The High Court and the Constitution by Leslie Zines (Butterworths, Sydney, 1987) pages i-xxii, 1-423 (including index). Price $62.00 (hardback), $45 (soft cover). ISBN 0 409 49178 0 (hardback) 0 409 49179 9 (soft cover).

This is a welcome new edition of Professor Zines' stimulating collection of essays on federal constitutional law. It has been revised to take account of major developments in the six years since the first edition. Important cases during this period include: *Commonwealth of Australia and Another v. State of Tasmania and Others (Franklin Dam* case)[1] (external affairs and corporations powers), *Re Lee and Another; ex parte Minister for Justice and A.-G. for Qld*[2] (conciliation and arbitration power), *Hematite Pty Ltd and Another v. The State of Victoria*[3] (s. 90), *Queensland Electricity Commission and Others v. Commonwealth of Australia*[4] (discriminatory treatment), *Actors and Announcers Equity Assoc. of Aust. and Others v. Fontana Films Pty Ltd*[5] (corporations power), *Gazzo v. Comptroller of Stamps (Vic.)*[6] (Commonwealth power to exempt from State taxation), *Hilton v. Wells and Others*[7] (separation of powers), and *University of Woolongong v. Metwally and Others*[8] (s. 109, and retrospective laws). Outside the High Court, the intervening years have also seen the passing of the Australia Acts.

The main changes have been made to the chapters on the corporations power and 'Australia as a Nation in External and Internal Affairs'. There is one totally new chapter, 'Common Law, Tradition and Individual Liberty', in which Zines examines the use the High Court has made of, respectively, the common law, express constitutional guarantees, and constitutional implications in defending individual liberty. He notes the anomaly that while the Court has been prepared to resort to common law principles and constitutional implications in order to protect individual liberty, with the exception of the acquisition power, it has interpreted the few express individual guarantees the Constitution contains, such as ss 80, 116 and 117, narrowly and literally. Recent cases have shown, however, 'an increasing restlessness and boldness by some judges in the area of traditional liberty' (p. 338). For instance, the interpretation of s. 80, which provides that '[t]he trial on indictment of any offence against any law of the Commonwealth shall be by jury . . . ', is now 'in a state of flux' (p. 333), with the old reading of this section, which sees it as providing no more than a procedural right (if there is an indictment, there must be trial by jury), being challenged by some members of the court (*e.g.* Deane J.) who see this section as providing a substantive individual right to trial by jury.

In examining the use of implications to defend individual rights, Zines is particularly concerned to question Murphy J.'s use of the concept of a free and democratic society, and his contention that implications arising from this feature of the nature of Australian society can be drawn just as readily as implications from the federal nature of the Constitution, and implications concerning responsible government (p. 337). Zines points out that federal implications can be drawn from various features of the Constitution (preamble, covering clause 3, sections 106–7), and that responsible government is a notorious social and political fact that only the most extreme literalist could ignore. However, the notion of a free and democratic society 'simply states a broad issue of political philosophy' (p. 339). But it is not clear that this answers Murphy J.'s challenge — if 'federalism' and 'responsible government' can be used as implications or assumptions in interpreting the Constitution, why not 'a free and democratic society' (p. 339)? It is not sufficient to object that such a concept permits a judge to read his own political philosophy into the Constitution. A judge will do so anyway and indeed, cannot escape doing so. With all due respect to Dixon C. J., legalism itself is a political philosophy, and not, as its proponents would claim, a stance that is neutral between different philosophies. As the present Chief Justice noted recently, '[t]he ever present danger is that [Dixon C. J.'s] "strict and

1 (1983) 46 A.L.R. 625.
2 (1986) 65 A.L.R. 577.
3 (1983) 151 C.L.R. 599.
4 (1985) 61 A.L.R. 1.
5 (1982) 150 C.L.R. 169.
6 (1981) 149 C.L.R. 227.
7 (1985) 58 A.L.R. 245.
8 (1984) 56 A.L.R. 1.

complete legalism" will be a cloak for undisclosed and unidentified policy values.'[9] The question is whether one confronts or avoids the fact that questions of constitutional law and political philosophy run into one another, that the former cannot be insulated from the latter. Federalism and responsible government are themselves capable of different interpretations, and these depend on the other values that judges hold. As Zines notes in the preface to the second edition, there is now in the High Court 'far more open reference to policy considerations and value judgments' (p. vi). The fundamental issue is whether the new-found boldness he observes by some judges in the area of individual liberties (p. 338) is to be guided by untutored, and ill thought-out moral intuitions, or a coherent political theory.[10] To ignore the proposition that Australia is a 'free and democratic society' in interpreting the Constitution is to be as prone to fall into the literalist trap as it would be to ignore the notions of federalism and responsible government.[11]

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[9] Sir Anthony Mason, 'The Role of a Constitution in a Federation: A Comparison of the Australian and United States Experience' (1986) 16 *Federal Law Review* 1, 5.

[10] Sampford, C., and Wood, D., 'The Place of Legal Theory in the Law School' (1987) 11 *Bulletin of the Australian Society of Legal Philosophy* 98, 108-9.

[11] For an alternative recent discussion of these issues, see Charlesworth, H., 'Individual Rights and the Australian High Court' (1986) 4 *Law in Context* 52.

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