

Speaker's Notes

**“Reactions to the Mason Court: What Are Australia’s Judges Thinking?”
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M. Night Shyamalan’s blockbuster movie from 2004, *The Village*, tells the story of what looks to be a utopian nineteenth century village where everyone works hard, gets along, and leads virtuous lives, or so it seems. As the movie unfolds, viewers learn that no one leaves the parameters of this self-sufficient village because deadly monsters lurk in the surrounding forests. Children are instructed from an early age never to leave the village’s confines, and indeed, to never even speak the word “monster” for fear of cursing the village. The monsters carry the benign moniker “those of which we do not speak.” Viewers are kept in suspense for much of the film, wondering if these monsters actually exist. Shyamalan brilliantly takes the audience to two suspense-filled answers: yes, the monsters are real, but not as we might think. The parents are responsible for the monsters. They don the monster uniforms as a way to keep their children from leaving the supposed utopian village. Seeing the monsters creates and maintains the community. Fear produces its desired end.

I am particularly intrigued with Justice French’s paper title for this panel, “Judicial Activists—Mythical Monsters?”¹ If I may comment on it briefly, its invocation by his Honor reminded me that one might have the impression from Australia’s popular press, particularly in the last year or so, that menacing monsters are lurking in the forests—judicial activists—and that

¹ Justice R.S. French, “Judicial Activists—Mythical Monsters?” 2008 Constitutional Law Conference, UNSW, 8 February 2008.

the padlock was effectively kicked off with Labor's victory in last year's federal election.² Some of this press coverage reminds me of the parents in the village. This paper offers some observations about the post-Howard High Court. In particular, it assesses what lasting influence the Mason Court may or may not have on the post-Howard High Court. You then can decide, again borrowing from Justice French, if there are monsters and just how menacing they may be. In the end, this paper concludes that certain factors do favor the reemergence of a Mason-like High Court, while others mitigate that occurrence.

Recent press coverage of the High Court suggests that Australia finds itself on the precipice of significant judicial change. Victoria and the Australian Capital Territory have adopted in the last several years state or territory bills of rights that circumscribe legislative power and ascribe new responsibilities to their respective courts, including the power to issue declarations of incompatibility. *The Australian's* Janet Albrechtsen and others have (misleadingly) warned readers over the last several months about Australia's judicial ranks appearing rife with "judicial activists." The Rudd Government has recently announced its intention to introduce a national charter of rights by the end of its first term. Add to this mix two new High Court appointments in the next two years—Chief Justice Murray Gleeson retires in 2008 and Justice Michael Kirby in 2009—and some foresee a return to the "activism" that characterized the Mason Court.

To assess the Mason Court's legacy in the post-Howard High Court, it is necessary to properly conceptualize the Mason Court, but before doing that, a few remarks are necessary

² See, e.g., Janet Albrechtsen, "Putting the Brakes on Judicial Hoons," *The Australian*, February 9, 2008; Chris Merritt, "Nation's Activist Judges Revealed," *The Australian*, July 14, 2007; Janet Albrechtsen, "Inside Judges' Secret World," *The Australian*, July 14, 2007; David Smith, "Mason Still Misjudging the Truth," *The Australian*, July 17, 2007.

about how the Mason Court should not be understood. It helps very little to describe the Mason Court as “activist.”

Why is “activism” an inapt descriptor?

The 2008 U.S. presidential election brings many firsts: the first presidential election since 1952 in which a sitting president or vice president is not running; the first African-American, first woman, and first Mormon candidate. And yet for all of these notables, the campaign themes are relatively unremarkable. Everyone, regardless of partisan stripe, is talking about “change.” American columnist Mark Steyn well captured voters’ reaction to this ubiquitous word in a recent column: “I used to support the ‘candidate of change’ but then I changed to the candidate of ‘change you can believe in,’ and then I changed back to the ‘candidate of change’ after the candidate changed to being an ‘agent of change’ which sounds very top-secret and groovy.”³

Invocations of “judicial activism” are akin to invocations of “change.” Both are protean and can mean many different things. Some equate activism with judicial review, so a court striking down democratically enacted law is activist. Others see activism when a court upholds a law. Some see activism when judges articulate their reasons in broad rather than narrow terms, or when a court overturns long-established precedent or overturns newly established precedent. Still others say an activist court reviews cases its predecessors may have rejected or employs non-interpretive modes of legal reasoning.

Judicial activism may be multifaceted and may mean different things in different contexts. Those who invoke the term, however, are often not explicit about which context they

³ Mark Steyn, “Happy Warrior,” *National Review*, January 11, 2008.

have in mind, thus rendering the term not only protean but also pornographic. I obviously do not mean that literally. Justice Potter Stewart famously wrote in a First Amendment obscenity case that he could not define pornography, but he “knew it when he saw it.”⁴ You or I may know activism when we see it, but that approach does not facilitate the type of public discussion that should take place in any country deliberating the proper scope of judicial power, including Australia.

If the term is problematic in public discourse, its invocation by legal scholars and politicians is even more unfortunate because it is one-sided and pejorative. It is used to describe what someone is not. In the 80-plus interviews I conducted for my book, *Inside the Mason Court Revolution*, not a single judge described him or herself as “activist.” And yet I interviewed a number of activists. The point is that judges do not think about themselves in this way. Their own judicial role conceptions are more nuanced and public discourse about judges would only improve if it too became more nuanced.

Last year Chief Justice Gleeson cautioned in a speech against using “convenient labels” to describe the Court’s complex work. Activism is a convenient label, but it and its less than apparent antonym do little to facilitate clear-minded, authentic deliberation about the proper scope of High Court power and judicial method.⁵

How should we characterize the Mason Court, then, if not activist? My book offers an answer to that question by drawing upon interview data with many of the Mason Court judges and many intermediate court judges. In all, about 60 percent of the appellate bench participated and nearly all of the key protagonists and observers. That interview data and other quantitative

⁴ *Jacobellis v. Ohio* 378 US 184, 197 (1964).

⁵ “Australia’s Contribution to the Common Law,” Singapore Academy of Law, 20 September 2007, 26.

data confirm the Mason Court undeniably brought profound changes in many areas of substantive law, but more was underway. The book makes the case that a group of judges on the Mason Court embarked on a concerted effort to redefine the Court's role within the legal and political systems. These judges supplanted long-established norms and expectations about the Court's role with a new vision, ushering the Court through a *judicial role transformation*. The Mason Court brought a shift—significant but not wholesale—toward a politicized role and away from an orthodox role.

These two labels—the orthodox role and the politicized role—are only a little less awkward than the activism label, so it is important to explore what each means. As the Mason Court judges talked about their motivations and intermediate court judges discussed their perceptions of what was occurring, two competing visions of the High Court's role emerged organically from the interview data. These two visions differed on seven dimensions. These dimensions were the purpose of law; the aims of appellate litigation; the judges' responsibility to law, politics and community; the accepted modes of legal reasoning; the treatment of precedent; the development of law; and conceptions of the Constitution.

The judges perceived the Court changing along these seven dimensions during the Mason era. Let me sketch, in admittedly broad terms, what the shift from the orthodox role toward the politicized role meant and invite readers to explore the relevant sections of my book for greater detail.⁶ Readers should bear in mind that these shifts emerged from the interviews and represent the judges' perceptions of what occurred. Counterfactuals and caveats undoubtedly exist to these generalized observations. In terms of the first dimension, the purpose of law, the Mason Court's emphasis shifted away from law providing certainty toward promoting fairness; that is, the Court

⁶ See *Inside the Mason Court Revolution*, chapters 4 and 5.

tolerated the uncertainty that came with changing the law to reach what it considered fair or just outcomes. Appellate litigation's aim shifted away from a private model toward a public model. This meant that cases before the Court were seen as more than discrete legal disputes involving the immediate litigants. Rather, cases transcended the immediate litigants, raising profound public questions that the Court was empowered to answer. One consequence of this shift from the private to the public model was that the Mason Court entertained more third party interventions and amici curiae participants than its predecessors.

The third dimension concerns the Court's relationships to law and the political world. Here the role transformation brought a shift in thinking from the Court as caretaker or discover of the law to actual lawmaker. While the orthodox role encouraged an apolitical and deferential court, the politicized role accepted a more politically pronounced stance. The role transformation also brought changes to legal reasoning. Whereas law under the orthodox role was understood as a logical, self-contained system that afforded judges with little discretion, the politicized role acknowledged that law does not always provide clear-cut, definitive answers to every legal question; therefore, judges have more discretion in their decision-making. The fifth dimension concerned treatment of precedent. Essentially the orthodox role favored a more robust practice of stare decisis, while the politicized role favored a weaker commitment to precedent. On this front, law was seen to change and develop under both roles, but the orthodox role favored interstitial change that litigants initiated, whereas the politicized role entertained non-interstitial, judge-initiated changes to law.

The final dimension concerns how the Commonwealth Constitution was conceived. The orthodoxy had understood the constitution almost exclusively as a boundary document—an instrument regulating the distribution of power between the federal and state/territory

governments and between the national branches of government. The Mason Court shifted its thinking to see the Constitution not only as a boundary document, but also a document that afforded citizens certain enumerated and unenumerated rights. Textualism was abandoned as the preferred modality of constitutional interpretation and a wider canon of acceptable approaches was adopted. In sum, the politicized role envisions a wider scope of judicial power, and thus, a more visible and controversial court.

Why did the role transformation occur when it did?

American political scientists have dedicated significant energies to understanding why and how the U.S. Supreme Court's role evolves longitudinally. In the name of parsimony, many political scientists are inclined to offer single causal variables for judicial role transformations. Some point to institutional structures, others point to political factors, and still others advance the importance of individuals to explain institutional change.⁷ My book advances the thesis that the emergence of the politicized role occurred from an interplay of these variables. Political, institutional, and individual factors aligned to make the politicized role a reality.⁸

Let me mention cursorily some of these variables. On the institutional front, the 1977 mandatory retirement provision proved critical. This reform forced, for example, Chief Justice

⁷ On the centrality of legal structures and processes shaping law see Lon Fuller, 92 'Forms and Limits of Adjudication' (1978) 92 *Harvard Law Review* 353; Henry Hart and Albert Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (1958); Herbert Wechsler, 'Toward Neutral Principles of Constitutional Law' (1959) 73 *Harvard Law Review* 1. For the role that individual judges play see Jeffrey Segal and Harold Spaeth, *The Supreme Court and the Attitudinal Model* (1993). Institutional factors are well canvassed in Cornell Clayton and Howard Gillman, *Supreme Court Decision-Making: New Institutional Approaches* (1999). The classic treatment of politics and legal development is Robert Dahl, 'Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker' (1957) 6 *Journal of Public Law* 279.

⁸ See *Inside the Mason Court*, chapter 6.

Gibbs to retire from the chief justiceship after only six years, at which point the Hawke Government elevated Anthony Mason to the helm in 1987. Justice Mary Gaudron filled Justice Mason's vacant seat. Both Mason and Gaudron would bring leadership to the role transformation. The adoption in 1984 of the special leave reform also facilitated the role transformation because it provided the justices with greater control over the Court's caseload. A third institutional reform was abolition of Privy Council appeals, an intermittent process culminating in the *Australia Acts* 1986. My book presents statistical evidence that the Privy Council affirmed and reversed the High Court's decisions at roughly the same rate as other commonwealth courts, but the High Court justices themselves reported a strong psychological influence. They were hesitant to depart from Privy Council case law and with this appellate route closed, the justices were freed to think more creatively.

On the political front, the judges reported that state and federal governments tacitly welcomed Mason Court reforms in at least one important policy area: native title. *Mabo* provided the Keating Government with the legal and political cover necessary to pass the Native Title Act of 1993. And no role transformation would be possible without the right mix of individuals on the Court who were willing to embrace the politicized role. The book discusses the importance of Justices Deane, Toohey, Gaudron and Chief Justice Mason to advancing the politicized role.

The larger point is that each of these variables—political, institutional, and individual—was necessary but insufficient to prompt the role transformation. The interplay of the three made the transformation possible. The interplay of these same factors also explains retreats from the politicized role during the Brennan and Gleeson Courts. The last few chapters of my book explore this retreat in some detail. By way of example, the white-hot political criticism of the

Court following *Wik* diminished support for the politicized role within the High Court. The mandatory retirement provision forced proponents of the politicized role off the Court—here I have Chief Justice Mason in mind—and enabled the Howard Government to move the Court in a different direction. Having sketched my book’s thesis about how the Mason Court should be understood, this next section draws upon the interplay thesis to explore the legacy of the Mason Court in a post-Howard High Court. In particular, what does the Mason Court’s role transformation portend for the High Court in the near term? Is the Mason Court a one-off event or is it, as Andrew Lynch suggests, “the once and future court?”⁹

The Once and Future Court?

This question reminds me of Samuel Goldwyn’s warning against making predictions, particularly about the future, but if the past is indeed prologue, let me gingerly ignore Goldwyn. If the interplay thesis is correct, close attention should be paid to politics, the constitution, and the individuals sitting on the High Court to assess the Mason Court’s legacy.

I turn first to politics. Undoubtedly John Howard’s six appointments to the High Court during his twelve year tenure is a significant achievement. Only Robert Menzies made more appointments, so the current court is largely one that John Howard built. When Howard came to office, two of the seven justices were Liberal appointees. When he left, five of the seven were Liberal appointees. In the U.S., that record would make even FDR blush. This appointment

⁹ Andrew Lynch, “The Once and Future Court? - Jason L Pierce’s ‘Inside the Mason Court Revolution: The High Court of Australia Transformed’ (2007) 35 *Federal Law Review* 145.

record has contributed to the post-Mason High Courts retreating from many of the Mason Court reforms.¹⁰

Labor's victory in last year's federal election is significant. Chief Justice Gleeson retires this year and Justice Kirby next year. Assuming everyone else stays on the Court, the Rudd Government will make two appointments during its first term and it will appoint Justice Gummow's replacement in 2012 should it win a second term. Justice Heydon turns 70 in 2013, which seems like a long way off, but not really. If the Rudd Government appoints someone to Justice Heydon's seat, four of the seven justices will be Labor appointees by 2013.

It is far from certain what a Labor-majority might mean, if anything. It matters a great deal who gets the nod, what cases go to the Court, and the political and constitutional contexts in which the justices operate. As scholars have documented in the U.S. Supreme Court and elsewhere, appointees often move in unexpected ways once on the Court. The appointment picture alone over the next six years will not return us to the Mason Court, but it is one of several triggers necessary for the reemergence of the politicized role—whether desirable or not. We can say the odds are that the orthodox role will garner fewer High Court adherents by 2013 than it presently does.

The second component to the interplay thesis concerns institutional reforms. Here too one sees developments that auger well for the politicized role. As this audience knows, Australia is unique among many of its commonwealth cousins for its lack of a national bill or charter of rights. Until this last federal election, what dynamism existed on the charter of rights front had been at the state and territory levels. Kyoto may have been top priority for the Rudd Government, but the Attorney-General's announcement regarding the introduction of a charter of

¹⁰ For a discussion of this retreat, see *Inside the Mason Court*, chapter 7.

rights and aspirations in the next three years came soon on its heels. Whether a charter will be introduced, whether the Liberal Party could sign on to it as with the indigenous apology, what rights it will enumerate, and what powers the courts will have under the document remain to be seen. If Canberra follows the Victoria and ACT path, where courts can issue declarations of incompatibility, it is reasonable to expect more rights litigation in federal courts and courts assuming more visible roles. Indeed, should the Rudd Government live up to its timeline, we could see a charter coming on board just as the Rudd Government's High Court appointments tip the composition to Labor's favor. The implications are far from certain, but this institutional reform would represent a second trigger for the reemergence of the politicized role.

The third component to my interplay thesis is the individual justice. Those serving on the High Court obviously shape the institution's role, but until the Rudd appointments are known, we can only speculate. The Mason Court's legacy depends, however, on two other groups of individuals who are often overlooked when thinking about the High Court's trajectory—intermediate court judges and law faculties. My book demonstrates that Australia's intermediate judicial ranks—that is state and territory supreme court judges and Federal Court judges—are divided over the High Court's normative role. Some favor the orthodox role and others the politicized role, and these divisions do not correspond to geography or jurisdiction.

I concluded in the book, and hold still today, that Australia's judiciary 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 Mason Court temporarily infused a new vision for the Court, but the politicized role failed to outlive the Mason Court. I mentioned a few of these reasons earlier, but let's consider two in the remaining pages.

Jack Peltason's book *58 Lonely Men* explored the challenges confronting southern federal district judges in carrying out the U.S. Supreme Court's desegregation mandate in *Brown v. Board of Education* (1954). Some judges bucked local pressures and recalcitrant political leaders and push forward. Others were more beholden to the local political communities and did not push forward. Peltason's account underscores the importance of the broader judicial community in understanding change in courts of final appeal. The Mason Court's role transformation depended to some measure on how intermediate appellate judges reacted to the politicized role. Although it does much of its business on the quiet shores of Lake Burley Griffin, the High Court operates atop the judiciary *but within* a larger judicial culture. The politicized role failed to outlive the Mason Court, in part, because it never garnered adequate support within this broader judicial community—to say nothing of the political community. This dearth may be attributed to the inability of Mason Court judges to cultivate through their judgments and extra-legal communications support for the politicized role.

I am skeptical about whether the Mason Court could have persuaded the larger judicial community because the orthodox role was so ensconced in the intermediate judicial ranks. Despite what some journalists would have their readers believe, Australia's judiciary is not rife with activists. Many judges spoke about their own roles in orthodox terms. That was not surprising. What was surprising—and what leads me to think there are few monsters in the forest—was how many orthodox judges at the intermediate ranks did not think the High Court's constitutional responsibilities might incline its justices to assume a different—less orthodox—role than an intermediate court judge. My larger point is that the Mason Court's legacy depended in part upon the larger judicial community's support. It lacked that when I conducted

my research and I have no reason to believe things have changed much. So, this factor bodes well for the orthodoxy.

The Mason Court's legacy also depends on the law faculties. Jeffrey Toobin's best seller, *The Nine*, provides a lively survey of the Rehnquist and Roberts Courts. The book does a marvelous job describing how critics of the Warren Court a generation-long counter offensive, with the goal of circumscribing judicial power and rolling back many Warren Court decisions. The movement started in the law schools in the early 1980s. The Federalist Society, as it is known, now has 180 chapters across the U.S. and some 20,000 members. Toobin describes how the Federalist Society has cultivated an entire generation of young lawyers and judges and now finds former Federalist Society members in the judiciary and sympathetic judges on the Supreme Court.

To know the Mason Court's legacy—whether it was a one-off court or “the once and future court”—close attention needs to be paid to the law schools. It matters how the present generation of law students looks upon the Mason Court, and more broadly, how they conceive judicial power in Australian democracy. I do not know what the current generation thinks, so I cannot answer which way this trigger goes. My sense, based on anecdotal evidence, is that younger lawyers favor the politicized role.

The Mason Court's legacy depends, as well, on what the legal academy does with it. Historians agree that the Warren Court caught the legal academy flat footed—that the Warren Court's vision of itself outpaced legal theory at the time. There was a rear-guard response, however, from a generation of law professors who sought to legitimate the Warren Court through

what Mark Tushnet describes as “grand theories” of constitutionalism.¹¹ Their names are familiar—Ely, Dworkin, Ackerman, and many others. And they’ve largely succeeded.

I say the following delicately and with great respect: it strikes me that Australia’s Commonwealth Constitution was and is under-theorized for the politicized role. I do not think a silver bullet article or book from the legal academy could have sustained the role transformation beyond the Mason Court, but the absence of *a priori* and rear-guard “grand theories”—legitimizing the Mason Court to law students, lawyers, politicians, and the public—plays some part in the story.

The implied rights cases represent one area where additional theorizing was needed. I read the implied rights cases as an extended debate about court-sponsored reform and non-formalist modes of legal reasoning. The story is fairly straightforward. The implied rights doctrine gained steam in the early 1990s but once the political and constitutional ramifications became evident to the justices and once the implied rights doctrine emerged without a grand theory underpinning it, support for it cooled and by the late 1990s its skeptics’ voices outmatched its proponents.

The High Court in *Nationwide News* and *Australian Capital Television* (both decided in 1992) concluded that sections 7 and 24 of the Constitution – those calling for a representative government and government chosen by the people—imply a right to free and open political communication. The Court concluded that to have a well functioning representative democracy Australians needed to speak freely about political matters. In one of the early cases, Justice Gaudron remarks, “The notion of a free society governed in accordance with the principles of representative parliamentary democracy may entail freedom of movement, freedom of

¹¹ Mark Tushnet, *Red, White & Blue* (1988).

association, and perhaps freedom of speech generally. But so far as free elections are an indispensable feature of a society of that kind, it necessarily entails, at the very least, freedom of political discourse.”¹²

I think Justice Gaudron issued a cue to the bar so it could raise these issues and a cue to the legal academy to shore up the theoretical foundation of the implied right. The first real intellectual showdown on the implied right to political speech occurred in *Australian Capital Television* between Chief Justice Mason and Justice Dawson. The strongest defense for the implied right came from Mason and it is telling to study who his Honor cites. When it came time to advance the argument that free political communication was an important value, he did not cite a single Australian legal theorist. Instead, he cited Archibald Cox’s *The Court and the Constitution*, where Cox argues that without free speech there is little opportunity for individuals to share political power. The Cox citation fascinates me. It shows that Mason felt it necessary to reach out to the legal academy to justify this controversial approach and that he thought American scholarship might be germane. But why Cox? Why not an Australian academic? One possibility is that it evidenced a dearth of indigenous scholarship that adequately theorized speech rights within the Australian system. The doctrine expanded in new ways in *Theophanous* and *Stephens* (1994), but one sees Justice Dawson and others expressing grave reservations about the methodology in those decisions.

The critical point for the implied rights doctrine came in *McGinty* (1996), where the Court had the opportunity to find an implied right to voter equality. This was the case dealing with malapportioned legislative districts in Western Australia. In the end, only Justice Toohey and Gaudron side with McGinty. What stands out in *McGinty* is how Justice Dawson and

¹² See (1992) 177 CLR 1 and (1992) 177 CLR 106.

McHugh outgunned and out-theorized Justices Toohey and Gaudron. Justices Dawson and McHugh were more adept at incorporating political science and constitutional theory in their decisions, explaining why theories of representation did not require parity in legislative districts. Their opinions were better researched and better grounded in legal history, political science and constitutional theory. The grand theory that legitimated implied rights within the Australian context was unavailable at that critical juncture. Since *McGinty*, the Court has circumscribed the implied rights doctrine and justified its existence strictly on the Constitution's text rather than non-textual principles or values.

My point is that legal academics have a role to play. Supporters of the politicized role need to generate theories legitimating a more pronounced judiciary, and co-opted overseas theories may not work. These theories should be contextualized to the Australian constitution, political traditions and practices. In my opinion, Ely-like process-based theories are most promising.

Opponents of the Mason Court need to generate their own grand theories as well, suited for the Australian context. Janet Albrechtsen has suggested theory based upon obligation.¹³ That sounds promising. I also think the work of Jeremy Waldron helps the cause. Waldron makes the case better than anyone, in my opinion, for legislatures taking the lead – not courts – on those political issues that divide us. In *Law & Disagreement*, Waldron argues that legal theorists have focused too much on theories of judicial review and too little on theories of disagreement. The issues that high courts confront often involve intractable divisions and disagreements. Courts are not as capable, in Waldron's mind, to handle the politics of disagreement as are legislatures. Waldron's theory carries added currency in parliamentary

¹³ "Conservatives must join rights talk," *The Australian*, December 5, 2007.

systems more inclined to legislative power, and I am aware of several Australian academics working in this venue. So, there is work to be done, all the more so if a national charter comes online. In sum, I think the academy's role has been mixed, but we have not seen an entire generation of Australian legal theorists turn their scholarship toward legitimating the politicized role, as the U.S. experienced after the Warren Court.

My last observation is whether desirable or not, the Mason Court's legacy is extant. Judges and politicians can discount, ignore or abandon the politicized role, but it is now embedded in High Court history. Its long-term fate is uncertain—some factors favor its reemergence and others do not—but the Mason Court is now available as an intellectual fount and reference point for future lawyers and judges. I am reminded of a question that Archbishop William Temple as a young man asked his father: Why don't philosophers rule the world? His father's answer: Of course they do, just 200 years after they die. That same long-term perspective is valuable when thinking about the Mason Court and its legacy.