



## ***Book Review: The High Court, the Constitution and Australian Politics***

**By Greg Reinhardt and Liz Porter**

**Edited by Rosalind Dixon and George Williams, *The High Court, the Constitution and Australian Politics*, Cambridge University Press 2015  
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*The High Court, the Constitution and Australian Politics* sets the decisions of the High Court against the background of Australian political trends and attitudes in which they were made, thereby providing an important and scholarly contribution to the academic areas of politics and law, as well as to the area of comparative constitutional law.

Edited by Rosalind Dixon, Professor of Law at the University of New South Wales, and George Williams, AO, one of Australia's most eminent constitutional lawyers and the Anthony Mason Professor at the same university, its contributors comprise a roll call of Australia's leading constitutional lawyers and political scientists.

In their introduction, the editors consciously place their work in the considerable body of scholarship about the relationship between the High Court and Australian federal politics, acknowledging a series of important works on the subject, from Geoffrey Sawer's two-volume seminal work *Australian Federal Politics and The Law*, the first book of which appeared in 1956, to Jason Pierce's *Inside the Mason Court Revolution: The High Court of Australia Transformed*, published in 2006.

The book's second chapter, by Monash University economists Russell Smyth and Vinod Mishra, entitled "Judicial Review, Invalidation and Federal Politics" sets out the rates at which the Court, at different periods, invalidated federal and state legislation and takes in the intervals of time between the enactment of the legislation in question and the decision to invalidate it. The authors were even ambitious enough to attempt to calculate a "Chief Justice Variable", in an attempt to measure the likelihood that the Court, under its various Chief Justices, striking down legislation, using such factors as the political color of the government in power and its length of time in power in relation to the calculation.

The focus of Chapter Four, by University of New South Wales Law Professor Andrew Lynch, is on key dissenting judges and judgments, with the author examining the link between dissent and various internal and external political dynamics. Here Professor Lynch draws attention to "the obvious fact that dissent is primarily a relational concept and that the individual's place in the decision-making of the Court is ultimately determined by those around him or her". He quotes the so-called "Great Dissenter" Justice Michael Kirby himself here and points out that Kirby himself noted that his reputation for dissent would never have been made, had he been appointed several years earlier, and been a member of the "Mason Court" (1986-1995). The author also tackles the tantalizing question of "Dissent and Audience", asking the question "For whom are dissenting opinions written?" and analyzing several episodes in Kirby's time on the High Court, including *Al-Kateb v Godwin*, in which a majority of four justices upheld the constitutionality of the indefinite detention of asylum seekers. Professor Lynch compares Kirby's opinion to the "far less exuberant" dissent of Chief Justice Gleeson, pointing out that the latter, far more than Kirby, potentially holds the key to the decision being reconsidered.

The subsequent twelve chapters look at the twelve periods in the Court's history that correspond to the eras of each of the twelve Chief Justices, beginning with an analysis of the "foundational era" of the Griffith Court, written by John M Williams, Dean of Law at the Adelaide University Law School.

Some of the authors in these chapters make the point that, in some eras, there appeared to be little reflection of political currents to be seen in the constitutional jurisprudence of the High Court. If anything, they note, the dynamics at play were more "internal". In his chapter on the Isaacs Court, for example, Macquarie University Emeritus Professor Tony Blackshield notes that the most significant factor shaping jurisprudence in this period was the appointment of Sir Owen Dixon, the "intellectual leader" of the court from the first day of his appointment.

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As might be expected, the chapters on the Mason Court and the Gleeson Court look outwards to the politics of their day. John M Williams and the University of New South Wales' Paul Kildea, for example, suggest that the Mason Court may very well have developed the law in conformity with community attitudes. Meanwhile, authors Rosalind Dixon and the University of New South Wales' Sean Lau argue that the Gleeson Court, was in "a very immediate sense, a court of the Howard (the Australian Liberal (Conservative) Prime Minister) era", with its chief justice a 'small c' legal conservative. The book's final chapter, on the French Court, by Anika Gauja of the University of Sydney and University of Queensland Professor of Politics and Public Policy, Katharine Gelber, undertakes the difficult task of reviewing an era that is still ongoing.

Clearly this final chapter met the approval of its subject well enough for him to launch the book, which he did last February, making a point in his launch speech of praising the book's editors for having engaged both legal academics and political scientists as contributors.

Chief Justice French declined to review that chapter's verdict on him as "an institutionalist with progressive tendencies", arguing that "nobody should be a judge about his or her own Court" However, he praised the book as "full of history and personalities and their interaction with the political events of 115 years of the Australian Federation" and declared it "a good read" – a judgment that is heartily endorsed.

This book will be of interest to those with an interest in jurisprudence and the development of the law, particularly the interaction of supreme courts with the governments of which they are an integral part. The book will be of interest not just to Australians but to all with an interest in the way in which court work, particularly in federations. It will be a particularly valuable resource for students of the law and the role of courts in the body politic.

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