THE ONCE AND FUTURE COURT?

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

Andrew Lynch[*]

In commencing his sprawling collective portrait of 19th century Britain a few years ago, A N Wilson stated simply, '[t]he Victorians are still with us.'[1] The truth of this, he went on to explain, lay in the fact that, though much changed, the world which they created persists. Although we seem to be at a great remove from the concerns, innovations and ideals of that era, Wilson ably demonstrated that the world left to us by the Victorians was immutably different from that which existed beforehand. As such it marked a break with the past and set in place the parameters within which the modern age has continued to develop.

It seems not unreasonable to suggest that this type of lingering generational significance may be just as true in the history of particular institutions, including courts. The United States Supreme Court under the Chief Justiceship of Earl Warren provides perhaps the strongest example of this. That Court's invigoration of the civil rights of Americans, its prevailing methodology, and general clarity of purpose ensured that the institution and its capacities were viewed afresh.[2] Despite attempts through later appointments to secure a reversal of much of the inheritance from the Warren Court, this has not been easily accomplished.[3] Certainly the jurisprudence of the Court has shifted, but even to its opponents and critics the Warren era continues to loom large. In presenting new possibilities, it altered the Court forever, both inside and out.

The title alone of Jason Pierce's new study of the High Court of Australia[4] indicates his premise that the institution under Chief Justice Mason experienced change on such a scale that what occurred was nothing less than a judicial 'revolution'. Yet the author

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* Senior Lecturer, Gilbert + Tobin Centre of Public Law, Faculty of Law, UNSW. I would like to thank Alexander Reilly for his comments on an earlier draft of this review.

1 A N Wilson, *The Victorians* (2002) 1.

2 For a contemporary assessment, see John D Weaver, *Warren: The Man, The Court, The Era* (1968). Latterly the most famous surveys of the Warren era have been provided by Schwartz: Bernard Schwartz, *Super Chief: Earl Warren and His Supreme Court – A Judicial Biography* (1983); Bernard Schwartz and Stephan Lesher, *Inside the Warren Court* (1983); and Bernard Schwartz (ed), *The Warren Court: A Retrospective* (1996).

3 See Vincent Blasi (ed), *The Burger Court: The Counter-Revolution That Wasn't* (1983).

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

makes no direct parallel to the Warren Court. That is perhaps surprising given that Pierce is himself an American, but his restraint entirely accords with his overarching approach, which is to examine the Mason era through the voices of its chief actors, successors and the wider Australian judicial fraternity. Even amongst extracts from over 80 interviews Pierce conducted with this impressive assemblage,[5] only one judge resorts to analogising the High Court in the late 1980s and early 1990s with the Supreme Court under Warren.[6] In part, one suspects that the comparison may be so evident as to be unnecessary. But the reason probably owes more to the fact that, as Pierce makes admirably clear, the 'Mason Court Revolution' was both preceded and stimulated by very distinctive local conditions.

In reading Pierce's study it struck this reviewer that, like the Victorians, the Mason Court also is 'still with us'. This is so despite it being over a decade since Sir Anthony Mason retired from the Court, and that with the departure of Michael McHugh in late 2005, no Justice who served during the Mason era remains on the highest bench. The truth of this statement is also not negated by those decisions of the Court under Chief Justices Brennan and Gleeson which have rejected or at least stunted the Mason era jurisprudence.

The Mason Court may have formally ended but it is not simply 'over'. It has, as amply demonstrated by Pierce, retained a remarkably strong presence in the minds of the judiciary and legal profession as well as the legal academy. Two reasons for this are immediately apparent. First, the post-Mason High Court obviously inherited legal problems the contours of which owed much to their predecessors. For example, while Justice Callinan has made clear his willingness to consign the implied freedom of political communication to history,[7] his colleagues have attempted, albeit without much enthusiasm, to engage with this particular part of the Mason Court's legacy. While in *Lange v Australian Broadcasting Corporation*[8] the Brennan Court united to achieve clarity on a more modest operation for the implied freedom than the earlier case law had suggested, the members of the Gleeson Court have had to confront the complexity which the apparent simplicity of *Lange* masks so well.[9] In short, the Court remains — for better or worse — on territory first mapped out by Mason and his colleagues.

Second, the Mason era irrevocably broadened the scope within which we may appreciate the Court's role and methodology. For illuminating this far better than anyone has to date we owe Pierce an enormous debt. As his interviews with the judiciary and senior profession make clear, the consequence of this is that even to its fiercest detractors the Mason Court still exerts a powerful fascination — as everything the High Court should *not* be. Conversely, to its passionate supporters, it represents not merely nostalgia for the recent past but an example of all that the Court could be

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5 An entire listing of those interviewed is provided in Appendix A (ibid 293–5). Comments quoted in the text are not attributed to individuals, though occasionally the status of the speaker is given.

6 Pierce, above n 4, 121, 188.

7 See *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 331 (Callinan J); *Roberts v Bass* (2002) 212 CLR 1, 102 (Callinan J).

8 (1997) 189 CLR 520 ('*Lange*').

9 See *Roberts v Bass* (2002) 212 CLR 1; *Coleman v Power* (2004) 220 CLR 1. See also Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23 *Melbourne University Law Review* 668.

and could achieve. It is surprising how many of those to whom Pierce spoke identify themselves so resolutely with either of these groups. But even to those of a moderate persuasion, the impact of the Mason Court is still keenly felt if for no other reason than that it finally exposed the limitations and contradictions of legalism — in thrall of which the Australian legal community had embarrassingly remained despite its desertion overseas much earlier.

The audience

If *Inside the Mason Court Revolution* merely made plain the above, it would still be a remarkable contribution. But Pierce's ambition is deeper than simply showing us the impact which that era of the Court has had. He seeks also to examine why the Court was so altered under Mason's Chief Justiceship. Anyone who has given pause to consider this question must inevitably have confronted the fact that the answer lies beyond the confines of the law itself. To those readers, the contents of this book will be largely confirmatory but with the distinct advantage of being empirically-based and systematically presented. But it seems that the book is written by Pierce with a rather different audience in mind. While I am sure he will not be surprised by interest from lawyers, he seems more intent on holding up the experience of the Court's institutional transformation as a challenge to the very dominant American stream of political science which seeks to explain judicial behaviour almost exclusively through attitudinal studies.[10]

Australians have had fairly limited exposure to serious academic studies of this kind,[11] and might dismiss it as a genre explaining how judges decide cases depending on which side of bed they got up from or what they might have enjoyed (or equally not) for breakfast. But that kind of ultra (non-legal) realism has always enjoyed a prominence grossly inflated by its being a soft target for such mockery. In reality, the early realists sought merely to show that accurate prediction of how courts decide cases hinged less on the law than the strict formalism of the 19th century would admit. Llewellyn argued that our predictive capacity owed more to observing the factors

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10 The work singled out as exemplifying this breed is Jeffrey Segal and Harold Spaeth, *The Supreme Court and the Attitudinal Model* (1993), in which the authors conclude that the outcome of United States Supreme Court cases is determined by the 'ideological attitudes and values of the justices': at 65. This explains the context for the book — its author and publisher being both American, it is primarily a contribution to political science debates in that country while also being of interest to the legal community here. In Pierce, above n 4, 14–7, Pierce recognises, with some surprise, the very limited interest in the judiciary taken by Australian political scientists with the exception of Galligan and Patapan (though we may now add Katharine Gelber; see 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).

11 The seminal works of this nature on the High Court were produced in the late 1960s by Glendon Schubert: Glendon Schubert, 'Political Ideology on the High Court' (1968) 3 *Politics* 21; and Glendon Schubert, 'Judicial Attitudes and Policy-Making in the Dixon Court' (1969) 7 *Osgoode Hall Law Journal* 1. Tony Blackshield built on those papers with 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* (1978) 133.

beyond the traditional rules.[12] The rise of feminist, race and critical legal scholarship provided more precise ways of classifying those elements.[13] Consistently with those later jurisprudential movements, attitudinal studies regard judges as largely consistent rational actors who adopt strategies to maximise their policy preferences.[14] They tend to support this through empirical work of a rather frightening complexity which ascribes numerical values to an individual's ideological outlook and experience and calculates how those might intersect when determining legal problems via a mathematical equation. The element that seems lost in the mix is the law itself. As a result, to say that work of this sort leaves lawyers nonplussed is to put it mildly.

Many readers then will be gladdened to hear that Pierce shares their scepticism over too heavy a reliance upon attitudinal factors as a key to understanding the results reached by courts. As he advises the colleagues in his discipline:

> Judges talk and think about law. Those thoughts are not simply shell games to cover up policy preferences. Law matters.[15]

However, and herein lies the book's great importance, Pierce so convincingly argues — utilising the remarks of the very echelon of the Australian profession as support — that how courts function is dependent upon a complex interplay of legal, individual, institutional and political variables that neither camp — lawyer or political scientist — can remain happily in their comfort zone.

Pierce concludes the book simply by affirming that '[l]aw absolutely matters. Politics absolutely matters'.[16] He very effectively shows how much is to be gained through greater exchange between the two. That is, being realistic, a challenge which falls particularly to legal academics and political scientists rather than the latter and the wider legal profession itself. But if this book is anything to go by, the profession will provide a primary resource, as well as, one suspects, a deeply interested audience.

Orthodoxy and transformation

In examining revolutions, one must inevitably confront the preliminary step of describing what was there before. In order to do so, Pierce bases his discussion around six categories or 'dimensions' of the orthodox, pre-Mason Court — which he then revisits in order to signal the shifts which underpinned the Court's transformation. The use of these themes as organising principles is helpful and enables Pierce to draw on his qualitative data from the interviews to good effect without the reader getting lost.

So, for example, the High Court's traditional approach to the purpose of law is identified as its capacity to provide certainty for public and private actors in ordering their affairs rather than as a means by which to dispense justice to an aggrieved party in a specific matter before it. Or, in the words of a Federal Court judge, the High Court

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12 Karl Llewellyn, 'Some Realism About Realism: Responding to Dean Pound' (1931) 44 *Harvard Law Review* 1222, 1241.

13 Thus effectively responding to Pound's very early call when he wrote, 'the element of most enduring effect in legal development is professional and judicial ideals of the social and legal order … We need to study these ideals scientifically instead of ignoring them. We need to learn whence they are derived, how they take form, and how they are used': Roscoe Pound, 'The Theory of Judicial Decision' (1923) 36 *Harvard Law Review* 641, 661.

14 Pierce, above n 4, 19–22. Pierce cites Segal and Spaeth, above n 10 as the definitive example.

15 Pierce, above n 4, 291.

16 Ibid 292.

should be determining 'what the law is', not looking to 'take the law forward'.[17] The decisions which attract opprobrium as ones where the law was developed in an unforeseen direction so as to provide a remedy where none previously existed, predictably include *Mabo v Queensland (No 2)*[18] and *Theophanous v Herald & Weekly Times Ltd*,[19] but the blow dealt by the Court to the very fixed rule of privity of contract in *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd*[20] is also a very clear example of the Mason Court's willingness to reshape legal doctrine where it felt necessary.

Linked to this very different sense of what the law might achieve, are differing perceptions as to the purpose of appellate litigation more generally. This does, however, throw up some anomalies. For instance, Pierce demonstrates through several statistical representations that there has been a steady increase in submissions from interveners and amicus curiae since the mid-1970s,[21] but he cautions against concluding that the Court moved to embrace a public litigation model consistent with it taking a 'big picture' approach to legal problems. Throughout the Court's transformation under Mason and its subsequent retreat presided over by his successors, there has been a 'continued leeriness about non-party intervention.'[22] Indeed, the Mason Court's decision in *Dietrich v The Queen*,[23] effectively guaranteeing an accused the right to legal representation where its absence would produce an unfair trial, is singled out for criticism by 'many appellate judges' due to the Court's failure to have recourse to submissions concerning the economic impact of such an approach on State finances.[24]

Similarly, there has been a consistency about the way in which, for the main, the Court expresses itself despite the evidence of role transformation. Drawing on the results of Groves and Smyth's exhaustive study of judgment delivery,[25] Pierce is able to show that the average page length of judgments rose markedly under Mason. But despite the argument later in the book that the High Court has retreated from the ethos which typified the Mason era, one has to concede that judgment length has hardly declined in the last decade.[26] The blunt criticisms given by State Supreme Court judges below would appear to be of the modern High Court generally:

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17 Ibid 49.

18 (1992) 175 CLR 1 ('*Mabo*').

19 (1994) 182 CLR 104.

20 (1988) 165 CLR 107. Pierce makes the very salient point that his colleagues often overlook the importance of developments in private law when commenting on courts: 'Bloody revolutions may be underway in contract or estoppel law and too often political scientists are glued to saber rattling in constitutional matters': Pierce, above n 4, 291.

21 Pierce, above n 4, 95–101.

22 Ibid 105.

23 (1992) 177 CLR 292.

24 Pierce, above n 4, 53.

25 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.

26 Ibid 258. The decision of last year *New South Wales v Commonwealth* (2006) 231 ALR 1 ('*WorkChoices Case*') is, at approximately 160 000 words, probably the longest decision ever delivered by the High Court. It easily exceeds the decisions in *Commonwealth v Tasmania* (1983) 158 CLR 1 ('*Tasmanian Dam Case*') (approximately 119 000 words) and *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 ('*Bank Nationalisation Case*') (approximately 117 000 words). I am grateful to Paul Kildea for these figures.

> It writes too much. It thinks too much. Its judges are too often concerned with leaving a legal legacy.[27]
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> Pick up any High Court judgment today and you wade through fifty pages of the most complex verbiage that you care to encounter[.][28]

Overall, Pierce makes a convincing case that the prevailing attitude of the Mason Court was a significant departure from the orthodox institutional role the Court had played up to that point. That the attitude to non-party intervention and the manner of judgment writing cannot be seen to have possessed idiosyncratic features at that time alone, but instead have a degree of continuity across the subsequent Courts of Brennan and Gleeson, does not seriously undermine his main thesis. It simply shows that in the ebb and flow of institutional transformation not all aspects of how the Court goes about its business will necessarily alter.

Indeed, far more significant than factors such as those, is the third dimension identified by Pierce — the High Court's relation to the broader political regime. This is a topic which Patapan directly addressed in his successful analysis of the Mason Court in 2000. He concluded that in asserting a role for itself in guarding fundamental rights against incursion from the legislature or executive, the Court had significantly departed from its usual deference underpinned by orthodox adherence to parliamentary sovereignty.[29] Consequently, the Court attracted immense hostility from the other arms of government as a result of its apparent embrace of a more Americanised role of imposing 'checks and balances'. This split was made explicit by the Attorney-General's refusal to fulfil his traditional role as defender of the courts.[30]

The interviews which Pierce has conducted confirm Patapan's earlier thesis. With a degree of bewilderment given his jurisdictional origins, he faithfully recounts the zeal with which Diceyan constitutionalism governs the responses of many members of the Australian judiciary,[31] confessing 'surpris[e]' at the extent to which it has traditionally dominated High Court jurisprudence.[32] The great attraction of such an approach though, as many of his informants are keen to point out, is that it insulates the judiciary from the perils of politicisation.

As Patapan explained, the Mason Court's repositioning of itself, through the embrace of a distinctly realist methodology accompanied by a commitment to popular sovereignty, led to a far greater level of interaction between the High Court and the political sphere. Much of this was, regrettably, rather unpleasant and that experience goes a long way to understanding the retreat by the Court in more recent times from such a provocative judicial method. The nature of the Court's reasoning is really the key here for, as Pierce acknowledges, the institution has decided politically contentious disputes at earlier times in its history — notably *Australian Communist Party v*

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27 Pierce, above n 4, 92.

28 Ibid.

29 Haig Patapan, *Judging Democracy: The New Politics of the High Court of Australia* (2000) 190 ('*Judging Democracy*').

30 Daryl Williams, 'Judges Must Conduct Their Own Defence', *The Australian Financial Review* (Sydney), 27 April 2001, 57.

31 Typified by their frequent exclamation, 'But we don't make the law, we interpret it!': Pierce, above n 4, 110.

32 Ibid 65.

Commonwealth.[33] What distinguished the Mason Court's decisions in *Mabo* and cases such as those recognising the implied freedom was the overt resort not simply to the tools of constitutional interpretation but to underlying political theories.[34]

Pierce argues that an offshoot of a judiciary politicised in this way, is the willingness of its individual members to speak publicly on matters of policy and community values. Initially this point is made in respect of extra-judicial speeches but it is difficult to assess the significance of this phenomenon, since the interviewees tended to concentrate mainly on Justice Kirby and he is very much of the present era, not the past. It is, of course, not revealed whether his Honour is the High Court judge identified as making the comment below, but even if not, one suspects he might share the sentiment:

> I feel obliged to participate in the social dialogue … Confining myself to just my judicial work goes against my intellect and is a waste of a valuable resource. It has to be done and I am willing to do it. My mind is stimulated to think about these things … Australia should tolerate Posner-like judges.[35]

While another member of the High Court as well as a Federal Court judge weigh in to support extra-judicial comments as helping to 'stimulate debate and stimulate minds',[36] the overwhelming feeling is that the bulk of the judiciary are extremely wary of entering the fray of public discussions about all manner of issues.

The far more important context in which members of the Court may speak more broadly is within their judicial opinions themselves. On this score, the judgments of the Mason Court clearly distinguished themselves by moving outside the parameters of judicial reasoning usually employed up to that time by the Court in making decisions — reflecting what Llewellyn called the 'Grand Style' of adjudication.[37] In particular, the Court frequently spoke beyond the litigants in the immediate case. Again, the example most cited by the interviewees is the judgments in *Mabo* — in particular the leading opinion of Justice Brennan. This propensity of the Court to speak more generally on the issues before it married well with a perceived inadequacy or inability of ordinary politics to get things done. It is interesting to see the number of judges interviewed by Pierce who support greater judicial activism on this ground, with remarks like these:

> When the Mason Court was at its most active, there became an awareness that the political process couldn't really solve some of the social problems because they were politically too difficult. …
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> [T]here is much decision-making that governments don't take on, for one reason or another. It's too hard. It's too complicated. They're too worried about the political effects. That means … that if the law isn't to remain totally static then it puts a lot of pressure on courts to make the changes. …
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> It takes parliaments a hell of a long time to make laws reflecting community feelings. The parliaments of Australia tend to follow the lead given to them by the High Court.[38]

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33 (1951) 83 CLR 1 ('*Communist Party Case*').
34 Pierce, above n 4, 114–5.
35 Ibid 117.
36 Ibid.
37 Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* (1960) 36–8.
38 Pierce, above n 4, 126–7 (emphasis omitted).

It is in reading these comments that one appreciates the novelty of Pierce's work and the value in guaranteeing anonymity to interviewees. Assertions of judicial power in competition to that which is democratically conferred upon legislatures and governments are not often delivered with such frankness. There are similar passages peppered throughout the book — many of which would raise the ire of politicians and the media's commentariat, as well as more thoughtful observers of the Court's work.[39] One way though in which courts may attempt to justify this kind of activism is clear from the last quotation above — the appeal to 'community values'. This is a major aspect of Pierce's fourth 'dimension' through which we might assess the Court's transformation — the admission of judicial discretion more generally.

Patapan's verdict on the Mason Court's use of 'community values' was that they had failed to restrain discretion.[40] While Pierce is not saying that is the whole point of such values, he certainly seems less surprised to find them existing at the 'leeways' of judicial decision-making.[41] The interviewees predictably split into two familiar camps on this issue. The sceptics cite both the limited ability of judges to identify community values and the usurpation of the legislature involved in doing so.[42] A certain New South Wales appellate judge pressed the point further by accusing the Court of 'drift[ing] towards a form of socio-political reasoning' as a response to the '[i]ncessant left-wing consumerism that people have been bellowing out for years'.[43] He made plain his view that resort to community values amounted to making the law 'what the people want', adding that '[i]t doesn't matter what the law says, you must make certain it doesn't upset the feminists'.[44]

By contrast, those in favour of acknowledging the role of community values repeat the sort of disillusionment in respect of more obviously democratic institutions which has already been noted.

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39 As to the latter, see, Greg Craven, 'The High Court of Australia: A Study in the Abuse of Power' (1999) 22 *University of New South Wales Law Journal* 216; John Gava, 'The Rise of the Hero Judge' (2000) 24 *University of New South Wales Law Journal* 747; Jeffrey Goldsworthy, 'Interpreting the Constitution in its Second Century' (2000) 24 *Melbourne University Law Review* 677.

40 Patapan, above n 29, 32. See my discussion of Patapan on this point, with further materials considered in Andrew Lynch, 'The High Court—Legitimacy and Change: Review Essay: Haig Patapan, *Judging Democracy—The New Politics of the High Court of Australia*' (2001) 29 *Federal Law Review* 295, 302–4.

41 Pierce, above n 4, 151.

42 Ibid 153.

43 Ibid 155.

44 Ibid 156. I have considered at length whether Pierce has erred in including these views which are so obviously idiosyncratic (if not downright eccentric). One difficulty is that he does not sufficiently indicate how much store he puts in them. While I suspect the individual judge was not being ironic exactly, it is likely that he is one of those (increasingly rare) judicial personalities who delights in a provocative generalisation. Inclusion of excerpts from the interview with this judge (denoted as Interviewee #3—similar remarks are elsewhere attributed to this individual) without a proper perspective on his mischievous tendencies risks distorting the actual division of opinion on these issues. On the other hand, it is such good 'copy' that anyone in Pierce's position would be tempted to use it. Ultimately, I think he was correct to include the statement as one made by a senior Australian judicial officer and worthy of dissemination — if only to expose it as nonsense.

The bulk of those with whom Pierce spoke agreed that the Mason era had 'ushered in a period of greater High Court candour' about both its creative abilities and the use of discretion to reason towards an outcome.[45] While this was seen as a strength by many ('[t]he world deserves more honesty', said one,[46] rather touchingly), inevitably some had a fairly unusual take on it:

> Yes, a shift has occurred. It's part of a more grass roots phenomenon that it's okay to express feelings … Instead of being hidebound by precedent, convention, statute, you say the law as you feel it is and that's good! It's a cathartic experience, like going to a psychologist to have analysis, telling the psychologist how you really feel about life.[47]

At first blush we might baulk at this as a remarkably crude interpretation of the Mason Court's prevailing methodology. But lest we think that none of the protagonists would choose to describe their work on the Court in such terms, consider these statements attributed to two judges (the first being from the High Court) in respect of the recognition of the implied constitutional freedom of political communication:

> As far as the legitimacy of what was done by the Court, I had some doubts … Some of those decisions tended to go rather far toward imaginative interpretation, but I think the outcome was a good one … Perhaps it's illegitimate to pull the rabbit out of the hat, but it's nice to see the rabbit emerging …
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> I do support it, but it was a little stretched to get it. It's not easy to get it out of the words of the constitution. But I'm happy enough that they got it[.][48]

On the other hand, the use of discretion in the context of this particular constitutional development was singled out by many as going too far. If the comments gathered here are anything to go by, unqualified acceptance of the jurisprudence anchoring the implied freedom is still a long way off. Two High Court judges, and many more from lower courts, express deep reservations over the implication's curtailment of legislative power, the ongoing challenge in maintaining it and its overall impact on the perceived legitimacy of the Court as an institution.[49] Ultimately, it seems that the efforts of the bench in *Lange* to secure the implication in the 'text and structure'[50] of the Constitution has failed to convince many in the Australian judiciary. A typical comment is '[t]he judges were making it up! It's nowhere in the text'.[51] Even those quoted above as supporting the implied freedom expressed a preference for it to be properly secured through a bill of rights.[52]

The enhanced role of discretion which marked the decisions of the Mason Court is also directly reflected in the two final 'dimensions' through which Pierce conducts his analysis and which may be dealt with here succinctly. The fifth of these is concerned with the Court's greater willingness to depart from and overturn long-established precedent while at the same time favouring the creation of new legal tests which were 'less determinate in language, giving judges greater flexibility in decision-making, more discretion, and therefore more power'[53] (proximity, anyone?). Of the former, it

45 Ibid 155.
46 Ibid 154.
47 Ibid 156.
48 Ibid 169–70 (emphasis omitted).
49 Ibid 162–4.
50 See, eg, *Lange* (1997) 182 CLR 520, 524.
51 Pierce, above n 4, 65.
52 Ibid 168–70.
53 Ibid 183.

must be noted that disputes over the proper approach to precedent and the acceptability of overruling both predate the Mason era and continue unabated today.[54] Nevertheless, as Pierce argues, a weakened role for judicial precedent accorded with the Mason Court's general methodology — particularly the emphasis it placed upon contemporary community values.

The final 'dimension' is the Court's attitude to development of the law. The orthodoxy is slow, considered interstitial change — essentially the common law tradition. Sir Owen Dixon was highly influential in ensuring that this approach was applied also to constitutional questions.[55] Not for us the American experience of constitutional bedrock set in place by the 'will of the people' through which the judiciary derive their authority. Instead, the unbroken inheritance of the common law suffuses Australia's subsequent constitutional arrangements. In conjunction with a commitment to Westminster parliamentary sovereignty, this view produces a climate in which 'big leaps' by the judiciary are highly unlikely. Of course, as is clear by this stage of the book, the Mason Court's notoriety is due, in a nutshell, to its propensity to leap big and leap often.

Patapan's *Judging Democracy* very effectively demonstrated that this was consistent with the Court's perception of its role and significance as the third arm of government whose origins were derived from a Constitution which, after the passage of the *Australia Acts*,[56] was now seen as a reflection of popular sovereignty.[57] Pierce, I think, is slightly less successful in conveying this interpretation — though I do not suspect he would dissent from it. He does assert that the Mason Court was not enamoured of Dixon's view of the institution as one whose authority was subsumed within the common law tradition and instead looked to the Constitution as the source of its power to constrain the other arms of government. But there is a failure to look much beyond this. One of the dangers with the methodology employed by this study (though difficult to avoid when one is interested in the phenomenology of an institution's transformation) is that Pierce is guided by his interviewees to quite a degree. In this specific context, that leaves us with a number of theories that members of the Mason Court simply set about becoming 'active agents for legal change'.[58] Pierce acknowledges that a new conception of the institution within the broader political system underpins this, but it is that aspect which would profit from further discussion.

As is apparent from this small complaint, the major challenge which faced Pierce was not describing the changes wrought by the Mason Court to the orthodoxy but how

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54 Recent commentary includes Gian Boeddu and Richard Haigh, 'Terms of Convenience: Examining Constitutional Overrulings by the High Court' (2003) 31 *Federal Law Review* 167; J D Heydon, 'Limits to the Powers of Ultimate Appellate Courts' (2006) 122 *Law Quarterly Review* 399; Bryan Horrigan, 'Towards a Jurisprudence of High Court Overruling' (1992) 66 *Australian Law Journal* 199; and Andrew Lynch, 'Dissent: The Rewards and Risks of Judicial Disagreement in the High Court of Australia' (2003) 27 *Melbourne University Law Review* 724, 759–67.

55 Sir Owen Dixon, 'The Common Law as an Ultimate Constitutional Foundation' in Justice Woinarski (ed), *Jesting Pilate and Other Papers and Addresses* (1965) 203.

56 *Australia Act 1986* (Imp); *Australia Act 1986* (Cth).

57 Patapan, above n 29, 31. But see Lynch, above n 40. In that book review I suggested that such consequences need not follow from a recognition of popular sovereignty — something which the Court post-Mason has demonstrated.

58 Pierce, above n 4, 187.

best to explain their causes. This is compounded by the fact that he cannot control the way in which his many interviewees discuss the Court — he is not as free in structuring his material as a researcher who is not drawing on 82 other voices. So issues of what happened and why are regularly intermixed despite his efforts to keep them distinct. Consequently, it is with fairly solid ideas of their own that readers will arrive at the chapter which aims to discover what it was about the Mason era that generated such a remarkable shift.

Why and why then?

Pierce commences his analysis by recognising two important matters. First, he reminds his audience that he is primarily interested in presenting the perceptions of the judicial community itself as to why the transformation occurred when it did. I have already suggested the difficulties attendant upon such an approach but certainly do not think they deny it of worth, and indeed am willing to accept Pierce's argument that it may be the most accurate way for us to understand the topic. It is probably the most *illuminating* given that the persons interviewed are those who work at the core of the Australian legal community and through whom future change is most likely either to occur or be constrained.

Second, Pierce neatly admits upfront that 'an interplay of individual, political, and institutional factors coalesced to bring about the transformation. No single variable can explain it'.[59] This is hardly a surprise — but it is a crucial moment in Pierce's case that those wishing to understand courts need to take an expansive view of them in all their complexity. His own contacts adhere to this approach themselves, but Pierce is primarily addressing those who strive to study judicial institutions with the precision of a science. Adjudication is ultimately a function fulfilled by humans, and courts, as a consequence, are very organic institutions — especially one comprised of seven members.

Nothing illustrates this better than the unpredictability of judicial appointments. Pierce assembles a range of data connecting the composition of the High Court over time with the political party in power at the Commonwealth level. By an unfortunate oversight Justice Gaudron has been omitted from one of these tables and its subsequent discussion,[60] but as it turns out not much hangs on the connection in the end. Pierce admits that the significance of the fact that from 1987 — just when the Court displayed signs of transformation — a majority of its members had been appointed by Labor is seriously undermined when one recognises that Sir Anthony Mason and Sir William Deane, who were so much at the forefront of that revolution, were both appointed to the Court by the Liberal-National Coalition.[61]

Unsurprisingly, Sir Anthony Mason's leadership as Chief Justice received a great deal of attention from those interviewed about why his Court had moved in the directions that it had. Pierce recounts the approving professional and public reaction to Mason's elevation to the Chief Justiceship. But he is wrong in his assertion that '[t]here were no explicit harbingers in his public remarks for what was to come'.[62] Although he goes on to discuss some 'subtle hints' found in an address made by Mason a few

59 Ibid 191.
60 Ibid 193–4.
61 Ibid 202–3.
62 Ibid 207.

months after replacing Sir Harry Gibbs as Chief Justice, Pierce makes no reference throughout his book to what is, arguably, Mason's most famous speech, which clearly stated his rejection of legalism as 'a cloak for undisclosed and unidentified policy values' and the need to take into account changing community values. A version of that address was printed in the *Federal Law Review* whilst Mason was still a puisne Justice on the Gibbs Court.[63] Pierce's oversight is doubly unfortunate given that the speech in question was delivered in the United States and has, as its organising theme, a comparison between the roles of the final constitutional courts in that country and Australia — material which would have very usefully assisted his analysis.

That some transformation in Mason himself was a crucial part of the larger change in the Court has already been recognised by others.[64] This is repeated by many of Pierce's interviewees, though it is disappointing to see judges attempt to explain this by employing the kind of labels which they so frequently decry as crude simplifications in the mouths of others. Mason is variously described by several as having been 'black-letter' or 'conservative' before becoming 'radical'. The more eccentric interpretations — that Mason was bored with 'lawyers' law' and was excited by 'interpreting things the way Marx, Freud or someone would have done' or that the High Court was simply staffed by 'Jacobins' at this time — are amusing in their own way but provide even less assistance.[65]

Pierce gets closer to unpacking the matter himself when he argues that just as important as Mason's intellect and leadership was the existence of 'a coterie of like-minded, reform-oriented judges',[66] since this acknowledges that, of course, a judge on a multi-member court does not exist in isolation from his or her colleagues but performs the functions of office alongside them. Consequently, even the most determined individualist is still defined by relation to the rest of the bench. Often, of course, those functions are performed jointly when judges write opinions together — and this was a strong characteristic of the Mason era.[67] Just as much as Mason changed the Court, the Court changed him.

Pierce correctly identifies a number of institutional features which altered prior to Mason's elevation to Chief Justice but which clearly changed the conditions under which the Court operated during his tenure as distinct from its earlier history. The Mason Court was the first to have all its members subject to the compulsory retirement age of 70 years introduced by constitutional amendment in 1977.[68] This is significant in at least two respects. First, it helps explain the resilience with which the orthodox approach of the Court had survived the better part of the 20th century since the generational turnover on the Court was previously much slower. Second, and more

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

64 Patapan, above n 29; Justice Michael Kirby, 'Sir Anthony Mason Lecture 1996: A F Mason — From *Trigwell* to *Teoh*' (1996) 20 *Melbourne University Law Review* 1087; Kristen Walker, 'Mason, Anthony Frank' in Tony Blackshield, Michael Coper and George Williams (eds), *Oxford Companion to the High Court of Australia* (2001) 459, 459–60.

65 Pierce, above n 4, 206.

66 Ibid 208.

67 Groves and Smyth, above n 25, 267, Figure 2; Andrew Lynch, 'Does the High Court Disagree More Often in Constitutional Cases? A Statistical Study of Judgment Delivery 1981–2003' (2005) 33 *Federal Law Review* 485, 497–500.

68 See Pierce, above n 4, 211–4.

specifically, it ensured the departure of Chief Justice Gibbs in 1986 and the advent of the Mason Court. Pierce notes that the appointment of two new Justices — John Toohey and Mary Gaudron — on 6 February 1987 was also important in rapidly recasting the composition of the Court.

More notable than this were the introduction of the requirement of applying for special leave in order to appeal to the Court after 1984[69] and the final purge of the Privy Council from the Australian court hierarchy in 1986.[70] There can be little doubt that control of its own docket must enable a court to decide a greater proportion of controversial cases than otherwise — though of course the Court can only lie in wait for the parties to apply to bring such disputes before it. As to the second consideration — the abolition of appeals to the Privy Council — this also must have had a subtly energising effect upon the High Court as an institution. Smyth has argued that statistically this had a negative effect upon the dissent rate of the Court (holding other variables constant), suggesting that having acquired the status of a true final court the Justices were keen not to undermine this through excessive disagreement.[71] That lends support to Pierce's contention — and Patapan's in his earlier work[72] — that a cohesion of institutional outlook was a particularly striking feature of the Mason High Court. Pierce shows empirically that the High Court 'fared' about the same as every other Court so far as reversals by the Privy Council.[73] It is not so much that the latter was actually terribly meddlesome but simply that 'the mere presence of the appellate route had a profound psychological impact on the judges'.[74] As noted by Smyth (with Groves)[75] elsewhere, Sir Anthony Mason himself attributed farewelling their Lordships of the Privy Council with producing a more bracing judicial climate in Australia.[76]

Beyond the personal and institutional, Pierce submits that the political branches 'encouraged, or were at least complicit with, components of the transformation'.[77] That may seem an odd assertion in light of just how very grumpy the Court made State Premiers in particular over this time, but the point harks back to comments from interviewees citing the failure of the political process to achieve necessary reform. The Court, in effect, moved to fill a vacuum left open by the other arms of government on other issues. To what extent this thesis explains any of the Court's decisions in areas other than native title is not clear. While I think Pierce makes a convincing argument

69 See ibid 214–24.
70 See ibid 224–37.
71 Russell Smyth, 'What Explains Variations in Dissent Rates? Time Series Evidence from the High Court' (2004) 26 *Sydney Law Review* 221, 225–6, 239.
72 See Patapan, above n 29.
73 Pierce, above n 4, 231–7. This research is, for those interested in understanding the impact of the Privy Council's involvement in the Australian court hierarchy, completely fascinating and, to my knowledge, entirely original. Perhaps the most interesting thing is that statistically decisions of the Queensland Supreme Court were markedly less likely to be overturned by the Privy Council than matters coming to it from any other jurisdiction — both throughout the Commonwealth and across Australia.
74 Ibid 237.
75 Groves and Smyth, above n 25, 262.
76 Sir Anthony Mason, '39th Annual Dinner Speech: Reflections on the High Court of Australia' (1995) 20 *Melbourne University Law Review* 273, 280.
77 Pierce, above n 4, 237.

that *Mabo* was a necessary precursor to legislative attention of that issue through the *Native Title Act 1993* (Cth), it is at this point that one starts to wonder how valid it is for our perception of the Mason era to be so dominated by that one, albeit seismic, decision. But perhaps this is as facile as suggesting that we need to keep *Brown v Board of Education of Topeka*[78] in perspective when we seek to understand the Warren years of the United States Supreme Court…

The penultimate chapter asks why the transformation stalled and of course there are just as many answers to this question as there are to asking why it happened in the first place. Inevitably, many of the factors — appointments, criticism of the court, width (or narrowness) in the framing of issues by the Court, leadership of the Chief Justice — are ones familiar to the reader from earlier parts of the book, just reversed. The decision which is held up here as symbolising the counter-revolution is that of *Re Wakim; Ex parte McNally*,[79] where practical considerations of access to justice and the efficiency of the Australian court system as a whole, not to mention co-operative federalism, were as straw in the wind of the majority's commitment to narrow legal technique. The case attracted potent criticism at the time,[80] but not quite as strong as we see here under the cover of anonymity: '*Wakim* is a f***ing outrage', fumes one Federal Court judge, before going on to argue that the ulterior motive for the decision was to arrest the drain of 'good work' from the State Supreme Courts to the federal system.[81] He or she is certainly not alone. Whether a decision like that of *Wakim* would have attracted such evident dissatisfaction twenty years earlier is open to question. But it is clear that after the Mason era, the production of such an inconvenient result as a result of a 'negative implication' and serving no meaningful constitutional principle is not as easily defended by resort to pure methodology as it once might have been.

Perhaps the major impediments to sustaining the approach of the Mason Court are the limitations which constrain a final court not charged with interpretation of a bill of rights. Pierce contrasts the transformations in the Supreme Court of Canada and the New Zealand Court of Appeal — which were precipitated by the introduction of bills of rights in those jurisdictions — with that generated largely by the Mason Court itself, absent any such external stimulus. This was then a remarkable development indeed, but one which, unsupported by permanent institutional arrangements, was unsurprisingly doomed to be vulnerable when other conditions turned against it.

What next?

Where does this leave us and what does it all mean? I began this review by positing that the Mason era should not be seen simply as 'the past' but as of continued importance to Australian jurisprudence and the place of the Court in the wider community. On one level that must always be the case since it is rarely possible to divorce the present from our history. But this is particularly acute when we consider the High Court under Mason since it altered forever the way we regard that institution.

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78 347 US 483 (1954).

79 (1999) 198 CLR 511 ('*Wakim*').

80 Most memorably in Denis Rose's pithily titled 'The Bizarre Destruction of Cross-Vesting' in Adrienne Stone and George Williams (eds), *The High Court at the Crossroads: Essays in Constitutional Law* (2000) 186.

81 Pierce, above n 4, 260.

The truth of this leaps out on almost every page of *Inside the Mason Court Revolution* as the nation's judiciary reflects upon the debates which were instigated by that era. Pierce's use of this material is astute and the range of views enables him to pinpoint a further reason the 'revolution' failed to last — Australia's appellate judges were simply too divided over the changes initiated by the High Court with many being asked 'to adopt a religion they did not know and could not practice'.[82] But the scepticism of those judges is offset by the enthusiasm of others, meaning that, however ardently some might wish it, there can be no simple return to the pre-Mason world. Instead we are poised, argues Pierce, at a crossroads:

> Australia's judicial community finds itself at that foggy yet definitive moment where two visions for the High Court are competing for ascendance within the intermediate judicial ranks. The judges now know and have witnessed the character and consequences of these competing visions.[83]

The consequence is that

> the Mason Court's legacy is extant. The politicized role, now imbedded in High Court history, can be discounted, ignored, and abandoned by future judges. Its existence — this period in High Court history — cannot be denied. It may lay dormant in the near term, but it is now available as an intellectual fount and reference point for future lawyers and judges.[84]

This is not just speculation. What emerges very clearly from this study is that the judiciary remains split over the Mason experience and the viability of the High Court adopting a more openly creative and engaged position within the polity. Pierce found that while a majority of his interviewees were uneasy with the prospect of a politicised judiciary which the Mason era had revealed, they were 'just as, if not more, uncomfortable with the orthodox role guiding the contemporary High Court'.[85] It is necessary to place a significant caveat on that observation. Pierce conducted his interviews between 1997 and 2000, which is now quite some time ago. It may be that the Gleeson Court has placated its judicial critics in the intervening years. But it is just as likely that it has not. As a decision like *Wakim* recedes in the memory, a case like *Al Kateb v Godwin*[86] simply supplants — if not exceeds — it as an example of the perils of mechanistic legalism.

Certainly there is ample evidence in this original and valuable study that those who firmly supported the methods of the Mason High Court are not averse to promoting them in their own courts. One interviewee even claimed that the disinclination of the present bench to actively develop the law was the 'reason I decided to leave the bar and become a judge'![87] With a fresh wave of High Court appointments almost upon us, and those most likely to be made from amongst the persons interviewed for this book, one can only wonder what we might see next from the High Court — more of the same or back to the future?

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82 Ibid 270.
83 Ibid 269.
84 Ibid 288.
85 Ibid 43.
86 (2004) 219 CLR 562.
87 Pierce, above n 4, 120.