George Winterton Memorial Lecture 2023

Judicial Review of Legislative and Executive Action: Acceptance and Resentment — Lessons from a Comparative Perspective

The Hon Susan Kiefel AC*

I am honoured to give this lecture which acknowledges the special contribution of Professor George Winterton to constitutional law scholarship in Australia. Professor Winterton was a scholar, a teacher, a lawyer and an enthusiast of the law until his passing. In his eulogy, Professor Gerangelos said[1] that Professor Winterton regarded the profession of teacher and scholar as the noblest of all professions. He was conscious of the immensity of the calling and the duties held both to the young and to knowledge. Sir Gerard Brennan also observed that '[i]t was in his recognition and exposition of the ways in which history, politics, the *Constitution* and the law are inextricably intertwined, that [Professor Winterton] was without peer in his cohort of Australian constitutional scholars'.[2] These connections are to an extent reflected in my discussion this evening, as is a comparative approach of which Professor Winterton was also a champion.

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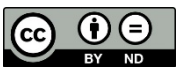

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1 Peter Gerangelos, 'Eulogy for Professor Winterton' (2008) 30(4) *Sydney Law Review* 567, 571.

2 Sir Gerard Brennan, 'Foreword' in HP Lee and Peter Gerangelos (eds), *Constitutional Advancement in a Frozen Continent: Essays in Honour of George Winterton* (Federation Press, 2009) v, v, quoting Laurence Maher, 'George Winterton: A Singular, Gifted Scholar' in HP Lee and Peter Gerangelos (eds), *Constitutional Advancement in a Frozen Continent: Essays in Honour of George Winterton* (Federation Press, 2009) xxxviii, xxxviii.

The Supreme Court of the United States, the Supreme Court of the United Kingdom and the High Court of Australia ('High Court') each exercise powers of judicial review of legislative and executive action. It is recognised, although on somewhat different bases, that there are limits to legislative power and that those who exercise executive power are amenable to the law.

Inevitably some decisions in the area of judicial review have drawn criticism from politicians in government. This may occur when legislative provisions are held invalid, or when a decision involves a controversial matter or a matter affecting the interests or policy of government. The criticism invariably proceeds from a misunderstanding of the role of the courts but it generally abates and the courts' decisions are accepted. But in more recent times, in the polities mentioned, the reaction to the power of the courts and the exercise of that power has appeared akin to resentment. This has led to discussion about how the courts' power may be curbed or the composition of the courts altered.

The Supreme Court of the United States and the High Court have exercised a power of judicial review for some time. Their history allows for some understanding of the early development of judicial review and the traditional view taken of the role of the courts by government. It permits a comparison with criticisms levelled at the courts in more modern times and with more recent reactions. These recent events give rise to several questions. Have the reactions to controversial decisions become stronger and less temperate? Are threats of action levelled at the courts harmful to them as institutions? Do the criticisms undermine the confidence that people have in the courts?

I Early Acceptance

History suggests that there was an early acceptance in the United States and in Australia of the role of the courts in undertaking judicial review.

There is no explicit provision in the *United States Constitution* for judicial review. *Marbury v Madison*,[3] which was decided in 1803, relied on the Supremacy Clause in art VI of the *Constitution* which provided, in summary, that the *Constitution* and the laws of the United States made under it 'shall be the supreme Law of the Land' notwithstanding anything in the *Constitution* or laws of any state. From this Chief Justice Marshall was able to elucidate high constitutional principle: 'It is emphatically the province and duty of the judicial department to say what the law is'.[4]

It is well known that *Marbury v Madison* was written in the aftermath of a heavily contested presidential election. The new President, Thomas Jefferson, directed John Madison, the Secretary of State, not to deliver the commissions of justices who had been appointed by the outgoing President, John Adams, in the last two days of his Presidency. Chief Justice Marshall held that Marbury, one of the

[3] *Marbury v Madison*, 5 US (1 Cranch) 137 (1803) ('*Marbury*').
[4] Ibid 177.

people whose commission was not delivered, was legally entitled to his commission and observed that ordinarily mandamus might be expected to lie as the remedy.[5]

A statute purported to give the Supreme Court of the United States original jurisdiction over applications for writs of mandamus.[6] But art III of the *Constitution* limited the original jurisdiction of the Court to cases where the state was a party to a lawsuit or the lawsuit involved foreign dignitaries.[7] In all other cases its jurisdiction was appellate. The Chief Justice held the statute to be invalid as inconsistent with the *Constitution*, but ultimately concluded that the remedy of mandamus was not available.[8]

Marbury v Madison may be understood as cementing the availability of judicial review in the United States whilst simultaneously sidestepping a politically charged situation. It has been pointed out that the Court could simply have dealt with the jurisdictional question concerning remedy.[9] But it may be that the Chief Justice was striving for acceptance of the Court's role in judicial review and to that end took the longer course to be seen to adhere to strict legalism in that process.

While the position held by the American founders in 1789 regarding the Supreme Court's function of judicial review has been a source of debate,[10] the position of the framers of the *Australian Constitution* in the 1890s is far clearer.[11] By that time judicial review was well established in North America and the Australian founders regarded it as an integral part of the structural logic of federalism.

Despite their awareness of *Marbury v Madison*,[12] the framers of the *Australian Constitution* made no express general provision for judicial review except for s 75(v) which notably includes the remedy of mandamus. Nevertheless, the exercise of the High Court's power to undertake judicial review appears to have been accepted from the outset, which suggests that the need for it was well understood by lawyers such as Griffiths, Barton, Inglis Clark and Deakin.

In the second reading speech to the Bill which would become the *Judiciary Act 1903* (Cth) ('*Judiciary Act*'), Alfred Deakin said that '[t]he *Constitution* is to be the supreme law, but it is the High Court which is to determine how [f]ar and between what boundaries it is supreme'. He described the Court as 'the competent

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5 Ibid 173.

6 *Judiciary Act of 1789*, ch 20, § 13, 1 Stat 73, 81.

7 *United States Constitution* art III § 2 cl 2.

8 See *Marbury* (n 3) 174.

9 Erwin Chemerinsky, *Constitutional Law: Principles and Policies* (Wolters Kluwer, 6th ed, 2019) 39–40, 43.

10 See, eg, William Michael Treanor, 'Judicial Review before *Marbury*' (2005) 58(2) *Stanford Law Review* 455.

11 Brian Galligan, 'Judicial Review in the Australian Federal System: Its Origin and Function' (1979) 10(4) *Federal Law Review* 367, 394.

12 William G Buss, 'Andrew Inglis Clark's Draft Constitution, Chapter III of the *Australian Constitution*, and the Assist from Article III of the *Constitution of the United States*' (2009) 33(3) *Melbourne University Law Review* 718, 781–8; John M Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2005) 798; A La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972) 234.

tribunal which is able to protect the *Constitution*, and to oversee its agencies'. The Court is, he said, 'properly termed the "keystone of the federal arch"'.[13]

The High Court was not required to establish its credentials as the Supreme Court of the United States was. In its formative years its acceptance was evident. Many of the early cases decided by the Court were constitutionally significant — such as delineating the boundaries of state and federal powers and setting new principles of constitutional interpretation. But they did not attract much controversy. In part this has been attributed to the approval and respect which the Court had early attained and the 'strict and complete legalism', in the words of Sir Owen Dixon, which the Court applied.[14]

In 1906, during a second reading debate about an amendment to the *Judiciary Act* to increase the number of justices of the Court to five, the then Attorney-General, Isaac Isaacs, said: 'the High Court of Australia has gained the complete confidence of the public'.[15] He observed that apart from the Supreme Court of the United States there was no legal tribunal in the world which has as much power as the High Court of Australia. He noted that the same could not be said of the House of Lords and the Privy Council which, he observed, 'may find their decisions upon any point whatever reversed by an Act of the Legislature'.[16]

The position in England, as alluded to by Isaac Isaacs, was different. There is no written constitution. Rather, the United Kingdom has what is referred to as its 'unwritten Constitution', which may be understood as the rights recognised by the common law resulting from judicial decisions.[17] Unlike the superior courts of the United States and Australia, there could be no early acceptance of a role for the courts in declaring the law. Rather the doctrine of parliamentary sovereignty promoted reliance on statutory interpretation to limit the operation and effect of statutes.[18]

The development of judicial review in the United Kingdom has been said to have commenced in the 1960s. Professor Sir William Wade noted that there was then a 'renaissance' of judicial review 'when public reaction against administrative injustice had become too strong to be ignored'.[19] Lord Neuberger, a former President of the Supreme Court, with his customary candour, has suggested that the attitude of the House of Lords to judicial review before the 1960s was 'rather spineless'.[20]

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13 Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 1902, 10965 (Alfred Deakin, Attorney-General).

14 *Swearing in of Sir Owen Dixon as Chief Justice* (1952) 85 CLR xi, xiv. See also Sir Anthony Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and United States Experience' (1986) 16(1) *Federal Law Review* 1, 4–5.

15 Commonwealth, *Parliamentary Debates*, House of Representatives, 18 July 1906, 1431 (Isaac Isaacs, Attorney-General).

16 Ibid.

17 AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10th ed, 1959) 196.

18 See generally Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010) ch 9.

19 HWR Wade, *Constitutional Fundamentals* (Stevens & Sons, 1980) 62.

20 Lord Neuberger, 'Reflections on Significant Moments in the Role of the Judiciary' (Speech, Personal Support Unit Fundraising Breakfast, 16 March 2017) [11].

Important as landmark decisions such as *Ridge v Baldwin*,[21] *Anisminic*[22] and *Council of Civil Services Unions v Minister for the Civil Service*[23] were in judicial review of administrative action, they did not involve the courts in review of legislation for invalidity. But then the United Kingdom entered the European Economic Community ('EEC') (later the European Union) and legislated to commit itself to the *European Convention on Human Rights*.[24] As Professor Winterton observed,[25] given that EEC law must prevail over domestic legislation this entailed a different conception of parliamentary sovereignty. The enactment of the *Human Rights Act 1998* (UK) has been considered to involve a transfer of political power from the executive and legislature to the judiciary.[26] The reality was that the courts now had the power to declare which law would prevail, to declare rights and to sometimes determine those rights as contrary to domestic legislation.

II Lapses in Acceptance

A *The United States*

Starting with the United States, later history was to show that recognition of the political effects of decisions involving judicial review could on occasion give rise to challenges to the legitimacy of judicial review.

Although the power of judicial review in the United States had been firmly established by *Marbury v Madison*, the Supreme Court did not exercise it to strike down another federal law for another 50 years. When it did, in *Dred Scott v Sandford*,[27] holding that an Act of Congress which purported to prohibit slavery in some US territories and to free slaves in others was unconstitutional, it was greeted with 'unmitigated wrath from every segment of the United States except the slave holding states'.[28] It was said that a 'tempest of malediction' had 'burst over the judges'.[29] Abraham Lincoln, not yet President, argued that steps would be taken to have the Court overrule it in the future.[30]

In the second half of the 20th century, the Supreme Court was once again drawn into controversy by its decisions in the segregation cases such as *Brown v Board of Education*.[31] In response to the Court's holding that laws establishing social

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21 *Ridge v Baldwin* [1964] AC 40.

22 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.

23 *Council of Civil Services Unions v Minister for the Civil Service* [1985] AC 374.

24 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

25 George Winterton, 'The British Grundnorm: Parliamentary Supremacy Re-Examined' (1976) 92 (October) *Law Quarterly Review* 591.

26 See, eg, KD Ewing, 'The Human Rights Act and Parliamentary Democracy' (1999) 62(1) *Modern Law Review* 79, 79.

27 *Dred Scott v Sandford*, 60 US 393 (1857).

28 Ronald D Rotunda and John E Nowak, *Treatise on Constitutional Law: Substance and Procedure* (Thomson-Reuters-West, 5th ed, 2012) vol 3, 445.

29 Robert G McCloskey, *The American Supreme Court* (University of Chicago Press, 5th ed, 2010) 62.

30 Mark Graber, *Dred Scott and the Problem of Constitutional Evil* (Cambridge University Press, 2006) 183.

31 *Brown v Board of Education of Topeka*, 347 US 483 (1954).

segregation in public schools were unconstitutional, the southern states openly and aggressively resisted compliance with desegregation and the Court was forced to make orders requiring it on a number of occasions.

The decision in *Roe v Wade*,[32] in 1973, again embroiled the Supreme Court in controversy. By a majority of 7 to 2 the Court held that a Texan law which prohibited all abortions violated a woman's right to privacy in the Due Process Clause of the Fourteenth Amendment. The reaction to the decision heavily polarised the community according to political and religious affiliation. Justice Blackmun, who wrote for the majority, speaking extra-judicially, expressed resentment that what was really a medical and moral problem, rather than a legal one, had to be decided by the Court.[33] It is of interest to observe that Judge Ruth Bader Ginsburg, when a judge of the US Court of Appeals for the DC Circuit, criticised the decision as preventing the resolution of the question by political means.[34]

Up until the recent decision in *Dobbs v Jackson Women's Health Organization*,[35] which overturned *Roe v Wade*, the most controversial interaction between the Supreme Court and the political branches would probably have been thought to be *Bush v Gore*,[36] which concerned the presidential election of 2000. The Court ruled 5 to 4 that the recount then under way in Florida be stayed. Then, after hearing full oral argument, the Court issued a 7 to 2 per curiam ruling holding that Florida's recount scheme was unconstitutional, but with a 5 to 4 split (along the same ideological lines) regarding whether a constitutional recount could be fashioned in time. Later analysis was to confirm that had the recount been allowed, Gore would have won the presidency.[37]

Some of the dissenting justices spoke of the decision as undermining the public's confidence in the Court. Justice Breyer said that that confidence is a 'public treasure' which had been attained slowly over many years, some of which were marred by the Civil War and the tragedy of segregation.[38] The most trenchant criticism was that the justices had been partisan in their decision making.[39] This would appear to have applied to both the majority and the dissentients.

Turning to more recent history, it is something of an understatement to say that the decision in *Dobbs* polarised the community. It removed the right of abortion which had come to be accepted in the decades since *Roe v Wade*. The majority were not only criticised for being partisan; it was said by many that some of the later appointees did what they had been deliberately appointed to do. The language of

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32 *Roe v Wade*, 410 US 113 (1973).

33 David J Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of Roe v Wade* (Macmillan, 1994) 607.

34 Ruth Bader Ginsburg, 'Speaking in a Judicial Voice' (1992) 67(6) *New York University Law Review* 1185, 1208.

35 *Dobbs v Jackson Women's Health Organization*, No 19-1392, 597 US ___ (2022) ('*Dobbs*').

36 *Bush v Gore*, 531 US 98 (2000).

37 Lance Dehaven-Smith, *The Battle for Florida: An Annotated Compendium of Materials from the 2000 Presidential Election* (University Press of Florida, 2005) 15, 37–41.

38 *Bush v Gore* (n 36) 157.

39 See, eg, Jack M Balkin, '*Bush v Gore* and the Boundary between Law and Politics' (2001) 110(8) *Yale Law Journal* 1407.

criticism was harsh. The President referred to the decision as the 'realization of an extreme ideology'[40] and the Court's behaviour as 'outrageous' and 'destabilizing'.[41] The Speaker said the Court was guilty of a miscarriage of justice.[42]

B *Australia*

Closer to home in Australia, Professor Winterton once described the *Communist Party Case*[43] of 1951 as 'probably the most important [decision] ever rendered by the [High] Court'.[44] I am sure many would agree. The Court held the *Communist Party Dissolution Act 1950* (Cth) ('Act'), which purported to ban the Communist Party and affiliated organisations, and to restrict the civil liberties of persons associated with it, to be invalid. The Court unanimously held that the Parliament has power to legislate with respect to the prevention of subversion and sedition; however, a majority of the Court concluded that the validity of such a law turned on the constitutional fact of whether a person or body was actually engaged in such subversive conduct. As the Act purported to declare the Australian Communist Party guilty of subversive conduct, of 'engag[ing] in activities or operations designed to bring about the overthrow or dislocation of … Australia',[45] the Parliament had attempted to recite itself into power, and the Act was invalid. Invalidity resulted because the Parliament itself declared that constitutional fact, or authorised the government to do so, when the finding of that fact was a matter for the Court.

The decision to declare the Act invalid might have been regarded as anti-democratic. The Menzies Government had won an election in which the Act was a central policy of the Liberal Party's election platform.[46] Menzies himself had described the result of the election as an 'overwhelming mandate from the people'.[47] The Prime Minister was no stranger to the High Court. He had appeared before it many times, including in landmark cases.[48] His response, though strongly worded, was respectful of the Court as an institution. He said that he had 'no legal criticism' to make of the decision but observed that it may have caused 'grave concern' to the Australian public.[49]

Professor Winterton observed that the decision in the *Communist Party Case* was not criticised as heavily as those in the United States, largely because the High

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40 White House, 'Remarks by President Biden on the Supreme Court Decision to Overturn *Roe v Wade*' (Press Statement, 24 June 2022).

41 White House, 'Remarks by President Biden in Press Conference, Madrid, Spain' (Press Statement, 30 June 2022).

42 Nancy Pelosi, 'Dear Colleague: Miscarriage of Justice' (Press Release, 25 June 2022).

43 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 ('*Communist Party Case*').

44 George Winterton, 'The Significance of the *Communist Party Case*' (1992) 18(3) *Melbourne University Law Review* 630, 653.

45 *Communist Party Dissolution Act 1950* (Cth) Preamble.

46 Winterton, 'The Significance of the Communist Party Case' (n 44) 635.

47 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 1951, 364 (Robert Menzies, Prime Minister).

48 For example, Robert Menzies KC appeared for the claimant in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

49 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 1951, 364 (Robert Menzies, Prime Minister).

Court's reputation was high. Even newspapers which had supported the Act did not criticise the Court in their reports of the decision.[50] This, he said, was the case's 'greatest legacy'.[51] That reputation might have been maintained of course by continued adherence to strict legalism in judgments, of which Sir Owen Dixon had earlier spoken. However, the 1980s and 1990s, in particular, may have marked something of a turning point in perceptions of judicial review in Australia.

In the *Tasmanian Dam Case*,[52] by a majority of 4 to 3, the High Court held valid Commonwealth legislation and regulations giving effect to the World Heritage Convention, thereby preventing the Tasmanian government from undertaking construction of its dam project. The majority's approach to the external affairs power was considered by some to be an unwarranted expansion and to upset the federal–state balance of powers.[53]

Perhaps foreseeing criticism, the Court for the first time released a media statement. This was not the neutral case summary which is now published with respect to each decision of the Court. The media statement sought to explain the role of the Court, pointing out that the questions it answered were strictly legal and that the Court was not in any way concerned with the merits of the dispute concerning the dam project.[54]

This was not sufficient to prevent some newspapers and politicians from emphasising the political nature of judicial review and questioning its legitimacy.[55] It did not prevent criticism by state Premiers.[56] The criticism led to a proposal to amend the *Constitution* to limit the scope of the external affairs power. It was considered at the 1985 Australian Constitutional Convention and by the Constitutional Commission. However, the Convention split along party lines and the Commission subsequently recommended that no alteration be made.[57]

Mabo [No 2][58] was not strictly a judicial review case; rather, Mr Mabo sought declarations as to his rights and interests as a consequence of the annexation of the Murray Islands by the Colony of Queensland. The case nevertheless demonstrates the role of the judiciary in determining the limits and scope of executive authority and sovereignty over land. In the course of his judgment Brennan J confirmed, in terms of *Marbury v Madison*, that it is the Court's duty to declare and enforce the law.[59] It is something of an understatement to say that the decision was controversial and that it caused much public debate. Some politicians claimed the Court to have

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50 Winterton, 'The Significance of the Communist Party Case' (n 44) 653.
51 Ibid 656.
52 *Commonwealth v Tasmania* (1983) 158 CLR 1 ('*Tasmanian Dam Case*').
53 Leslie Zines, 'The Tasmanian Dams Case' in HP Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 262, 274–5.
54 *Tasmanian Dam Case* (n 52) 58–9.
55 Brian Galligan, *The Politics of the High Court: A Study of the Judicial Branch of Government in Australia* (University of Queensland Press, 1987) 243–4.
56 See ibid 244.
57 Zines (n 53) 275.
58 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 ('*Mabo [No 2]*').
59 Ibid 29.

become political and to have assumed a legislative role.[60] One political party promised to legislate to overturn it.[61]

Very soon after *Mabo [No 2]* there followed *Nationwide News v Wills*[62] and *ACTV v Commonwealth*[63] which involved the use of the freedom of political communication, which was found to be implied by the *Constitution*, to strike down legislation. The decisions were described by one eminent academic commentator as creating a 'political storm'.[64] The development was described on the one hand as '[p]erhaps the most remarkable feature of Australian constitutional development in the past decade'.[65] On the other hand, it was described as an unjustified intrusion into the legislative and political domains.[66] An anonymous federal Minister was reported as saying that the Cabinet should 'hold discussions on limitations on the court's powers'.[67] Some politicians called for changes to the appointment process including political screening US-style.[68] At least the Attorney-General of the day rejected such calls and pointed out that the government should not intrude into the business of the Court and notably advised 'nor should the views of political appointees become a matter for political debate'.[69]

The later native title case of *Wik Peoples*,[70] where a majority of the Court held that pastoral leases did not confer rights to exclusive possession and did not necessarily extinguish all incidents of native title,[71] created another storm and claims that large tracts of land, including freehold, were at risk. A state Premier called the High Court 'an embarrassment' and suggested 'constitutional surgery' be undertaken to allow voters to elect and dismiss judges.[72] The Deputy Prime Minister pointed to a trend towards 'judicial activism' and said that the next vacant seat on the High Court should be filled by a 'capital "C" Conservative'.[73]

In *Plaintiff M70/2011*,[74] the Court held invalid a declaration by the Minister for Immigration and Citizenship that Malaysia met the criteria stated in the

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60 Richard Bartlett, 'Mabo: Another Triumph for the Common Law' (1993) 15(2) *Sydney Law Review* 178, 178, quoting Bill Hassell, *The West Australian* (Perth, 24 October 1992) 2. See also sources cited in Bartlett's article at n 2.

61 Bartlett (n 60) 178, citing *Daybreak* (ABC Radio National, 13 January 1992).

62 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

63 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 ('*ACTV v Commonwealth*').

64 HP Lee, 'The Implied Freedom of Political Communication' in HP Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 383, 392.

65 Adrienne Stone, 'Freedom of Political Communication, the Constitution and the Common Law' (1998) 26(2) *Federal Law Review* 219, 219.

66 HP Lee (n 64) 383.

67 Ibid 392.

68 Ibid.

69 Quoted in Margo Kingston, 'Duffy Rules Out Checks on Court Positions', *The Age* (Melbourne, 8 October 1992) 4.

70 *Wik Peoples v Queensland* (1996) 187 CLR 1.

71 Ibid 122, 131 (Toohey J), 154–5, 166–7 (Gaudron J), 204–5 (Gummow J), 242–3, 261 (Kirby J).

72 Quoted in Scott Emerson and Bernard Lane, 'States Push for High Court Change', *The Australian* (Canberra, 19 February 1997) 1.

73 Quoted in Niki Savva, 'Fischer Seeks a More Conservative Court', *The Age* (Melbourne, 5 March 1997) 1.

74 *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144.

Migration Act 1958 (Cth) so as to enable asylum seekers to be removed to Malaysia. The then Prime Minister held a press conference in which she said the 'decision basically turns on its head the understanding of the law in [Australia]'.[75]

The more recent decisions in *Love v Commonwealth*[76] and *Thoms v Commonwealth*[77] also drew political fire. Unnamed conservative members of the Parliament, whilst not calling for 'capital "C" conservative' appointments, were reported by the press to have said that future appointments to the Court would be 'black letter lawyers'.[78]

C *The United Kingdom*

Turning back to the United Kingdom, in the 1990s judicial review was gaining momentum. Decisions such as the *Factortame Case*[79] marked turning points in judicial review. The courts no longer relied on a 'contrived interpretation' of legislation.[80] The decision in 2004 in *A v Secretary of State for the Home Department*[81] showed the courts were not going to completely defer to the Secretary regarding whether persons detained were a risk to national security, as had been the case in *Liversidge v Anderson*.[82] The courts were required to engage in judicial review to ensure rights afforded under the *European Convention on Human Rights* were protected. The statutory provision providing for it was simply declared to be incompatible with the Convention.

This is the background to the Brexit cases — *Miller [No 1]*[83] and *Miller [No 2]*[84] — which were decided in 2016 and 2019 respectively. In the first case the Supreme Court ruled that withdrawal from the European Union could not be effected by notice given by a Minister, which is to say by use of the prerogative power. An Act of Parliament was necessary. In *Miller [No 2]*, the Court held that the government's attempt to prorogue Parliament for five weeks while attempts were being made to legislate to require the government to seek an extension to the Brexit process in order to minimise the chance of a 'no-deal Brexit' had, 'of course', the 'effect of frustrating or preventing the constitutional role of Parliament in holding the Government to account'.[85]

The decision at first instance in *Miller [No 1]* resulted in some tabloid newspapers calling the judges of the Divisional Court 'enemies of the people'

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75 Julia Gillard, 'Transcript of Joint Press Conference, Brisbane' (Transcript ID 18108, 1 September 2011) <https://pmtranscripts.pmc.gov.au/release/transcript-18108>.

76 *Love v Commonwealth* (2020) 270 CLR 152.

77 *Thoms v Commonwealth* (2022) 401 ALR 529.

78 Nicola Berkovic, 'The Great High Court Lottery', *The Australian* (online, 28 October 2020) <https://www.theaustralian.com.au>.

79 *R v Secretary of State for Transport; Ex parte Factortame Ltd [No 2]* [1991] 1 AC 603.

80 Michael Gordon, *Parliamentary Sovereignty in the UK Constitution* (Bloomsbury Publishing, 2015) 162.

81 *A v Secretary of State for the Home Department* [2005] 2 AC 68.

82 *Liversidge v Anderson* [1942] AC 206.

83 *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin) ('*Miller [No 1]*'). See also *R (Miller) v Secretary of State for Exiting the European Union* [2018] AC 61.

84 *R (Miller) v Prime Minister* [2020] AC 373 ('*Miller [No 2]*').

85 Ibid 408–9, [55]–[56].

because the decision was regarded by them as contrary to the will of the public as expressed in the Brexit poll.[86] All of this was met with conspicuous silence from the government, including the Lord Chancellor, who offered no support for the Court. The outrage had subsided somewhat by the time the matter was heard in the Supreme Court. *Miller [No 2]* was met with claims of judicial activism and misuse of judicial power.[87] Calls were made to abolish the Supreme Court.[88]

III The Aftermath

So what of the aftermath of these recent decisions? Attention may be directed in the first place to the United Kingdom and the United States where consideration was given, respectively, to curbing the powers of the court and to altering the constitution of the court and the tenure of its judges.

In the wake of the decision in *Miller [No 2]* a general election was held in December 2019 where the Conservative Party ran a platform which included investigating reforms to the Supreme Court.[89] Following its re-election the government set up the Independent Review of Administrative Law ('IRAL') in July 2020 to consider reforms to the process of judicial review. The IRAL Report[90] was released in March 2021 at the same time as the Government's Response.[91] As Professor Paul Craig observed,[92] the Government's Response did not mention the fact that the IRAL Panel had pushed back on the great majority of suggestions for curtailment contained in the terms of reference. It spoke instead of the importance of striving 'to create and uphold a system which avoids drawing the courts into deciding on merit or moral value issues which lie more appropriately with the executive or Parliament'.[93] Proposals with respect to ouster clauses and to legislate for decisions to be a nullity, which had been raised for discussion, were not to be progressed.[94]

The result was some reforms in the *Judicial Review and Courts Act 2022* (UK) which, amongst other things, provided the courts with a discretion to suspend quashing orders, that discretion to be guided by a non-exhaustive list of factors, and allowed the courts to limit the retrospective effect of quashing orders.[95] It removed

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86 James Slack, 'Enemies of the People: Fury over "Out of Touch" Judges Who Have "Declared War on Democracy" by Defying 17.4M Brexit Voters and Who Could Trigger Constitutional Crisis', *The Daily Mail* (online, 4 November 2016) <https://www.dailymail.co.uk/news/article-3903436>.

87 See, eg, John Finnis, *The Unconstitutionality of the Supreme Court's Prorogation Judgment* (Policy Exchange, 2019) 6, 18.

88 Derrick Wyatt and Richard Ekins, *Reforming the Supreme Court* (Policy Exchange, 2020) 9.

89 *Get Brexit Done, Unleash Britain's Potential* (The Conservative and Unionist Party Manifesto 2019, 2019) 47–8.

90 *Independent Review of Administrative Law* (Report, CP 407, March 2021) ('IRAL Report').

91 Ministry of Justice, *Judicial Review Reform: The Government Response to the Independent Review of Administrative Law* (Report, CP 408, March 2021) ('Government's Response').

92 Paul Craig, 'IRAL: The Panel Report and the Government's Response', *UK Constitutional Law Association* (Blog Post, 22 March 2021) <https://ukconstitutionallaw.org/2021/03/22/paul-craig-iral-the-panel-report-and-the-governments-response/>.

93 Government's Response (n 91) 8 [2].

94 Ibid 6 [11].

95 *Judicial Review and Courts Act 2022* (UK) s 1.

what are called '*Cart*'[96] judicial reviews, by which certain decisions of the Upper Tribunal are reviewable by supervisory courts. The statute excluded the ability to judicially review a decision of the Upper Tribunal to refuse permission to appeal from first-tier tribunals but left a residual review jurisdiction for the supervisory courts in certain circumstances.[97]

Thus no serious restrictions on judicial review resulted. But that is not to say that there does not remain in the United Kingdom a push for reform or curtailment of judicial review based largely on the perception that between 2015 and 2020 there was an 'inflation' of judicial power,[98] which was seen to have been confirmed by these high-profile cases. A group called the Policy Exchange, which claims to have influence across party divides[99] and is said to have links to the Conservative Party,[100] has remained active in the pursuit of this goal. In October 2022, it published a paper entitled 'The Limits of Judicial Power: A Programme of Constitutional Reform' which outlined reforms that would 'restate and buttress the traditional limits on judicial power'.[101] Its Judicial Power Project aims to 'correct the undue rise in judicial power by restating, for modern times and in relation to modern problems, the nature and limits of the judicial power'.[102]

In the United States, questions had already been raised about the Supreme Court before the decision in *Dobbs* because of an appointment which had been made close to the 2020 Presidential election. Following President Biden's inauguration, Congressional Democrats introduced legislation[103] to expand the Court from 9 to 13 justices on the basis that the previous Republican government had politicised the Court and undermined its legitimacy with its appointments.[104] But most were prepared to await the Presidential Commission on the Supreme Court of the United States ('SCOTUS') which was formed in April 2021 by the President's Executive Order.[105]

The SCOTUS Report, which was submitted in December 2021, began by explaining the developments giving rise to the issuance of the Order. It accepted that

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96 The term '*Cart* judicial review' refers to the Supreme Court holding in *R (Cart) v Upper Tribunal* [2012] 1 AC 663 that if a decision of the First-tier Tribunal is affected by an error of law, with the result that the refusal of the Upper Tribunal to grant permission to appeal against the decision of the First-tier Tribunal is also affected by an error of law, then the Upper Tribunal's denial of permission to appeal could — in certain circumstances — be judicially reviewed and quashed.

97 *Judicial Review and Courts Act 2022* (UK) s 2.

98 Richard Ekins, *The Case for Reforming Judicial Review* (Policy Exchange, 2020) 7 [1].

99 'About', *Policy Exchange* (Web Page) <https://policyexchange.org.uk/about/>.

100 George Monbiot, 'No 10 and the Secretly Funded Lobby Groups Intent on Undermining Democracy', *The Guardian* (online, 1 September 2020) <https://www.theguardian.com/commentisfree/2020/sep/01/no-10-lobby-groups-democracy-policy-exchange>.

101 Richard Ekins, *The Limits of Judicial Power: A Programme of Constitutional Reform* (Policy Exchange, 2022) 7, 16–20.

102 'About the Judicial Power Project', *Policy Exchange* (Web Page) <https://judicialpowerproject.org.uk/about/>.

103 Judiciary Act of 2021, HR 2584, 117th Congress § 1 (2021).

104 Senator Ed Markey, 'Expand the Supreme Court: Senator Markey and Reps Nadler, Johnson, and Jones Introduce Legislation to Restore Justice and Democracy to Judicial System' (Press Release, 15 April 2021).

105 Executive Order 14023 on the Establishment of the Presidential Commission on the Supreme Court of the United States, 86 Fed Reg 19,569 (14 April 2021).

debates surrounding the process by which the President nominates and the Senate confirms justices were not new, but the Report observed that it has become more intensely partisan in recent years.[106]

The Report discussed arguments for and against contemporary reform, including Court expansion and methods to ensure ideological balance,[107] although none were suggested to offer practical benefits having any certainty. It considered term limits for the justices and explored proposals that would reduce the powers of the Supreme Court or the judicial branch as a whole, but concluded that such reforms would probably be found to be unconstitutional.[108]

The decision in *Dobbs* was published on 24 June 2022.[109] Despite the trenchant criticisms from government there has, as yet, been no suggestion that there will be structural or jurisdictional changes to the Court. The President had stated he was 'not a fan' of 'court packing' during the 2020 campaign.[110] He is said to regard the Report as a resource that he will continue to review.[111]

In the past it may more confidently have been said that anger or resentment towards the courts about controversial judicial review decisions abates over time. In Australia, in particular, there was never any doubt that Tasmania would accept the decision in the *Tasmanian Dam Case* and the fears expressed following the decisions in *Mabo [No 2]*, the implied freedom cases and *Wik Peoples* proved to be unfounded.

The point to be made is that in none of the polities in question has the authority of the court been denied. That said, the decision in *Dobbs* may have seriously affected the reputation and standing of the US Supreme Court judging by the strength of the reaction to it. Time will tell.

Whatever the future holds for the courts of the United Kingdom and the United States or the curtailment of their powers, a political conversation has started about major changes to limit the authority of the courts or to effect their restructure.

No such conversation has started in Australia. But that is not to say that we should not learn from experiences elsewhere, particularly in the United States, where the Supreme Court's reputation as partisan appears to have grown. It should teach us that there are real problems with such an appointment process so far as concerns public perceptions of the independence of the judiciary.

That is why we in Australia should be concerned about misguided arguments for 'fixing' the judiciary when a decision is unpopular with the government or politicians. And we should be concerned because such suggestions have been made

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106 Presidential Commission on the Supreme Court of the United States, *Final Report* (December 2021) 14–17.

107 Ibid 73–94.

108 Ibid 163–9, 179–82, 189–91.

109 *Dobbs* (n 35).

110 Quoted in Sean Sullivan, 'Biden Says He's "Not a Fan of Court-Packing"', *The Washington Post* (online, 13 October 2020) <https://www.washingtonpost.com/politics/biden-says-hes-not-a-fan-of-court-packing/2020/10/13/4ea7af22-0d02-11eb-8a35-237ef1eb2ef7_story.html>.

111 The White House, 'Press Briefing by Press Secretary Jen Psaki, May 4, 2022' (Press Briefing, 4 May 2022).

more than once and over a period of time. The reactions by some in government to the implied freedom cases, that appointments should be made to the High Court US-style, and to the decision in *Wik Peoples*, that only persons of like-mind with the government should be appointed, were ill-considered. Recent statements attributed to those in government following the decisions in *Love* and *Thoms* suggest that the latter view may still be maintained. Such suggestions should be the subject of comment and criticism. And expressly rejected. They should not be made because people may assume that they will be acted upon.

It is generally understood that acceptance of the role and of the authority of our courts is essential to the maintenance of the rule of law and our democracy. The authority of a court depends upon the confidence of the public in it. That authority and that confidence cannot be maintained if the public perception of judicial independence is undermined. The perception of judicial independence requires on the part of judges adherence to strict legal and judicial method in decision-making. For those who are in a position to influence the appointment of judges it requires an understanding of the role of the court, the importance of judicial independence, including perceptions of it, and careful consideration of what is said about the use of an appointments process to 'fix' a court.