "Symposium" (1979) 6 *Hast. Const. L.Q.* 403-635; "Symposium: Judicial Review Versus Democracy" (1981) 41 *Ohio St. L.J.* 1-434; "Symposium: Constitutional Adjudication and Democratic Theory" (1981) 56 *New York U.L.R.* 259-544; "Symposium: Judicial Review and the Constitution — The Text and Beyond" (1983) 8 *U. Dayton L.R.* 443-831. See also, "Symposium: Law and Literature" (1982) 60 *Texas L.R.* 373-586.

review by appointed and tenured Justices⁵² and notions of responsible and representative majoritarian democracy.⁵³

Other than as alluded to in the extracted cases, there is only sparse reference in editorial notes to the general premises, themes and issues which underlie and provide the larger canvas of Australian constitutional law and to the historical,⁵⁴ political,⁵⁵ social⁵⁶ and economic⁵⁷ background and context in which Australian constitutional law has been nurtured, developed and changed. *Sawer's Australian Constitutional Cases* can thus be placed in the first of three transitions, which have been identified, in the compilation of materials for legal education:

[T]he first [transition], [is] from education via digest, apprenticeship, and, for some, attendance at lectures, to education via immersion in the materials of legal science, the limited number of classic cases stating the true principles of that science. The second transition, [is] from the casebook to the book of "cases and materials," under the influence of legal realism. . . .

The third transition . . . [occurs when] . . . [t]eachers at law schools . . . [with] unrestricted access to copying centers, and, with the impending flood of word-processing equipment . . . compile their own selections of materials, word-process in some linking commentary, and reproduce the result for their students.⁵⁸

⁵² S. 72 Aust. Const. As to the compatibility of judicial review, majority rule and the Constitution see, e.g., Stephenson, "Recharting the Course: Judicial Review in the 1980's" (1981) 26 *N.Y.L. School L.R.* 943, 946-947.

⁵³ See, e.g., *Sawer's Cases* 722. Professor Gunther succinctly summarizes the interweaving of these themes: "[C]oncern with the bases of judicial review in constitutional history and text is often closely connected with explorations of the consistency between judicial review and democratic government. Views on that issue . . . may profoundly affect exercises and evaluations of the judicial power. . . . Anxiety about the undemocratic aspects of judicial review, for example, tends to support the judicial self-restraint stance. . . . Closely related to this debate about the propriety and scope of judicial intervention are several other themes. . . . For example, views about the legitimacy of judicial review may influence attitudes about the appropriate sources of constitutional interpretation. To what extent must the Court confine itself to the text and history of the relevant constitutional provision? To what extent may it rely on inferences from the structures and relationships established by the basic document? . . . To what extent is the Court authorized to implement values derived from sources outside the written document — e.g., the society's political and moral values, or the Justices' personal ones? . . . Moreover, views about the legitimacy of judicial review and its consistency with democracy may influence positions about the appropriate deference the Court owes to legislative judgments." G. Gunther, *supra* n. 29 at 23-25. For a dramatic illustration see, e.g., Rudolph and Rudolph, "Judicial Review versus Parliamentary Sovereignty: The Struggle over Stateness in India" (1981) 29 *J. Clth & Comp. Politics* 231.

⁵⁴ See, e.g., *Sawer's Cases* 16, 162, 343.

⁵⁵ See, e.g., *id.* 28, 43-44, 122-123, 448, 490, 519.

⁵⁶ See, e.g., *id.* 535, 574. See generally, e.g., J. Rickard, *Class and Politics: New South Wales, Victoria and the Early Commonwealth, 1890-1910* (1976); Holmes, "A Federal Culture" in *Australian Politics: A Third Reader* 215 (H. Mayer and H. Nelson, eds., 1974); Encel, "The Social Impact of the Australian Constitution" in *Legislation and Society in Australia* 114 (R. Tomasic, ed., 1980).

⁵⁷ See, e.g., *Sawer's Cases* at 122-123, 262.

⁵⁸ Tushnet, "Book Review" (1982) 26 *Am. J. Leg. Hist.* 184. "[T]he American law school casebook has evolved during this century from a simple, more or less imaginatively ordered collection of cases to a complex combination of extracts from cases, with questions and comments — often questions as comments — not infrequently interlaced with excerpts from the non-legal as well as legal writings of other authors. The casebook thus has tended to become less a construction of blocks and more a construction of clay." Hyman, "Constitutional Jurisprudence and the Teaching of Constitutional Law" (1976) 28 *Stanford L.R.* 1271. The preeminent examples are G. Gunther, *supra* n. 29 and P. M. Bator, P. J. Mishkin, D. L. Shapiro, H. Wechsler, *Hart and Wechsler's The Federal Courts and the Federal System* (2nd ed. 1973) (1981 Supp.). See also, P. Brest and S. Levinson, *supra* n. 29.

Sawyer's Australian Constitutional Cases is structured in two ways; by grouping cases in a manner which emphasises "doctrinal themes, functional problems, and constitutional provisions" and by a chronological ordering highlighting changes and trends in judicial decisions.⁵⁹ It lacks, however, a third organisational strand which, despite its rare appearance in materials dealing with Australian constitutional law, is perhaps the most important. That is, the extension of the ambit of discussion and investigation beyond mere case studies to encompass a broader framework resulting in a "methodological, process-oriented [organisation], focusing on pervasive problems of modes of adjudication, allocations of decision-making authority, and sources of constitutional interpretation, from text and history to structural and contemporary values".⁶⁰

To compile a case book which endeavours to incorporate this third strand by discussion and elucidation of such basic underlying premises, themes and issues will be a formidable task. Nevertheless, it is a task which if carried to fruition would be of inestimable value and assistance to all Australians who are at various times required to evaluate present constitutional arrangements and assess proposals for change.

JAMES A. THOMSON*

⁵⁹ G. Gunther, *Cases and Materials on Constitutional Law* xviii (9th ed., 1975) reproduced in G. Gunther, *supra* n. 29 at xxii and quoted in Hyman, *supra* n. 58 at 1273.

⁶⁰ G. Gunther, *supra* n. 59 at xviii, reproduced in G. Gunther, *supra* n. 29 at xxii and quoted in Hyman, *supra* n. 58 at 1273-1274.

* B.A., LL.B.(Hons.)(W.A.), LL.M., S.J.D.(Harv.).