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***JUDICIALIZATION OF POLITICS: THE INTERPLAY OF
INSTITUTIONAL STRUCTURE, LEGAL DOCTRINE AND
POLITICS ON THE HIGH COURT OF AUSTRALIA***

**By Reginald S Sheehan, Rebecca D Wood and Kirk A Randazzo
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The politics of the United States of America is singularly alluring to external observers. An inextricable part of this vibrant and frequently polarised landscape is the Constitution of that country and the Supreme Court which interprets it. The Court, of course, has its own ‘politics’ and has been home to a cavalcade of colourful personalities since its establishment over two centuries ago. Certainly in Australia at least, one suspects that many political scientists and constitutional lawyers view the Supreme Court with fascination laced with a measure of wistful envy — the latter arising from the sense that our own High Court of Australia is a dryly uninteresting institution by comparison.

But while Australia’s lack of a bill of rights has undoubtedly meant that the High Court’s decisions have generally failed to resonate in the public’s consciousness in a way similar to those of its American counterpart, it is a mistake to lose sight of the fact that the Court has played a central role in some major Australian political dramas: most notably through its decisions over bank nationalisation, the banning of the Communist Party, the protection of Tasmania’s Franklin river and the waterfront dispute of the late 1990s. To that list, we must add, of course, the Court’s decision in *Mabo v Queensland [No 2]*.¹ *Mabo* was, by any standard, a landmark case, the impact of which was both immediate and seismic. Quite aside from the remarkable and invigorating reasoning employed by the majority judgments, the Court’s decision was the direct catalyst for a heated political and community debate which culminated in the introduction of the *Native Title Act 1993* (Cth) by the Keating government.

The story of the *Mabo* case — its origins and aftermath — is used to open and conclude a new book by three American authors whose aim is to ‘examine how institutional and legal change impacts the evolution of a high court and its politics’ and to ‘provide the first comprehensive examination of the business of the High

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¹ (1992) 175 CLR 1 (*Mabo*).

Court'.² It is not without precedent for scholars from the United States or elsewhere³ to turn their gaze upon Australia's highest court — but it certainly seems to run counter to the natural order of things and remains sufficiently rare as to justify serious attention when it occurs.

The full title of this slim volume is *Judicialization of Politics: The Interplay of Institutional Structure, Legal Doctrine, and Politics on the High Court of Australia*. The book's publisher, Carolina Academic Press, appears set on cornering the modern market for books about the High Court of Australia written by American political scientists — having produced Jason Pierce's *Inside the Mason Court Revolution* in 2006.⁴ That book received much attention in Australia due, in large part, to Pierce's extensive use of material gathered from oral interviews with many past and serving members of the Australian judiciary, as well as leading practitioners. Likened by one newspaper columnist to 'a transcript of bugged conversations from a sweaty judicial locker room',⁵ the candour, and indeed pungency, of some of the interview excerpts excited both speculation as to the identity of individual speakers and assertions, later rejected by Pierce,⁶ of a deeply divided judicial culture. Although an unquestionably valuable study, one problem with *Inside the Mason Court Revolution* was that several of the interviewees expressed themselves in such a florid fashion that it risked the simultaneous magnification and simplification of genuinely held disagreements about the judicial role and the proper boundaries of the Court's power.

One might have thought that the authors of *Judicialization of Politics*, in their eschewal of any interview material to augment their reliance on highly elaborate empirical data, would run no similar danger. After all, in preference to the 'sweaty judicial locker room' they have headed to the computer laboratory. But whether setting the scene for the statistical results they present or drawing conclusions from the same, the authors frequently rely upon generalisations of concerning breadth (referenced, it must be said, to some occasionally rather curious

² Reginald S Sheehan, Rebecca D Wood and Kirk A Randazzo, *Judicialization of Politics: The Interplay of Institutional Structure, Legal Doctrine, and Politics on the High Court of Australia* (Carolina Academic Press, 2012) 7.

³ Other United States studies are referred to later in this review, but for an example of very highly regarded scholarship from Canada on the *Mabo* case itself see Peter H Russell, *Recognising Aboriginal Title: The Mabo Case and Indigenous Resistance to English-Settler Colonialism* (University of Toronto Press, 2005).

⁴ Jason Pierce, *Inside the Mason Court Revolution: The High Court of Australia Transformed* (Carolina Academic Press, 2006).

⁵ Janet Albrechtsen, 'Inside Judges' Secret World', *The Australian* (Sydney), 14 July 2007.

⁶ Jason Pierce, 'Reactions to the Mason Court: What are Australia's Judges Thinking?' (Paper presented at the Gilbert + Tobin Constitutional Law Conference, Sydney, 8 February 2008) <http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/mdocs/351_JasonPierce.pdf>.

sources).⁷ This is most apparent in their truncated and fairly lifeless account of the history and development of the High Court and its individual judges over the first two substantive chapters. So, to give just one example, reservations might be expressed about this sentence on page 12:

After Prime Minister Keating's government attempted to implement the Court's [*Mabo*] decision through the *Native Title Act* of 1993, his Australian Labor Party suffered electoral defeat at the hands of Howard's Liberal-National Coalition in 1996.

For one thing, 'attempted to implement' is a poor description of the relationship between the *Mabo* decision and the legislative response it provoked, quite aside from hardly doing justice to the achievement of the *Native Title Act*. The sentence also suggests a causal link between that legislation and the defeat of the government three years later when of course the picture is very much more complicated.

Superficiality in describing the complex historical and political significance of an evolving multimember institution such as a final constitutional court must be an occupational hazard for those working in another jurisdiction. Certainly it is not a task for the faint-hearted armed only with theories devised in another setting and a head for numbers. The Pierce book stood up not merely because its author had, I suspect, a more nuanced understanding of the phenomenon he was studying than do Sheehan, Wood and Randazzo but also, of course, much of the book was gleaned directly from the chambers of Australian judges and advocates. Without the benefit of that sort of extensive exposure to the topic, it is little wonder that *Judicialization of Politics* frequently reflects the limitations of its authors' grasp of Australian law and politics. Sometimes this leads to simple slip-ups such as confusing the cousins (Prime Minister) Robert and (Justice) Douglas Menzies; sometimes it produces understandable if still mildly offbeat remarks such as referring to a High Court judge having being knighted by the 'Queen of England'; and other times, often when they are attempting to make an important point, it is just downright strange. How else are we to view the blunt observation made of the ALP that 'their main political goals remain outside the scope of the constitutional framework'?⁸

These and other clangers in the commentary might conceivably be taken in our stride if they did not undermine the reader's confidence in the utility of the book's many and varied empirical findings. While lots of the tables and graphs presented throughout the book are illuminating on particular points, a great many of them are hindered by a lack of clarity about the categories employed to arrange the data — and doubt about the way in which the primary material of the Court's decisions might have been handled.

⁷ For example, discussion of Sir Owen Dixon's views on Sir John Latham's judgment in *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 is referenced to the entry on Dixon in the *Australian Dictionary of Biography* and the identification of distinctive features of the High Court under Chief Justice Mason are referenced to newspaper opinion-editorials by Janet Albrechtsen.

⁸ Sheehan, Wood and Randazzo, above n 2, 135.

For the empirical testing of their various hypotheses, the authors of *Judicialization of Politics* drew on the National Science Foundation's High Courts Judicial Database — an American resource of which, to the best of my knowledge, no Australian researcher of any discipline has ever made use. This may say more about the modest attention given to the study of 'judicial politics' in this country than anything else. Only a handful of political scientists have written on the Court and those who have done so have taken a rather different approach to that on display in this book. To consider a non-exhaustive but prominent sample, the work of Brian Galligan,⁹ Haig Patapan¹⁰ and Katharine Gelber¹¹ is largely free of talk of 'dummy variables' and 'regression analysis'. This perhaps explains why the work of those authors has been effective in crossing the disciplinary divide and being influential upon legal scholars. Tony Blackshield's famous jurimetrics studies on the Court over the 1970s were strongly influenced by United States jurimetrics research,¹² and followed on from Glendon Schubert's studies of the High Court in the late 1960s,¹³ but Blackshield determined the classification of primary material himself. Likewise, the hugely prolific Russell Smyth, whom the authors correctly attribute with having 'almost single-handedly reinvigorated the empirical study of judicial behaviour in Australia' in the last decade,¹⁴ does not use this database but independently manages the data he presents.¹⁵

⁹ Brian Galligan, *Politics of the High Court: A Study of the Judicial Branch of Government in Australia* (University of Queensland Press, 1987).

¹⁰ Haig Patapan, *Judging Democracy: The New Politics of the High Court of Australia* (Cambridge University Press, 2000).

¹¹ Katharine Gelber, 'High Court Review 2004: Limits on the Judicial Protection of Rights' (2005) 40 *Australian Journal of Political Science* 307; Katharine Gelber, 'High Court Review 2005: The Manifestation of Separation of Powers in Australia' (2006) 41 *Australian Journal of Political Science* 437; Anika Gauja and Katharine Gelber, 'High Court Review 2010: The Resurgence of Rights?' (2011) 46 *Australian Journal of Political Science* 683.

¹² A R Blackshield, 'Quantitative Analysis: The High Court of Australia, 1964–1969' (1972) 3 *Lawasia* 1; and A R Blackshield, 'X/Y/Z/N Scales: The High Court of Australia, 1972–1976' in Roman Tomasic (ed), *Understanding Lawyers: Perspectives on the Legal Profession in Australia* (Law Foundation of New South Wales, 1978) 133.

¹³ Glendon Schubert, 'Political Ideology on the High Court' (1968) 3 *Politics* 21; Glendon Schubert, 'Judicial Attitudes and Policy-Making in the Dixon Court' (1969) 7 *Osgoode Hall Law Journal* 1.

¹⁴ Sheehan, Wood and Randazzo, above n 2, 136.

¹⁵ See, by way of a small sample, Russell Smyth, "'Some are More Equal than Others' — An Empirical Investigation Into the Voting Behaviour of the Mason Court' (1999) 6 *Canberra Law Review* 193; Russell Smyth, 'Judicial Interaction on the Latham Court: A Quantitative Study of Voting Patterns on the High Court 1935–1950' (2001) 47 *Australian Journal of Politics and History* 330; Russell Smyth, 'Historical Consensual Norms in the High Court' (2002) 37 *Australian Journal of Political Science* 255; Russell Smyth, 'Explaining Historical Dissent Rates in the High Court of Australia' (2003) 41 *Commonwealth & Comparative Politics* 83.

I am not questioning the integrity of the material gathered in the National Science Foundation's High Courts Database, but on the evidence provided by *Judicialization of Politics*, I think it is fair to say that the way in which High Court decisions have been 'coded' in that resource is problematic — at least it is intended to be enlightening to those who regularly follow the Court's work. For example, in Chapter 4, the Court's decisions are broken down between 1970–2003 into four 'general issue areas': 'Criminal Law', 'Civil Liberties', 'Administrative Law' and 'Economic and Torts'. 'Administrative Law', it soon becomes clear, refers to a category more expansively badged as 'Government Regulation'. This comprises (in order of frequency): 'Taxation', 'Health, Safety & Environment', 'Unions & Labour Relations', 'Agriculture & Land Reform', 'Immigration & Citizenship' and 'Federalism'. Precisely what kind of case merits the classification of 'Agriculture & Land Reform' is anyone's guess — and the idea that in the relevant period 9.4 per cent of the High Court's 'Government Regulation' decisions were of this ilk while just 6.0 per cent concerned 'Federalism' begs several additional questions. Here is just one: how have the authors dealt with the fact that many disputes across all these various categories possess a 'federal' dimension? The suggestion from the data set is that insulation of cases to these discrete categories is not just possible, but also meaningful. I think neither is so. One need only consider s 109 of the *Constitution* to envisage how a case might concern overlapping Commonwealth and State regulation in the space of health, safety and the environment. How is such a case categorised?

'Federalism' is used in the tables of later chapters as a category apart from 'Criminal', 'Economic' and 'Tort', but from a public law perspective, this is a bizarrely narrow label to affix to what I can only presume is meant to be constitutional cases more generally. But perhaps not? It may well be that the authors have captured much of the High Court's ch III jurisprudence under the category of 'Criminal' cases. Who knows? They may have felt it too much to require the reader to wade through elaborate detail about the methodological choices made in preparing and presenting their data, but frankly I think that omission was a grave mistake. The organisational categories are insufficiently explained and raise questions about the results presented by the authors to such a degree that I doubt any Australian researcher would feel much confidence in using them. That hesitancy may vary depending on the field in which one works — but as a public lawyer, my view is that the results presented in this book which depend on the classification of cases by topic are unable to be cited to any meaningful end.

Not all of the data in *Judicialization of Politics* is of this kind. But then the authors' suppositions or conclusions present further difficulties. For example, they confirm that, as already established by Matthew Groves and Russell Smyth,¹⁶ the length of judicial opinions is increasing. They suggest, not implausibly, that this follows from the removal in 1984, with the introduction of the special leave requirement, of

¹⁶ Matthew Groves and Russell Smyth, 'A Century of Judicial Style: Changing Patterns in Judgment Writing on the High Court 1903–2001' (2004) 32 *Federal Law Review* 255.

the need for the Court to devote resources to ‘simple cases’ coming to it from the mandatory docket.¹⁷ I suspect there is much in that, but I am also persuaded by the view of Justice Ruth Bader Ginsburg, observing the same phenomenon in respect of the United States Supreme Court, that the ease of electronic retrieval of case authorities and the greater number of judicial associates have been significant drivers of this trend.¹⁸ There is no recognition of these more mundane explanations in the authors’ discussion. Nor do they really dwell on the significance of the unwavering climb in judgment length over the period under study — well after the end of the era marked by Sir Anthony Mason’s Chief Justiceship.

This last point reflects an almost unfathomable deficiency in the book which is the thinness with which it discusses the Court under Chief Justice Murray Gleeson. In part this is a matter of substance — although the authors acknowledge the return to a rhetoric of ‘legalism’, they also suggest that this could not quite mask or effectuate a retreat from the policy orientation of the Court that occurred under Chief Justice Mason. Indeed, they go so far as to make the startlingly unqualified claim that although the Mason Court may have ‘judicialized’ politics, ‘the Court has stayed in the centre of policy-making in Australia’.¹⁹ With respect, there is great complexity here that is being glossed over. But the limitation is also simply the result of the authors going no further in their study than the year 2003. I am not sure how American academia would describe this nor whether that kind of time lag is acceptable when publishing in that jurisdiction, but I would submit that by local standards we would say the *Judicialization of Politics* was already ‘out of date’ when it appeared — three years into the tenure of Chief Justice Robert French. It is not at all clear why the second, arguably more dynamic, period of the Gleeson Court is excluded from this study — and indeed, if the authors are really interested in institutional transformation, would they not want to give readers as much of a sense of the developments after the Mason era as possible? To merely offer a few curt observations about the Gleeson Court’s ‘conservatism’ is inexcusably one-dimensional. This book appeared 12 years after Haig Patapan’s *Judging Democracy* and despite the benefit of eight more years of the High Court under Chief Justice Gleeson upon which to draw, it barely advances our understanding of that era any further. The deficiency is particularly glaring when one contrasts the substantial attention given to the Gleeson period, still then on foot, by the Pierce book.

The final chapter is undoubtedly the book’s most ambitious and original. It aims to reveal decision-making trends in the Court as a matter of substance. It does so through a series of tables dauntingly titled ‘Random Intercept Hierarchical Logit Model of Voting Behaviour’ and which attempt to crunch figures based upon the political party that appoints a judge, his or her age and also state of origin (or, to be precise New South Wales versus the rest of the country) while controlling variables such as whether the case involves torts (‘tort law has been used to further civil

¹⁷ Sheehan, Wood and Randazzo, above n 2, 116.

¹⁸ Ruth Bader Ginsburg, ‘Remarks on Writing Separately’ (1990) 65 *Washington Law Review* 133, 148–9.

¹⁹ Sheehan, Wood and Randazzo, above n 2, 61.

liberties’),²⁰ the presence of government regulation and if the appeal is allowed or dismissed. The authors do express their work with some caveats but to be honest one either goes for this sort of thing or one does not. The exercise defeated me once I reached the point where the authors explained that their weighting of the variable of statehood was based around the idea that judges drawn from New South Wales ‘are expected to cast more pro-defendant votes’ in criminal cases because they will have a “‘big city” approach [which] may be associated with more lenient views on crime and punishment than the more conservative areas’.²¹ Aside from querying whether judges appointed from New South Wales necessarily identify as Sydneysiders if they have built a practice in the city but have been raised elsewhere in the State, the hypothesis concerning attitudes to crime was, at least to this reviewer, presented unconvincingly (Canadian studies are referenced but none in support of the ‘big city–pro-defendant’ connection specifically). So interrelated are the elements of the statistical findings at this point of the book that once scepticism takes hold in relation to a part, it taints the whole.

Overall, it is hard to escape the feeling that *Judicialization of Politics* will struggle to make much impact on an Australian audience — in either law or political science. The era it reviews in the Court’s history has been the subject of a sizeable number of books and articles by now and the decade since the authors drew a line under their work — the end of the Gleeson Court and the start of Chief Justice French’s tenure — has provided rich new material for analysis. The authors’ claim that *Mabo* was the signature moment in which the Court signalled a lasting ‘change to policy-oriented activism’²² is a position that would have been bold, albeit appreciable, in the mid-1990s. It is a contribution that is, at this remove, hard to press so emphatically. *Mabo* was 22 years ago and the authors look no further than the 11 years immediately following it being handed down. There is much evidence from the period they examine to counter their baldly stated claim, but much more water has run under the bridge since then.

Quite apart from timeliness, this book suffers from difficulties against which comparativists should remain ever vigilant. Not only is its attempt to give a potted history of the High Court and its judges unsatisfactorily sketchy, but the way in which its empirical data has been developed reflects usage of categories and assumptions that do not have much obvious purchase in Australia. That is, ultimately, a great shame — for there is much industry on display here and a genuine attempt to enlighten. That so much effort should be expended for so little gain, is a cause for regret.

²⁰ Ibid 154.

²¹ Ibid 153.

²² Ibid 109.

