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Commentary
The High Court of Australia and political science: A revised historiography and new research agenda

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The judiciary has not been the subject of sustained scrutiny within the political science discipline. The High Court plays a central role in the Australian political system, however, and the exercise of judicial power has far reaching consequences for the legislative and executive branches of government. This article presents a historiography of the study of the High Court by political scientists, using Helen Irving's 'The Constitution and the judiciary' as a foil. In order to foster cross-disciplinary study and research within the political science discipline, this article concludes by setting out a new research agenda for the future study of the High Court and the law by political scientists. This research agenda provides new insights into (among other topics) how judges exercise power and the changing relationship between the judiciary and the legislative and executive branches.

Keywords: High Court; law; Australian politics; realism

In 'The Constitution and the judiciary', Helen Irving recorded the study of 'political constitutionalism' by political scientists in Australia (2009: 107–18). Historically, Irving argued, the disciplines of law and politics have remained separate. In turn, this disciplinary separation has limited analysis of the law, the legal system and legal actors by political scientists. Irving's conclusion reflects the repeated observations of contemporary political scientists, who noted the segregation of the law and political science disciplines and the under-developed state of political science scholarship on the High Court prior to Galligan's *Politics of the High Court* (Campbell 1959: 1; Galligan 1987: 1; Irving 2009: 107–08). This article joins in Irving's conclusion. Irving, however, overlooked a handful of political scientists

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whose writings have contributed to the re-conceptualisation of the High Court and whose methodologies indicate future possibilities for study.

This article sets out a history of the study of the High Court in the discipline of political science focusing on two related themes: first, the perception of the High Court as a political institution; and second, the challenge to legalism and the neutrality and autonomy of judicial decision-making by legal realists and socio-legal theorists. This article is divided between introductory and generalist texts, on the one hand, and specialist texts, on the other. Within this framework, analysis of the discipline is organised chronologically in order to demonstrate how the study of the High Court by political scientists has broadened and intensified over time.

The textual scope of this article is necessarily narrow. It accounts only for texts published by political scientists or within the discipline of political science (including multi-disciplinary texts). The writings of lawyers or scholars within the discipline of law are intentionally excluded from this analysis, except where they have been published in political science texts (such as *A.P.S.A. News*) or have played a significant role within the political sphere or the discipline (a notable example being the writings of Geoffrey Sawer).

The article concludes by setting out a new research agenda for the future study of the High Court by political scientists. It contends that political scientists ought to study the High Court and its role in the Australian social and political systems to a greater extent within their discipline and collaboratively with legal scholars. Further, lecturers and teachers ought to include content on the Constitution, the judiciary and the law within undergraduate political science curricula.

The High Court from the perspective of political science

Judges, lawyers and legal scholars have long offered analyses of the High Court. The same cannot be said of political scientists. According to Irving, prior to the publication of Galligan's *Politics of the High Court*, the judicial branch was not the subject of specialised study within the political science discipline (2009: 115). Political scientists focused instead on the legislative and executive arms of government whose activities and powers are more accessible and explicable. Galligan, for example, wrote that 'political scientists have left the study of the High Court and judicial review to constitutional lawyers' (1987: 3) and referred to 'an entrenched legal apartheid' in the study of the High Court and the law (1987: 36). He went on to say that 'the political role of the High Court has been neglected by both lawyers and politicians. The notable exception is [constitutional lawyer] Geoffrey Sawer' (1987: 3). Irving concurred in this assessment, writing that:

> The repeated lament about the paucity of political science interest in the Constitution is, I have suggested, open to a mild challenge. It is more accurate, however, with respect to the High Court as an object of study in its own right, at least prior to the publication in 1987 of Brian Galligan's seminal work, *Politics of the High Court*. Again, there were exceptions. (2009: 115)

Irving's observation is correct. Despite noting the contributions of David Solomon and Richard Lucy (Irving's 'exceptions'), Irving overlooks the works of important political scientists, including Leslie Crisp, Glendon Schubert and related jurimetricians and John Playford.

Irving orders her disciplinary history according to selected topics (such as 'teaching the Constitution') and important constitutional developments or conflicts (such as the dismissal of the Whitlam government in 1975 and the republic debate). There are two overarching themes in Irving's discussion: constitutional law and federalism, on the one hand, and the characterisation of the High Court as a political institution, on the other. The former subject matter is the principal focus of Irving's commentary. She acknowledges and discusses the varying perceptions of the High Court as 'progressive' and 'a bastion of conservatism' (2009: 113) and sets out specialist and generalist works on 'The politics of the High Court' (2009: 115–17), but Irving principally accounts for the Constitution as a site and cause of conflict rather than the role of the High Court in this conflict. The focus on the formative role of the judges of the High Court in constitutional conflicts (rather than simply the text of the Constitution) was a significant optical shift that, as explained later, was brought about in the political science discipline by Schubert and Galligan.

The structure and focus of Irving's commentary is also significant. Irving observes at the outset of her chapter that 'we need to distinguish between political science writings on the Constitution, and writings specifically on the High Court and its jurisprudence' (2009: 108). Irving is correct, and to the extent that this historiography is critical of Irving it is only insofar as she has not accorded sufficient consideration to writings by political scientists on the High Court. In particular, many of the generalist and introductory texts that Irving refers to in her discussion of the Constitution (such as Sawer, Crisp and Emy) also included commentary on the political character of the High Court and judicial decision-making. The contributions of such authors to the reconceptualisation of the High Court are, however, either unacknowledged or acknowledged by Irving with minimal substantive consideration. Moreover, such authors are absent from Irving's section expressly addressing (and headed) 'The politics of the High Court' (2009: 115–17).

To an extent the disciplinary separation between political science and law that is reflected in this commentary is artificial. This is due to the similarities between the disciplines, cross-disciplinary scholarship and the common combination of an undergraduate degree in law with arts. As the final section of this article demonstrates, however, political scientists have valuable contributions to make to the study of the law and legal institutions. For this reason, it is vital that the recorded history of the cross-disciplinary study of law and legal institutions by political scientists is both accurate and comprehensive.

The seeds of political exegesis: introductory and generalist texts

The earliest analysis of the High Court as a political institution by a political scientist is found in the successive editions of Crisp's *The parliamentary government of the Commonwealth of Australia* (1949), which later became *Australian national government* (1965: Ch 3). Referring to the successive editions of this text, Scott Bennett notes that it 'was ground-breaking in Australia and was a staple of many reading lists, going through numerous editions and remaining in print for some years after [Crisp's] death' (2007). The text established themes that Galligan would later expand upon, including the conflict between the interests of the labour movement and the High Court, the political nature of judicial appointments and the influence of the background of judges on their decision-making (Crisp 1949: 266, 276–77, 278–79; 1965: 63–65, 69–70, 80). Indeed, Galligan acknowledged the influence of

Crisp and Sawer's works in the preface to *Politics of the High Court* (1987: xi). In each edition, Crisp quoted Robert Menzies speaking of the effect of 'political philosophy' on judicial decision-making:

> there is no question that what we call constitutional law is only half law and half philosophy, political philosophy, and therefore it, more than any other branch of law, changes according to the philosophical currents in the minds of the people from time to time. (1949: 266)

That is to say, the law as decided by judges changes according to the philosophy of each judge. This proposition implies an important rule-making role for judges and characterises the Constitution and judicial precedents as malleable. This led Crisp to the conclusion that 'the authoritative interpretations of the Constitution given by the High Court depend on the *sort* of men appointed to its Bench' (1965: 63, emphasis in original; see also Blackshield 1977: 121). Moreover, Crisp introduced new descriptions of judicial decision-making (in Australian political thinking at least), such as 'judicial legislation' (1949: 276) and 'judicial "law-making"' (1965: 69). Crisp also wrote that '[i]t is true that the judges would deny that they "legislate"' (1949: 276). One might reasonably question the extent to which judicial law-making can be equated with legislating due to their different processes and limitations, but Crisp's characterisation frames the discourse for political scientists in political rather than legal terms.

The writings of Sawer similarly evidence an early awareness of the political role and function of the High Court within the Australian system of government and the limits and consequences of judicial decision-making. One year prior to the publication by Crisp of *The parliamentary government of the Commonwealth of Australia*, Sawer had published the 'booklet' *Australian government today* (1948). In that short volume, Sawer described the High Court as 'of necessity a kind of legislator' (1948: 5) and set out the formative role of the High Court in shaping the political system and State–Commonwealth relations (1948: 5–7).

Sawer was not a political scientist, but a lawyer. His writings, however, warrant comment due to both his influence on the political science discipline and the cross-disciplinary nature of much of his work. Indeed, Irving described Sawer's role in facilitating cross-disciplinary constitutional law and political science studies as 'magisterial' (2009: 108). Sawer was appointed as a self-described 'spare-part lawyer' in the Australian National University's Research School of Social Sciences (RSSS) in 1950, having previously been located within the faculty of law at the University of Melbourne (Sawer 1953: 10). In this position, Sawer criticised the disciplinary segregation and limited foci of the schools of law and social sciences and facilitated the cross-pollination of ideas and thinking between the disciplines of law and political science (Sawer 1953: 10). The cross-disciplinary effect of Sawer's work is recorded in a published commentary from an interdisciplinary conference at the Australian National University:

> As a political scientist with an abiding interest in Australian politics, I have been using Professor Sawer's books and articles for years. As a former member of the Research School of Social Sciences at the ANU I enjoyed his company and benefited from his counsel for a decade. (Aitkin 1976: 149)

In his article 'The record of judicial review', in a collection of papers from two seminars held at the Australian National University in 1951, Sawer criticised the declaratory theory of judicial decision-making (i.e., the idea that in deciding cases, judges merely declare pre-existing law) (1952: 211, 214–25; see also Sawer 1953: 16). The importance of this article for the discipline was augmented by its inclusion in the general political science text *Readings in Australian government* (Hughes 1968: 243).

Sawer was an early exponent in Australia of the school of legal realism developing in the United States of America, writing that '[t]here is a general theory widely held in the U.S.A that *all* judicial opinions are rationalisations for decisions arrived at on digestive and similar grounds' (1952: 217). Sawer's challenge to legal orthodoxy at the time continued in his contribution to each of the successive editions of *Australian politics: A reader*. Legal realism would, as discussed later in this article, subsequently become commonplace in Australian law schools and gradually seep into political science faculties. It is indicative of the tension between studies of law and politics at the time that Ruth Atkins described Sawer's contribution to *Australian politics: A reader* as 'perhaps a little too much a constitutional lawyer's survey' (1966: 114).

In this text, Sawer wrote of the scope for judicial choice in interpretation (which had 'long been a commonplace of legal theory'), and the influence of judges' social and political preferences on judicial decision-making (1966: 87, 95, 98; 1967a: 85, 95, 98; 1969: 87, 96, 98; 1973: 195, 205; 1976a: 315, 320–21; 1980: 129, 135–36). Rather than describing his conception of judicial decision-making as the 'politics of the High Court' (as Galligan would come to) or as the politics of judges, however, Sawer referred to the scope for political judgements as the 'politics of the Constitution' or 'the Constitution and its politics' (1966: 96; 1967a: 97; 1969: 97; 1973: 205; 1976a: 321; 1980: 136). Sawer reiterated this viewpoint in *Australian federalism in the courts*, writing that judges may reason to different conclusions from equally legitimate starting points and premises (1967b: 59). On his reasoning, dissenting judgements were not 'wrong' (particularly because dissenting judgements have formed the basis for the development of the law in future years), but simply the rational viewpoint of a minority in that case (1967b: 59).

The *A.P.S.A. News* was a medium in which Sawer (frequently), and other legally trained writers such as Enid Campbell, influenced political science. Indeed, in an article in *A.P.S.A. News* Campbell lamented the 'hands-off' approach of political scientists to the study of the High Court, writing that '[r]elatively speaking Australian political scientists have contributed almost nothing to the study of judicial review in Australia and have shown a degree of disinterest in or reluctance to comment on High Court decisions' (1959: 1). Campbell recognised the benefits of the 'working alliance between lawyers and political scientists' in the United States and proposed topics on which Australian political and legal scholars could collaborate (1959: 1–5).

Notwithstanding the writings of Crisp and Sawer (see also *Federal Law Review 1980*: 260), other generalist and introductory political texts only gradually began to include discussions of the High Court as a political institution. In *The politics of Australian democracy: Fundamentals in dispute*, for example, Hugh Emy described the High Court as 'political' only 'in the non-pejorative sense that it is a major rule-making body which helps to shape national policy' (1978: 26). Despite this limited characterisation of the High Court as political, Emy disputed the positivist account of judicial decision-making, characterising positivism as 'a dangerous illusion' and

writing that legalism 'has its limitations' (1978: 25–26). Emy did not, however, take this idea further.

Thus, within the political science discipline, the identification of the political characteristics of the judiciary and the study of the Court as a political institution had been underway since the publication of Crisp and Sawer's texts. Crisp, Sawer and, to a lesser extent, Emy planted the seeds of political studies of the High Court, but their thinking only gradually changed political discourse by framing the High Court in political (rather than legal) terms (see the expression of the orthodox view in Miller 1954: 123–24; [1959] 1963: 141). It provided, however, a foundation within the discipline for the study of the judicial branch of government as a political institution, and found occasional expression in political discourse. Most significantly, Gough Whitlam expressed similar views to Crisp and Sawer in a series of speeches published by the Victorian Fabian Society in which he also drew attention to the tension between the Constitution and the policy platform of the Australian Labor Party (Whitlam 1965: 6).

At this time a theoretical, 'realist' shift was underway in Australian law schools that facilitated the study of the judiciary from the standpoint of political science. Some, such as Sawer (1939), had noted the emergence of realist thinking much earlier. The legal realist school of thinking that had developed in the United States in the early 20th century began to infiltrate Australian universities in the 1960s and 1970s alongside the Critical Legal Studies movement (James 2000: 969). Bruce Kercher has suggested that it was '*prominent* in Australia's university law schools from the 1970s onwards' (1995: 189, emphasis added), aided by the writings of Sawer and the sociological jurisprudence of Julius Stone (1946; 1964; 1966a; 1966b; 1985). Responding to the publication of Galligan's *Politics of the High Court*, for example, Jeffrey Goldsworthy wrote that 'we are (almost) all realists now' (1989b: 51). The question of whether judges make law, he continued, was 'old hat' among legal academics, though it remained 'novel' for the general public and 'too radical' for some judges (1989b: 51). For political scientists, however, legal realism was not 'old hat': it had not yet penetrated the disciplinary barrier between law and politics to engender a re-imagining of the High Court as a political institution. Even now the complexity of legal realism is at times not properly appreciated in political science texts.

The central claim of the realist school is that 'judges are largely "fact-responsive" rather than "rule-responsive" in reaching decisions' (Leiter 2010). That is to say, the facts of cases and policy-outcome preferences rather than legal rules shape the decision-making behaviour of judges. There is, however, disagreement within the 'school' about the extent to which rules constrain or affect the decision-making power of judges (cf. Frank 1950; Hutcheson, Jr. 1929: 285, on the one hand, and Llewellyn 1960: 53, on the other). Notwithstanding the diversity of viewpoints within the legal realist school, it has broken down established perceptions of the judiciary and its decision-making process through attempts to expound a 'realist' account of judging. Lord Reid, for example, is often noted for having mocked the long-standing idea that judges did not make law, but merely declare it, as a 'fairy tale' as if 'in some Aladdin's cave there is hidden the Common Law' (1972: 22). Legal realism thus invites us to examine the Court realistically and ask how judges exercise power.

The perception of the High Court as a political institution and the questioning of legalism also emerge in cross-disciplinary texts. By way of example, the text *Australian lawyers and social change*, which collated papers from a seminar at the

Australian National University in 1974, challenged the traditional perception of the Court and judicial decision-making. The papers collected in the text are predominantly written by legally trained scholars, but both lawyers and non-lawyers attended the seminar, evidencing the breaking down of the disciplinary boundaries. Gareth Evans referred to the High Court as an 'apolitical political court', and wrote that 'judges in Constitutional cases [can] pick and choose precepts to match their institutions [*sic*] while nonetheless maintain[ing] their intellectual respectability' (1976: 69, 46). Likewise, Sawer wrote of 'the influence of powerful personalities and of changing social values' on the jurisprudence of the Court – a sentiment iterated recently by former High Court Justice Dyson Heydon (2013: 215) – and commented that 'so far as constitutional law is concerned, the scope for judicial legislation is enormous' (1976b: 132, 134; see also Stone 1976: 376–77).

The theoretical shift underway in the 1960s and 1970s accompanied an evolution in the role and power the High Court exercises. Appeals to the Privy Council were limited by the *Privy Council* (*Limitation of Appeals*) *Act 1968* (Cth), *Privy Council* (*Appeals from the High Court*) *Act 1975* (Cth) and, notwithstanding §74 of the Constitution, abolished in practical terms by the *Australia Act 1986* (Cth). The effect was to accord the High Court an increased independence and freedom in its decision-making. At the same time, the *High Court of Australia Act 1979* (Cth) granted the court increased control over its internal affairs and the amendment of §35A of the *Judiciary Act 1903* (Cth) by the *Judiciary Amendment Act* (*No 2*) *1984* (Cth) afforded the court increased discretionary power to determine those matters (not within the court's original jurisdiction under the Constitution) that it would hear.

Specialist texts and the reconceptualisation of law and the High Court as political

Two political scientists, Schubert and Galligan, pioneered the study of the High Court as a political, rather than a legal, institution in specialised texts. Since the publication of Galligan's *Politics of the High Court* (1987), in particular, the Court has increasingly been the subject of political exegesis in both specialised and generalist political science texts. As a result, Irving suggests, the perception of the Court as a political institution had become 'commonplace' by the 1990s (2009: 116). Notwithstanding the widening of the discipline and the conceptual sphere of politics brought about by Schubert, Galligan and authors inspired by their works, the study of the law and legal institutions (often termed 'judicial studies') occupies a small subset in the discipline of politics, with limited cross-disciplinary research. Ultimately, it points to the conclusion that there remains some way to go in dispelling misperceptions of the Court and its role and powers in the Australian political system.

Schubert's early work focused on the conceptualisation of the Supreme Court of the United States as a political institution (1959; 1960; 1964; 1965a; 1965b). He engaged with the Court's jurisprudence from a behavioural perspective, using quantitative measures to identify the policy-making and 'voting' behaviour of judges. Subsequently, Schubert translated his thinking into the Australian context (1968a; 1968b; 1969a; 1969b). His major contribution to Australian political and legal studies came with his analysis of 710 judgements of the Dixon court between 11 May 1951 (the 'de facto retirement' of Chief Justice Latham, according to Schubert) and 22 September 1961 (1969a: 3–4). Schubert endeavoured to identify correlations between the background characteristics of the judges and their participation and

voting behaviour by scaling the policy positions of each judge, as represented in the judgements of the court, along a scale between the broadly expressed poles 'collectivism' and 'authoritarianism'. His primary conclusion was that, 'in general, the older judges were the ones most sympathtic [*sic*] to collectivism' (1969a: 27). Schubert also noted that there was a weak link between personal characteristics (such as age and socio-economic and political status) and the decision-making approach of the judges (1969a: 29).

The effect of Schubert's writings, both in the United States and Australia, was the questioning of the autonomy of the law and the linking of judicial outcomes to extra-legal factors. In turn, this encouraged the analysis of the backgrounds of judges in order to explain ideological differences on the High Court and demystify judicial decision-making (1968a: 40). In his article 'Judges and policy on the Latham court', for example, R.N. Douglas applied a variant of Schubert's scalogram analysis to the Latham court (1969). Douglas commenced his article by challenging the declaratory theory of law and discussing the limits on judicial choice in judicial decision-making (1969: 24). He went on to use a scalogram analysis in order to identify the rates of agreement and disagreement between the judges, arguing that the personal relationships between judges and their policy preferences explain the rates of agreement and disagreement among judges (1969: 27).

Within the discipline of law, Tony Blackshield adopted Schubert's scalogram (or 'jurimetric') analysis (1972; 1977; 1978), albeit with limited effect on legal scholarship. Even now, jurimetrics occupies an uneasy place within the legal discipline (Kirby 2013: 13). The effect of Schubert on the political science discipline in Australia was similarly muted. Introductory and generalist texts did not adopt it at the time, although Galligan discussed Schubert and Blackshield's articles (1987: 34–36). Following these initial quantitative analyses, jurimetrics fell out of use until Russell Smyth – not a political scientist but a legally trained economist – adopted empirical techniques in his analysis of the High Court from the late 1990s onwards (Groves and Smyth 2004; Narayan and Smyth 2005; Smyth 1999; 2001; 2002a; 2002b). According to Gill, Randazzo and Sheehan, Smyth 'almost single-handedly reinvigorated the empirical study of judicial behavior in Australia' (2012: 136). Ultimately, the interrogation of judicial decision-making through the quantitative study of the High Court's jurisprudence was an important step in altering the assumptions that underpinned the study of the High Court.

John Playford cited the writings of Schubert and Douglas, inter alia, in his writings in the 1960s and 1970s questioning the neutrality and independence of the judiciary. Playford criticised the relationship between judges and political parties in Australia and the effect of the (generally) conservative backgrounds and commercial interests of judges on their decision-making (1961: 6; 1970). In 'Who rules Australia?' Playford expressed a critique of judicial decision-making that reflected legal realist trends within Australian law schools:

> Judges are not the mere exponents of the law as they find it: there is plenty or room for judicial discretion in the application of the law and for judicial creativity in making law … In interpreting and making law, judges are deeply affected by their view of the world. Of course, they frequently see themselves as guided exclusively by values which transcend class interests, but these are usually a cloak for their conservative bias. (1972: 142–43)

The significance of Playford's work lies not only in his general challenge to orthodoxy, but also in the standpoint from which this challenge was issued. His critique of the relation between capital and the law stemmed from a socialist or anti-capitalist worldview. In a series of articles he accused the High Court and the law of 'defend [ing] capitalist relations of production and the political and social conditions which are based on them' (Playford 1970: 16) and evincing a 'bias in favour of privilege, power and property' (Playford 1972: 143). At the time, Encel (1970: 74–76) and Connell and Irving (1973) also expounded Marxist critiques of the High Court (Irving 2009: 109). Substantive Marxist analysis of High Court jurisprudence has not, however, followed from these early works.

The discipline noticeably widened only with the publication of *Politics of the High Court* in 1987. Galligan's early writings on the role of the High Court in the Australian political system drew out themes that he would address in more depth in *Politics of the High Court* (1979; 1981a; 1981b; for reviews of Galligan's text see Cairns 1988; Goldsworthy 1989a; Saunders 1988). In this text, Galligan argued for a reconceptualisation of the political and the identification of the High Court as a political institution. He studied the High Court within its broader institutional framework, identifying its role within the party system and its relationship with the legislative and executive branches in the constitutional arrangement (1987: 6). The Court, he suggested, performed a 'stabilizing role' both through its management of conflicts between different levels of government and between ideologies, and its maintenance of the constitutional system (1987: 6–7).

Galligan questioned the methodologies of the Court and criticised the legalist and realist accounts of judging. In effect, he challenged the orthodox perception of the Court's role. In part, the significance of Galligan's writing lies in an important but subtle shift in his focus. Much of political science at the time focused on the Constitution as the primary site of conflict. Galligan focused instead on the formative role of the High Court and its individual judges in this conflict, with a consequent downplaying of the Constitution in the decision-making process of judges in constitutional adjudication. In doing so, Galligan argued that the judicature, like the executive and legislative branches of government, ought to be studied as a political institution (1987: 261). According to Galligan, legalism was a political strategy by which the Court maintained the existing economic and social order: 'the Court's public rhetoric and legalistic technique have disguised judicial power and helped legitimate the Court's controversial decisions' (1987: 242). In demonstrating this point, he placed particular emphasis on the *Bank Nationalisation* case, the *State Banking* case, the *Pharmaceutical Benefits* cases and the *Airlines* case, which frustrated the attempts of Labor governments to reshape the economic structure of Australian society in the post-war period.[1] For Galligan, such cases demonstrated how the interpretation of the Constitution from a liberal perspective stymied the implementation of radical (i.e., non-liberal) ideologies advocated by the Australian Labor Party (1987: 30).

Some scholars quickly incorporated Galligan's thinking into introductory and generalist political texts. Lucy's 1985 study, *The Australian form of government*, for

[1] *Bank of New South Wales v Commonwealth* (*Bank Nationalisation* case) (1948) 76 CLR 1; *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31; *Attorney-General (Victoria); Ex rel Dale v Commonwealth* (*First Pharmaceutical Benefits* case) (1945) 71 CLR 237; *British Medical Association v Commonwealth* (*Second Pharmaceutical Benefits* case) (1949) 79 CLR 201; *Australian National Airways Pty Ltd v The Commonwealth* (1945) 71 CLR 29.

example, drew on Galligan's discussion of the legitimating rhetoric of legalism in an earlier journal article (1981a), writing that '[t]he Australian High Court has been very successful in projecting an image of legalism … This image of legalism legitimizes the power of the court' (1985: 301). In this text, Lucy pushed the conceptualisation of the High Court in political terms, describing it as 'a political institution' and setting out the ways in which he considered the High Court to be a political actor (1985: 300). Lucy concluded that judicial decision-making is not a neutral process:

> [i]t is extremely hard, at least for a political scientist, to believe that politicians would appoint judges to such a powerful body as the High Court without taking into account the type of judgements [*sic*] such judges are likely to arrive at … It is difficult to believe that judges of the High Court are totally unmoved by the likely consequences of some of their judgments. (1985: 300)

For others the reconceptualisation of the Court from a legal to a political institution took longer. In Andrew Parkin, John Summers and Dennis Woodward's text, *Government, politics, power and policy in Australia*, for example, the role of the Court in the Australian political system did not receive considerable scrutiny until the fifth edition in 1994 (cf. Parkin, Summers and Woodward 1990; Solomon 1994: 105). Similarly, the contrast between the first and second editions of *Politics in Australia* reflects a shift in thinking within the discipline, both in the expanded treatment of the High Court and the consideration afforded to Galligan's work (cf Thompson 1993: 72; Watson 1989: 60). Watson's contribution to *Politics in Australia* iterated a legalistic conceptualisation of the High Court, but Thompson suggested in the second edition that '[t]he Australian court wraps its judgements [*sic*] in a cloak of legalism and wishes to appear impartial. Despite its legalistic camouflage, the Court has frequently made major political decisions' (1993: 71).

More recently, the introductory texts *Politics one* (Stewart and Ward 2010), *The Australian political system in action* (Barry, Errington and Miragliotta 2010) and *Contemporary politics in Australia: Theories, practices and issues* (Gelber 2012) have each included a chapter on the political function of the High Court. So too have *The Oxford companion to Australian politics* (Coper 2007) and *Powerscape: Contemporary Australian politics* (Gauja, Gelber and Vromen 2008). There are exceptions. Most notably, Don Aitkin, Brian Jinks, Gwynneth Singleton and John Warhurst's *Australian political institutions* affords the High Court only two pages (2009: 54–56), while the series of handbooks authored initially by Graham and Hughes, and subsequently by Hughes alone, on Australian government and politics overlook the High Court almost entirely (Graham and Hughes 1968; Hughes 1977; 1986; 2002).

Introductory or generalist texts have a broader readership than specialist texts. They do not, however, contain the same depth of scholarship as specialist studies of the High Court and have been limited in their effect on political science discourse. The implication is that, more than simply expanding the treatment of the High Court in generalist texts, the High Court ought to be subjected to sustained and detailed studies from within the political science discipline.

Since the publication of Galligan's *Politics of the High Court*, six specialist texts have been published that have expanded on or updated Galligan's arguments (Gill, Randazzo and Sheehan 2012; Patapan 2001; Pierce 2006; Solomon 1992; 1999; Wood 2008; see also the short update by Galligan 2003: 234). Each focuses on the

political character of the High Court, the political nature of decision-making or the political effects of the Court's judgements. There has also been increased study of the Court in legal and political journals by political scientists (e.g., Tucker 1994). Between 2002 and 2011, the *Australian Journal of Political Science* provided an annual 'political review' of the High Court (Gauja 2009; 2010; Gauja and Gelber 2011; Gelber 2004; 2005; 2006; Gelber and Kildea 2007; Patapan 2002; 2003). In this way, the greatest effect of *Politics of the High Court* has been to make the role of the High Court the subject of debate within the political science discipline.

At times, studies of the judiciary by political scientists mischaracterise legal terminology or treat it laxly. For example, some authors conflate realism with judicial activism in describing the methodologies of the High Court (e.g., Gelber 2012: 265). Describing realism and judicial activism as interchangeable terms presupposes that realism's counterpoint, legalism, equates to judicial restraint. It also overlooks the genesis of the expression 'judicial activism' (see Josev 2013). As a result, such writers misconstrue realism and legalism, both of which are contestable theories of judicial decision-making. Moreover, such a characterisation is too simplistic: it overlooks the reality that judicial restraint in a particular case is itself an ideological decision.

Similarly, quantitative analyses of judicial decision-making have suffered from methodological flaws. This has included the use of impractically broad or overlapping evaluative categories or definitions that prejudice the utility of the author's findings (e.g., Gill, Randazzo and Sheehan 2012: 68–69, 125; Weiden 2011: 335) and failing to account for institutional and political differences in the translation of methodologies across jurisdictions (e.g., Gill, Randazzo and Sheehan 2012; and see Cane 2014: 110–21). Such criticisms point towards a pressing need for care in the use of technical legal terminology, legal concepts and research methodologies, as well as greater engagement by political scientists with legal concepts and theories.

What future for political scientists and the High Court?

This article has demonstrated that the concept of the political has gradually widened to account for the function of the High Court in the Australian political system, although the disciplines of law and politics remain separated. Almost three decades after the publication of *Politics of the High Court*, 'judicial' and 'legal' studies are under-developed sub-disciplines in Australian schools of politics. In addition, courses on law and legal institutions are uncommon in undergraduate political science curricula. Consequently, a great deal of work remains to be done by political scientists to add to the discipline's understanding of the High Court and the political and institutional consequences of exercises of judicial power. Indeed, one needs look no further than the recent observation of Andrew Lynch to recognise the value of political scientists' offering:

> Certainly in Australia at least, one suspects that many political scientists and constitutional lawyers view the Supreme Court [of the United States] 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. (2014: 465)

Australian political scientists ought to disagree with Lynch's assertion and argue, instead, that the High Court is not 'a dryly uninteresting institution by comparison'

but simply one that has not been studied to the same extent. Lynch's comment reveals the need for more systematic studies of the High Court, its decision-making and power, and of the legal regulation of political activities and actors. This analysis could take multiple avenues. Six possibilities that look at different aspects of the power and decision-making of judges as rulers are set out below.

First, 'judicialisation studies' has had little influence on the political science discipline in Australia, in contrast with other common law jurisdictions (cf. Hirschl 2004a; 2004b; 2006). Judicialisation studies refer to the analysis of the translation of political controversies into legal controversies and the consequent shift in law-making power from the legislative and executive branches to the judicial branch that this practice entails (e.g., Hirschl 2004a: 71–72). The increasingly frequent translation of political controversies into legal controversies and the political and institutional consequences of the judgements of the High Court indicate that judicialisation is a fertile subject for study. In recent years, politico-legal controversies have included (among others) marriage equality legislation in the Australian Capital Territory; the Northern Territory Intervention; the Malaysian agreement for the processing of refugee claimants and immigration matters generally; plain packaging of cigarettes and the federal stimulus program in response to the Global Financial Crisis.[2] Such examples indicate that the High Court is an important political forum used to advance or stymie political programs. This practice merits evaluation by political scientists in order to reveal how legal institutions are used as tools of social and governmental change (for a comparator United States text, see Rosenberg 2008).

Related to judicialisation is a second topic: the policy-making role of the High Court. The role of the Court (and other, lower courts in the judicial hierarchy) as a policy-maker outside of the constitutional law context is not often noted in political science texts. Judicial decisions on taxation, corporations law and (increasingly) migration (among other topics), however, have significant political and societal implications. Tied to this policy-making role is the agenda-setting activity of the High Court in allowing or rejecting special-leave applications (although, of course, such an analysis must also make allowance for those matters that the Court must hear due to their being within its original jurisdiction). In addition, international-relations students might look at the extent to which judicial decisions impact on Australia's foreign relations or the extent to which international law effects domestic politics. Recent judicial pronouncements, for example, have indicated an increased willingness to circumvent the act of state doctrine in order to adjudicate upon the conduct of Australian officials in their relations with foreign states.[3]

Third, former Justice Heydon's recent comment that 'stronger judicial personalities [on the High Court] tend to push the weaker into submission' (2013: 217) suggests that small-group decision-making theory could provide an insight into the Court's rates of agreement and disagreement (Miller 2008). Indeed, research in other jurisdictions supports, inferentially, Heydon's comment (e.g., Eisenberg, Fisher and Rosen–Zvi 2013; Martinek 2010).

[2] *The Commonwealth v Australian Capital Territory* (2013) 250 CLR 441; *Wurridjal v Commonwealth* (2009) 237 CLR 309; *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144; *JT International SA v Commonwealth of Australia* (2012) 250 CLR 1; *Pape v Commissioner of Taxation* (2009) 238 CLR 1.
[3] See *Moti v The Queen* (2011) 245 CLR 456; *Hicks v Ruddock* (2007) 156 FCR 574.

Fourth, Playford's Marxist analyses in the 1960s and 1970s held the promise – since unfulfilled – of ongoing analysis of the High Court and the extent to which its jurisprudence maintains the ascendance of capital in Australian society, practically and/or intellectually, or impedes socialisation or the objectives of labour. The increasing use of the High Court as a forum to challenge government action indicates one route that such a Marxist analysis could take in the present day. One might ask who is using litigation as a political strategy in order to influence government policy – as occurred in relation to the mineral resources rent tax[4] – and, perhaps more importantly, who is not? Alternatively, a Marxist (and broadly sociological) analysis might ask to what extent differences in adjudication reflect the socio-economic and ideological backgrounds of judges. Such analyses might proceed from (and test) the thesis, expressed by Sumner, that:

> the legal system is first and foremost a means of exercising political control available to the propertied, the powerful and the highly educated. It is the weapon and toy of the hegemonic bloc of classes and class fractions whose rough consensus it sustains. As such, it lies hidden beneath a shroud of discourse, ritual and magic which proclaim the Wisdom and Justice of The Law. (1979: 277)

Fifth, rhetorical criticism offers a framework through which to explore the argumentation strategies and language that judges use. It is a well-developed mode of analysis in the United States to critique legal discourse and rhetorical strategies (e.g., Malphurs 2012; White 1985), but not in Australia. Rhetoric has, however, recently been used to study the legislative and executive branches in Australia (Uhr and Walter 2014). Its application to the judicial branch will assist readers to understand how judges legitimate their law-making power through written judgements and how ideologies and perspectives on gender, sexuality, race and other topics manifest in judicial rhetoric. The deconstruction of judgements in this way serves as a useful pedagogical tool to elucidate how judges speak through the law (exercising their power of argumentation) and in doing so construct the law and mask their exercise of power.

Sixth, quantitative citation analysis and survey data that indicate the uses and influence of political science texts would complement the disciplinary history set out in this article. One might reasonably ask to what extent specialist texts (such as those of Schubert and Playford) are relied on by students, prescribed in undergraduate classes, or used to any useful extent by researchers. Citation analysis and survey data would suggest answers to these questions. It would not, of course, reveal the entire influence of a text, but it would provide a useful insight into political science scholarship.

Each of these suggestions for further study by political scientists warrants exploration for two primary reasons. First, further research by political scientists may challenge the de-politicisation of the judiciary and judicial power. By doing so, it would strengthen realist characterisations of the significant role and power of judges in both the law and political science disciplines. In turn, this would create a critical space for questioning the selection of judges and the High Court's ideologies and policy-making. Second, increased research about the High Court within the political

[4] *Fortescue Metals Group Limited v The Commonwealth of Australia* (2013) 250 CLR 548.

science discipline may have a consequent influence on the study and teaching of undergraduate coursework and generalist texts. In this way, it would bring about more widespread recognition of the policy-making role of the High Court in the Australian political system by political science students.

Conclusion

The High Court of Australia is an inherently political institution, both as a result of its role in the Australian political system and the nature of its decision-making. This article has demonstrated that the political function and decision-making behaviour of the High Court was the subject of study prior to Galligan's *Politics of the High Court*. Crisp, Sawer, Playford, Schubert and others had already pushed a political conceptualisation of the High Court in the political science discipline. As Irving argues, however, it was not until the publication of *Politics of the High Court* that the study of political science broadened and the analysis of the High Court from the perspective of political science intensified (2009: 116). The implication is that there is significant scope for research and conceptual growth in the study of the High Court within the discipline of political science.

Political scientists have important contributions to make to the study of the law, just as lawyers have important contributions to make to the study of politics. One's understanding of the High Court differs depending on one's epistemological and disciplinary starting point. Whether one looks on the High Court as a political scientist or a lawyer affects their understanding of the court, its function and its power. Cross-disciplinary studies of law and the legal system ought to be encouraged as a means of critiquing disciplinary mindsets and better understanding the law. As Pound has written: '[l]et us look to economics and sociology and philosophy, and cease to assume that jurisprudence is self-sufficient … Let us not become legal monks' (1910: 35–36).

To this end, this article has presented a research agenda for political scientists. This research agenda holds the promise of new and important perspectives about the judicial branch, judicial power and the institutional structure of government. By doing so, it encourages political scientists to look afresh at issues such as the process of judicial appointments, the funding of the judiciary, the power of judges, litigation strategies as a mode of social and political change, and the relationship between the branches of government. A new teaching agenda ought to accompany this new research agenda so as to incorporate research about the judicature into university curriculums and broaden political scientists' understanding of the political system.

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