

TOOLS FOR TEACHING, AND THINKING ABOUT, AUSTRALIAN CONSTITUTIONAL LAW

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Review of *Australian Constitutional Law: Principles in Movement* (Jonathan Crowe, Oxford University Press, 2022, ISBN 9780190311414)

Jonathan Crowe has added another textbook to the growing number of options for teachers of public and constitutional law in Australia. In doing so, he provides both students and scholars with useful tools to make sense of this area of law and to help teach, learn and critique constitutional law as created by judges of the High Court. Crowe is best known for his scholarship in legal philosophy, particularly the natural law tradition.¹ However, he is also active in constitutional law, having commented on cases and constitutional reasoning in several publications.² His book *Australian Constitutional Law: Principles in Movement* ('*Australian Constitutional Law*')³ emerges from his experience in teaching constitutional law over the last 15 years.

Australian Constitutional Law adds to the recent rise in textbooks which challenge the case book approach. Case books remain significant and well-used⁴ but are now

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¹ See Jonathan Crowe, *Natural Law and the Nature of Law* (Cambridge University Press, 2019) <<https://doi.org/10.1017/9781108653237>>.

² See, eg, Jonathan Crowe, 'The Narrative Model of Constitutional Implications: A Defence of *Roach v Electoral Commissioner*' (2019) 42(1) *University of New South Wales Law Journal* 91 <<https://doi.org/10.53637/SFAQ6074>>; Danielle Ireland-Piper and Jonathan Crowe, 'Whistleblowing, National Security and the Constitutional Freedom of Political Communication' (2018) 46(3) *Federal Law Review* 341 <<https://doi.org/10.1177/0067205X1804600301>>; Jonathan Crowe and Peta Stephenson, 'An Express Constitutional Right to Vote? The Case for Reviving Section 41' (2014) 36(2) *Sydney Law Review* 205; Suri Ratnapala and Jonathan Crowe, 'Broadening the Reach of Chapter III: The Institutional Integrity of State Courts and the Constitutional Limits of State Legislative Power' (2012) 36(1) *Melbourne University Law Review* 175.

³ Jonathan Crowe, *Australian Constitutional Law: Principles in Movement* (Oxford University Press, 2022) ('*Australian Constitutional Law*').

⁴ See, eg, Nicholas Aroney et al, *Winterton's Australian Federal Constitutional Law: Commentary and Materials* (Thomson Reuters, 5th ed, 2022); George Williams, Sean Brennan and Andrew Lynch, *Blackshield*

either replaced or supplemented by the alternative offerings which treat constitutional law thematically or critically, or which provide overviews of areas of law without being explicitly led by case extracts.⁵ As Crowe describes, his book aims to be a ‘coherent account of the central principles of Australian constitutional law’.⁶

Crowe’s text is in many ways a traditional account of constitutional law in Australia. After an introductory chapter setting out the development and schema of the book, Crowe covers the three arms of government: the representative Parliament and its legislative powers (chapters 2–5), the Executive (chapter 6) and the Judiciary (chapters 8–9) with a slight detour through federalism in chapter 7. Then follow chapters on express and implied rights (chapters 10–11), ending with a chapter on constitutional change. The content addressed in each chapter is the case law developed by the High Court and the way in which that law sets up doctrine, rules, patterns and resolves tensions between competing forces in constitutional law. As a descriptive account of constitutional law, it is neither surprising nor controversial; being a text deliberately aimed at introducing students to the field rather than critiquing the field and proposing reform. There are some notable exceptions to the overall descriptive tenor of the book, such as in relation to rights, where Crowe exposes conceptual incoherence in the way in which the Court uses language to describe constitutional rights.⁷

This book is worth some attention, not for its choice of topics, but for the way in which Crowe sets out his pedagogical approach and frameworks models of learning and thinking. These are useful not only to students but also to scholars. Crowe describes his approach as ‘spaced repetition’, such that ‘repetitive training is more effective following an interval than when carried out in quick succession’.⁸ The practice of returning to materials on several occasions, separated by time and other pursuits, is a practice which is also useful to teachers and scholars to ensure a freshness of understanding rather than reliance on a past observation. A notable example of this is in New York University Professor Joseph Weiler’s reflection on teaching several years ago, where he explained:

At the end of each course, I destroy my teaching notes. Thus, in the following year I can prepare afresh for class – reading the assignments as do the students, and coming up with new ideas. It also helps you to appear fresh and engaged. On several occasions my

and Williams *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 7th ed, 2018).

⁵ See, eg, Luke Beck, *Australian Constitutional Law: Concepts and Cases* (Cambridge University Press, 2020) <<https://doi.org/10.1017/9781108658348>>; Gabrielle Appleby, Alexander Reilly and Laura Grenfell, *Australian Public Law* (Oxford University Press, 3rd ed, 2018).

⁶ Crowe, *Australian Constitutional Law* (n 3) ix.

⁷ See *ibid* 200–1.

⁸ *Ibid* xi.

Research Assistants have pointed out that I analyzed the same text differently in the preceding year. I took that as a vindication and compliment.⁹

The approach adopted by Crowe is a narrative one of learning through the theme of constitutional movement. Narratives are a useful technique which ‘[recognise] that humans understand the world by placing information and events in the context of narratives. We tell stories to help us grasp what we are experiencing’.¹⁰ Crowe uses the narrative approach to help provide some coherence in the story of constitutional law over time in Australia. The theme of constitutional movement is an attractive one, as it explicitly embraces the reality of change and development in constitutional law: not in a normative sense of assuming progression towards an ideal goal, but rather as a metaphor to capture the way in which reasoning in case law over time is reflective of change. The model of movement adopted by Crowe focuses on the reasoning and outcomes of High Court cases addressing constitutional law. Crowe argues that the Court constantly returns to centres of gravity – which he describes as values – and the Court has to work out how to resolve tensions between those values. Thus, over time, one can see a model of oscillation between competing centres of gravity.¹¹

One example of such oscillation is described as the ‘democratic’ movement in cases concerned with representative government. Here, the Court balances representative government and parliamentary sovereignty to determine the scope of the Parliament’s power to set the details of the electoral system but with limits to ensure representation is secured.¹² Another is in the way in which the Court addresses federalism, addressing the tension between Commonwealth power and state autonomy.¹³

Overall, Crowe’s description of oscillation is an accurate depiction of what is happening, and gives students and scholars a way to understand broader narratives of constitutional law development over time. The model embraces the fact that change is not necessarily linear and that the Court moves backwards and forwards. Crowe’s analysis here is focused on the overall reasoning of the Court. More could be said regarding the way in which individual judges lead or follow or contribute to the movement described, but that is sensibly avoided in this text due to its intended scope and purpose.¹⁴

⁹ J H H Weiler, ‘On My Way Out IV: Teaching’, *I-CONnect* (Blog Post, 15 January 2017) <<http://www.iconnectblog.com/2017/01/on-my-way-out-iv-teaching-i%C2%B7con-14-issue-4-editorial/>>.

¹⁰ Crowe, *Australian Constitutional Law* (n 3) xi.

¹¹ *Ibid* 1.

¹² *Ibid* 48–9. See generally *ibid* ch 1.

¹³ *Ibid* 163. See generally *ibid* ch 7.

¹⁴ For scholarship regarding the contribution of individual judges on the High Court see, eg, Rosalind Dixon and George Williams (eds), *The High Court, the Constitution and Australian Politics* (Cambridge University Press, 2015) <<https://doi.org/10.1017/CBO9781107445253>>.

The model adopted by Crowe fits within the developing scholarship concerned with functionalism and the role of values within law,¹⁵ and recognizes the impact of values and structure of government and governance, whether implicitly or explicitly, within judicial reasoning. Crowe recognises that the values he refers to may be in tension, so that a part of the story he narrates is of how the Court over time has had to address those tensions. The method through which such tensions may be resolved which Crowe focuses upon is that of proportionality. Proportionality has become a cause célèbre in constitutional law, with the rise of ‘structured proportionality’ and the ongoing debates in the Court regarding its suitability and legitimacy in the Australian context.¹⁶

The model of movement does reach its limit, however, at the end of the book, when Crowe addresses sovereignty. In chapter 12, Crowe covers methods of textual constitutional change for Commonwealth and state constitutions – namely section 128 and manner and form respectively. He introduces the concept of sovereignty – popular sovereignty through the electors’ role in section 128 referenda, and then Indigenous sovereignty as having been rejected by the High Court. It is at this point that the metaphor of centres of gravity reaches the end of its usefulness. Indigenous sovereignty is not a centre of gravity of the Court. The Court has been abundantly clear in express terms that no Indigenous legal sovereignty is recognized by the Australian settler legal system, purporting to relegate Indigenous laws and customs to questions of fact rather than law.

To continue with another astronomical metaphor – they are part of a different universe with which the Australian settler legal system is yet to reach any kind of equilibrium or acceptable accommodation. Crowe does not seek to bring Indigenous sovereignty into his model, rather he highlights it as a challenge to the Court and its doctrine: ‘[t]he role of Indigenous sovereignty remains a complex and fraught issue for the *Australian Constitution* today’.¹⁷ In conversation with Crowe, he acknowledges that Indigenous sovereignty does not fit in the internal model of movement, that it is an external and parallel source which is to be treated with respect as such.¹⁸ No solution is provided and we wait to see the developments both in the Court and in the political sphere to see the future of Indigenous sovereignty and its interaction with the *Australian Constitution* and broader Australian legal system. In light of the outcome of the 2022 federal election, we await the referendum for a Voice to implement the structural constitutional reform sought by the Uluru Statement from the Heart.¹⁹

¹⁵ See Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018).

¹⁶ See Shipra Chordia, *Proportionality in Australian Constitutional Law* (Federation Press, 2020); Murray Wesson, ‘The Reception of Structured Proportionality in Australian Constitutional Law’ (2021) 49(3) *Federal Law Review* 352 <<https://doi.org/10.1177/0067205X211016581>>.

¹⁷ Crowe, *Australian Constitutional Law* (n 3) 16.

¹⁸ See Discussion with Jonathan Crowe (Elisa Arcioni, I-CON•S Aus/NZ Constitutional Law Theory Group, The Australian National University, 1 April 2022).

¹⁹ See ‘The Uluru Statement from the Heart’, *The Uluru Statement* (Web Page) <<https://ulurustatement.org/the-statement/view-the-statement/>>.

The models adopted by Crowe are a useful means to find order out of chaos. Crowe describes his approach as fitting within the social science method of choosing a deliberately simple set of models. This is useful as an organizing method and to facilitate the narrative approach noted above. This approach links in with standard understandings of common law reasoning, whereby one reads case after case to find the relevant principle that is then worked out in a subsequent series of cases, and which can then be applied to future cases in the process of which the principle is further refined. That Crowe has adopted a model which is affiliated with the common law method is not coincidental. It reflects his sympathy for common law constitutionalism and is in parallel with his natural law theory. We can see this when considering what constitutional law is and how Crowe describes its changing content over time.

Crowe's work in natural law theory sets up natural law as the background view comprising a set of moral principles which evolve through the human quest to coexist in community and live a good life. In Crowe's view morality is in a constant state of movement and change as social perceptions of the good life change.²⁰ The *Constitution* can be understood in a similar and parallel fashion. The usual narrative is that the *Constitution* is the basic structure of the legal system which facilitates the pursuit of constitutional values.²¹ We can see Crowe's contribution in this book as a narrative of movement in constitutional law which reflects changes over time in consequence of changing values.

This approach to constitutional law implicitly adds to broader debates about the development of constitutional law and reasoning, and the connections between the common law and the *Constitution*.²² We can see examples of common law reasoning interacting with the *Constitution* in several – sometimes conflicting – ways with the current High Court. Some judges embrace a common law approach in some areas – for example Gageler J, who rests on common law ideas when considering judicial power to resolve the chaos of Chapter III case law, and push back against encroachments by the Parliament and the executive.²³ Yet he and others object to connections being made between other common law developments – for example,

²⁰ Crowe, *Natural Law and the Nature of Law* (n 1) 6–8.

²¹ See Elisa Arcioni and Adrienne Stone, 'The Small Brown Bird: Values and Aspirations in the Australian Constitution' (2016) 14(1) *International Journal of Constitutional Law* 60 <<https://doi.org/10.1093/icon/mow003>>.

²² See Leslie Zines, 'The Common Law in Australia: Its Nature and Constitutional Significance' (2004) 32(3) *Federal Law Review* 337 <<https://doi.org/10.22145/flr.32.3.1>>; Adrienne Stone, 'Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication' (2001) 25(2) *Melbourne University Law Review* 374; Cheryl Saunders, 'Common Law Constitutionalism under a Codified Constitution' (Research Paper No 863, Melbourne Law School, University of Melbourne, 2 December 2019) <<https://doi.org/10.2139/ssrn.3495337>>; Lisa B Crawford, 'The Communist Party Case Revisited: Constitutional Review in the 2020 Term' (2022) 50(1) *Federal Law Review* 20 <<https://doi.org/10.1177/0067205X211066142>>.

²³ See, eg, *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219.

those seen in *Mabo v Queensland [No 2]*²⁴ and constitutional questions concerned with membership. We see that complex area in the *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Montgomery*²⁵ proceedings where the Commonwealth seeks to reopen *Love v Commonwealth*.²⁶ Crowe encourages us to stay attentive to the movements in constitutional law and consider the driving forces behind the choices being made by the Court on each occasion.

In teaching law – whether it be constitutional law or other areas – I like to have students get to the end of a subject and not only know some of the law that has been established and how that has happened, but also to think about how developments in the future could be made. That is, I like students to also know how to challenge the orthodoxy and seek reform. To the extent that that is possible through the courts and their reasoning, Crowe’s book provides a grounding in existing patterns of constitutional law, thereby giving students the basic tools to read and understand the cases that they will have to rely upon to consider what comes next. This textbook is a good starting point for the next generation of creative legal minds and a good resource for all of us who thrive on the challenge of teaching.

²⁴ (1992) 175 CLR 1.

²⁵ (High Court of Australia, S192/2021, commenced 29 November 2021).

²⁶ (2020) 270 CLR 152. Elisa Arcioni and Kirsty Gover, ‘Aboriginal Identity and Status under the *Australian Constitution: Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Montgomery*’ (2022) 44(1) *Sydney Law Review* 137.