REVIEW ARTICLE

LEGITIMACY, THE HIGH COURT AND AUSTRALIAN POLITICS

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Law and courts have a political role when they carry out all or any of their functions. This role includes a legitimating function: law and courts legitimate the existence of the state and the exercise of power within the state; they establish the structure of the state; and they provide means by which the state can be administered and the policies and functions of the state can be exercised. These functions are not always either overt or obvious, but they are closely connected with state power, and therefore with state politics.

English studies, such as those of Griffith[1] and Robson and Watchman[2] demonstrate that even where the courts do not have the function of judicial review of legislative action under a written constitution, their decisions have profound political impact. Where, as in Australia, the United States of America, and Canada, the formal constitution of the state has a statutory form, and the courts either are given by that formal constitution, or assume, a function of judicial review of legislative and executive action within the state, the political significance of law and courts becomes more obvious. Thus Brian Galligan's recent study, *The Politics of the High Court,*[3] is a significant contribution to the understanding both of Australian politics and of Australian constitutional law. He does not set out to examine the political influence of the High Court of Australia in its role as the highest appellate

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1 J.A.G. Griffith, *The Politics of the Judiciary* (3rd ed. 1985).
2 P. Robson and P. Watchman (eds), *Justice, Lord Denning and The Constitution* (1980).
3 B. Galligan, *Politics of the High Court: A Study of the Judicial Branch of Government in Australia.* St. Lucia, Qld, University of Queensland Press, (1987), 333 + xii pp.; RRP $24.95 paper.

Australian court, though this effort would be worthwhile. His study is confined to the role of the High Court as a branch of government, and specifically in its role as interpreter and enforcer of the Commonwealth Constitution.

Galligan is a political scientist who appreciates both the impact of the activities of the High Court on Australian political life and the need to understand legal techniques and legal culture before attempting any serious analysis of the function of the Court in politics. His work is therefore "interdisciplinary" in the best sense. Much of the ground covered in this book is quite well-known, as it was broken by Geoffrey Sawer, especially in three books published between 1956 and 1967.[4] However, Galligan's approach is slightly different. While Sawer was a lawyer examining the relationship of the political history of the Australian federation to Australian constitutional law, Galligan seeks to examine the role of law, and especially of the High Court, in the development of Australian politics: his analysis is of a different order. Over the years he has published a number of articles exploring his ideas, including the notion, repeated at p.41, that legalism is the "noble lie" of Australian politics. In this book he develops these ideas and relates them to a broader analysis of the political development of Australian society. A number of questions arise from such an analysis. One might seek an understanding of the end of government and politics in any given society, or of the class basis of politics in such a society. This is clearly not Galligan's quest. He seems less than content with the packaged social theories revealed by his survey of material written about the development of Australian politics and political economy, but does not offer any substitute by way of any overall theory. Nevertheless, he comes close to postulating an all-encompassing theory to explain the role of the High Court, and this flaws an otherwise valuable contribution to understanding the relationship of Australian constitutional law and politics. He sets himself the task of examining some specific institutions within the Australian polity, and drawing some conclusions about them. Because those institutions exist and affect all Australians, that task is justifiable and helpful, even if it does not penetrate some of the more fundamental questions which some more radical scholars of Australian and general constitutional jurisprudence are now raising in a tentative way,[5] including the desirability and efficacy of "representative and responsible" systems of government.

It seems fashionable these days for writers on society to relate their hypotheses to some "grand theory",[6] but Galligan does not attempt to do

4 G. Sawer, *Australian Federal Politics and Law 1901 — 1929* (1956); *Australian Federal Politics and Law 1929-1949* (1963); and *Australian Federalism in the Courts* (1967).

5 *e.g.* C. Harlow, "Power from the People? Representation and Constitutional Theory" in P. McAuslan and J.F. McEldowney (eds), *Law, Legitimacy and the Constitution; essays marking the centenary of Dicey's Law of the Constitution* (1985); V. Kerruish and I. Duncanson, "The Reclamation of Civil Liberty" (1986) 6 *Windsor Yearbook of Access to Justice* 3; and "The Regulation of Civil Liberty" (1986) 4 *Law in Context* 1; A. Fraser, "The Political Architecture of Federalism" (1986) 10 *BASLP* 75.

6 *e.g.* Q. Skinner (ed.), *The Return of Grand Theory in the Human Sciences* (1985).

this. He is careful to avoid the theoretical straightjackets fashioned by writers of both the "old" and the "new" Left, though readily accepting insights provided by such writers. He recognises the dangers of attempting to force human activities, past, present, or future, into a theoretical model where they may fit uneasily. He does, however, advert to, and perhaps adopt, a theme or theory which he believes will assist understanding of the political role of the High Court. This is that:

> two of the major structural determinants of Australian politics are the federal constitution and the Labor Party ... [which] shape the forces of Australian politics and give the Australian polity its uniquely Australian form ... In fact, Labor and the constitution are incompatible in important respects, and much of Australian politics has involved the working out of the conflict inherent in the juxtaposition of these two political institutions.[7]

Much of the book is directed to illustrating this hypothesis, but he sees the need, first, to explore in some detail the nature of the Australian Labor Party, and then to examine the background of the Australian Constitution and the place in it of the institution of judicial review borrowed by its framers from the United States of America. This he does by drawing on a wide range of historical and other material.

It would have been unwise for Galligan to insist that the only incompatibility between the Constitution, as developed by the High Court, and party politics arose from political initiatives of the Australian Labor Party. One of the chief arenas of constitutional combat between legislature and judiciary in Australia has been over the legal validity of primary product marketing schemes, which were established on the initiative of the conservative-populist Country Party, rather than the social-democratic Australian Labor Party. Galligan's thesis is that "throughout most of its history the Australian High Court has been a conservative and restraining force on Australian politics through its exercise of judicial review"[8] implying that any progressive moves, especially any serious challenges to the established order, came from the Labor side of politics.[9] He does not say that the Australian Labor Party has ever been a radical party, or that class-based issues have been at the centre of Australian politics. Rather, the potential divisive and destabilising effect of the party system in Australia has never been realised, and a principal reason for this is that Australian society is, and always has been predominantly liberal and middle-class.[10] Its political system has been stable "because it has tamed or terminated the main disruptive and reforming attempts of federal Labor governments".[11] The High Court, through its development of constitutional law, has been the major influence in achieving this result, and the main technique it has employed to this end has been "legalism".

7 Note 3 *supra,* 26.
8 *Id.,* 231.
9 *Id.,* 22.
10 *cf.* T. Rowse, *Australian Liberalism and National Character* (1978).
11 Note 3 *supra,* 22.

The Federal Constitution and the institution of judicial review were, in Galligan's view, borrowed from the United States of America not only because they fulfilled a particular need at that stage of Australia's development but also because it was appreciated that they provided a system which could fragment power and prevent radical change. The values of the middle-class delegates at the constitutional conventions were reflected in the prevailing values of the judges of the High Court. None of this is new; it is clearly apparent in much published work, especially Sawer's *Federation Under Strain* [12] published after the Constitutional crisis of 1975, in which the High Court was not directly involved. While Galligan acknowledges his debt to Sawer, unfortunately, in many respects he does not add a great deal to the substantive material on this subject, already published by Sawer and others. That does not diminish the contribution made by the book as a whole.

He also emphasises the important legitimating role which the High Court has had in Australian politics, a point alluded to by Rickard,[13] but until now not well developed. Perhaps the most significant contribution which Galligan makes to the understanding of the function of the High Court in Australian politics is his demonstration of the way in which, by use of the "noble lie" of legalism, the High Court has managed to retain not only its own legitimacy, but also the legitimacy of a conservative, stable social order. At times, when the Court has found legislative initiatives (usually by the Australian Labor Party) to be unconstitutional, there have been outbursts of criticism from supporters of that party. However, the outbursts which followed the High Court decision in *Commonwealth* v. *Tasmania* [14] came not from Labor supporters, but from outraged conservatives and supporters of States' Rights. Galligan sees this as significant — it suggests that the traditional, or conservative forces, which have been well served over the years by the High Court and the Constitution, are now not only critical of the decisions of the Court, but are also more likely than the Australian Labor Party to question the legitimacy of the Court and its role in Australian politics. From such sources come the loudest rejections of a positivistic or legalist approach to constitutional interpretation.[15]

Galligan has provided a very sound account of how the Court has been able to use legalistic approaches to produce results which appear consistent with accepted traditional doctrines of adherence to precedent but which in fact embody conservative political values. Since the days when this was politically most important (in the years from 1945 to 1956), views of what the judges actually do have changed. Judges themselves no longer accept a

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12 G. Sawer, *Federation Under Strain: Australia 1972-1975* (1977).

13 J. Rickard, *Class and Politics: New South Wales, Victoria and the Early Commonwealth, 1890-1910* (1976).

14 (1983) 57 ALJR 450 (hereinafter *Dams* Case).

15 *e.g.* G. de Q. Walker, "Dicey's Dubious Dogma of Parliamentary Sovereignty: A Recent Fray with Freedom of Religion" (1985) 59 *ALJ* 276.

"declaratory" view of the law; all judges tacitly accept that they make law, and some (Galligan quotes Justices Murphy and Kirby) actually say so.

The novelty of this book is the attention to the effect which the Court had on Australian party politics. In the past, attention has tended to concentrate on the reverse effect. In 1957, E. G. Whitlam, to become Prime Minister fifteen years later, delivered a lecture to the Victorian Fabian Society entitled "The Constitution *versus* Labor"[16] a theme which is eagerly taken up by Galligan. Yet in 1978, according to Galligan,[17] Whitlam had indicated that it was no longer the case that the Constitution would frustrate any initiatives of the Australian Labor Party. Galligan states:

> Labor reoriented itself away from working-class antagonism to private enterprise towards a benign acceptance of capitalism and a primary concern with middle-class and quality of life issues.[18]

He suggests that this is a consequence of a realisation that the Constitution, as interpreted and applied by the High Court, had knocked the essence out of Labor's program of reform. However, it could have been more a consequence of other factors operating on the Australian Labor Party, whose supporters were (or at least saw themselves as) no longer struggling, exploited workers, but rather as a group whose political and other efforts had secured for themselves an acceptable standard of living and a reasonable lifestyle. The trade unionists who have always dominated the Labor side of Australian politics were no longer the poorest section of the community; the unemployed and the single parents were not influential in party politics at all.

The Australian Labor Party has changed, but Galligan's notion that this is largely a result of the High Court and its interpretation of the Constitution is not entirely convincing. No doubt the presence of the Constitution has to some extent dampened the class-based antagonism which might otherwise have influenced Australian politics, but other factors, largely economic, have also played a significant part. Galligan himself acknowledges that since 1918, during the periods when the Australian Labor Party has had a majority in the House of Representatives, only from 1945 to 1951 has it also controlled the Senate. That period was, of course, the period when the Australian Labor Party suffered its most significant defeats in the courts, but the foundations for those defeats were laid much earlier. This period, discussed below, was a crucial period for Galligan's analysis.

The period of rapid, sustained economic growth based on exports of wool, wheat, meat and minerals in the period 1945-1974 meant that the standard of living of Australian wage-earners remained relatively high, as it was in the early years of the federation. Periods of expansion are not periods in which political tension is great: tension increases when there is real struggle for the allocation of relatively scarce resources. The periods during which there was

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16 Reprinted in E.G. Whitlam, *On Australia's Constitution* (1977).
17 Note 3 *supra*, 215 ff.
18 *Ibid.*

high unemployment and economic depression (the 1930s and the decade from 1975) were, perhaps coincidentally, periods during which the role of the High Court as a political factor were relatively limited. They also illustrate that political radicalism is not a major feature of Australian politics. Galligan concedes this. He describes the character of the Australian Labor Party as "populist, working class and mildly socialist", yet finds that it is the major reformist element in Australian politics.

The most convincing sections of the book are those dealing with the early development of the Constitution, and those which elaborate the argument that the legalism of the High Court has been a political strategy which has had the effect of legitimating stability in Australian society because major reforms, which seek modification of the economic structure of the society or the wholesale redistribution of wealth within it, have been blocked by the Court. Chapter two of the book examines the origins of the doctrine of judicial review and its adoption in Australia. The analysis leaves little doubt that the founders knew what they wanted: judicial review on the American model. The first Justices of the Court (Griffith, Barton, O'Connor, Isaacs and Higgins) were all active at the constitutional conventions of the 1890s and simply assumed that the constitution in whose drafting they had played such a dominant role provided for judicial review. They differed on the approach the Court should take on the basic question of the division of powers between the centre and the provinces — but this was no secret. Isaacs and Higgins were "radical nationalists" and had always favoured a greater concentration of power at the centre. They sought to overcome the narrower views of the three original Justices, exemplified by the doctrine of "reserved powers" which those Justices implied from the "spirit" of the Constitution. More important was the technique that was ultimately adopted to achieve what Nygh, drawing on an American model, would call an "organic centralist" view of the Constitution.[19] Isaacs, especially, had always approached the Constitution as primarily a statute, a written law, and in this he found support in the attitude of the Privy Council, which, through an anomalous piece of political manoeuvering, remained not only the ultimate Australian court of appeal in non-constitutional matters, but also retained some jurisdiction in constitutional matters.

Though the Privy Council was essentially an English Court, comprising English judges, it had, for the first four decades of this century, an Imperial function, including the task of interpreting the Canadian Constitution (until recently the British North America Act 1867), which was also, in a sense, federal. Its approach ran totally counter to that of Griffith, Barton and O'Connor, as those Justices' rejection in *Baxter* v. *Commissioner of Taxation (N.S.W.)*,[20] of the "legalistic" approach taken by the Privy Council in *Webb*

19 P.E. Nygh, "An Analysis of Judicial Approaches to the Interpretation of the Commerce Clause in Australia and The United States" (1967) 5 *Sydney L Rev* 353.

20 (1907) 4 CLR 1087.

v. *Outtrim* [21] demonstrated. When Griffith, Barton and O'Connor were replaced by Justices whose prior experience had not been as politicians, especially politicians active in the federation movement, but as practising legal technicians, it became much easier for an astute advocate (R.G. Menzies), to convince the High Court that the implied doctrines of "Immunity of instrumentalities" and "State reserved powers" had no place in Australian constitutional law; rather, the Constitution was to be treated as an Imperial statute applying in Australia. This approach had always attracted Isaacs, the leading figure who established it as doctrine in *The Amalgamated Society of Engineers* v. *The Adelaide Steamship Co. Ltd.*[22] It has been the orthodoxy of the High Court ever since.

Galligan gives a good account of this process. He then shows how this approach, which consciously ignores the political environment in which the Constitution was framed, has enabled the Court to play a significant political role, without the political nature of that role being fully appreciated by the people affected by it. Much of the remainder of the book develops the theme that the "strict and complete legalism" of the High Court, which has prevailed since the *Engineers* case, is a political device which has enabled the High Court to frustrate attempts at social, economic, and political reform without attracting the criticism and antagonism which might have been directed at other institutions playing the same role. This has been possible because of the popular perception of "law" as a neutral body of rules, interpreted by judges and courts free of political and class affiliations.

Such a popular perception is, of course, quite unjustified, even if one does not accept many marxist and neo-marxist accounts of the nature of law. Galligan does not attempt to say precisely what values have been incorporated into Australian constitutional law, but demonstrates, through a detailed study of some of the major areas of constitutional litigation, that those values are inimical to the major reformist policies of the Australian Labor Party. The examples chosen range from the cases dealing with the extent of the legislative powers enumerated in s.51 of the Constitution, especially the trade and commerce power, the "labyrinth" of s.92, the defence power, and finally the treatment of "reformist" legislation, such as the provision of medical benefits, the imposition of taxes, and the attempts of the Chifley Labor Government to intervene in the transport and finance industries. He largely ignores interventionist moves by non-labor governments, especially in primary produce marketing, though he does mention the fate of the Australian Industries Preservation Act during the second decade of federation, and of its successor, the Restrictive Trade Practices Act sponsored by Sir Garfield Barwick, a fervent supporter of free-market policies and competition, as Attorney-General in a conservative government and developed while he was Chief Justice of Australia.

21 [1907] AC 81.
22 (1920) 28 CLR 129 (hereinafter *Engineers* Case).

Galligan's legal analysis is competent, though more restricted than one would find in a legal textbook. It is certainly sufficient to sustain his principal arguments.

The impact of the High Court on Australian politics was most noticeable during the "time of testing", when the Chifley Labor Government controlled both Houses of Parliament, from 1945 to 1951. During this period it attempted its major reforms, in the area of transport, welfare and finance. Its opponents were business, the professions, and several State governments. Most of its major reforms were found to be unconstitutional. The main obstacle was s.92, but other constitutional provisions also played a part.

During the war, the High Court went to extraordinary lengths to find legislation supporting intervention by the Commonwealth government into a wide range of social, political, economic, and even religious activity justifiable under the defence power. In *The State of South Australia* v. *The Commonwealth*[23] the High Court had upheld a legislative scheme which, in effect, deprived the States of their power to raise revenue through taxation of incomes. Other decisions upheld Commonwealth control of working conditions, wages, housing, et cetera. The Chifley Government believed it required powers of this type to put its reformist, and mildly socialist, policies for post-war reconstruction into effect. Attempts by the Chifley Government to prolong extensive central power after the end of the war, through referendums under s.128 of the Constitution, had failed. The Government, advised by Evatt, who was now its Attorney-General, but whose influence on the formation of some of the High Court's thinking in the ten years he served on the Bench had been considerable, determined to rely on the constitutional powers it believed it possessed. However, the departure of Evatt J. from the Bench had influenced the High Court's approach to the Constitution, especially on s.92.

Even in 1945, when *Australian National Airways Pty Ltd* v. *The Commonwealth*[24] was decided, this area was totally muddled and Galligan has attempted to explain this. As Galligan acknowledges, Coper[25] has given a comprehensive account of the legal reasoning employed by the High Court in s.92 cases, and while drawing on Coper's work, Galligan does not seek to emulate it.

Chapter three explains how, during the 1930s the "policy-oriented" [sic] approach enunciated by Evatt J. was accepted by the majority of the Court, but gradually came to be superseded by the "legalistic" approach of Dixon J. Evatt J., who had been a member of the Australian Labor Party, took the view that the "freedom" of interstate trade and commerce which s.92 requires was not *individual* freedom, but rather the freedom of interstate

23 (1942) 65 CLR 373 (hereinafter *First Uniform Tax* Case).

24 (1945) 71 CLR 29 (hereinafter *Airlines* Case).

25 M.D. Coper, *Freedom of Interstate Trade Under the Australian Constitution* (1983). An earlier, but theoretically wider ranging account of the related question of the scope of the trade and commerce power, which provides extensive American analogues has been given by Nygh, note 19 *supra*.

trade and commerce taken as a whole. Sir Owen Dixon took a view which Galligan describes as "liberal" in the classical sense: the freedom of interstate trade and commerce was a freedom vested in individuals. Dixon's views clearly influenced the Privy Council's decision in the seminal case of *James* v. *The Commonwealth,*[26] where the approach was essentially similar to that of Sir Owen Dixon. This decision was the essential foundation, in formal legal terms, for the interpretation of s.92 which the High Court employed in the *Airlines* case and later in *Bank of New South Wales* v. *The Commonwealth.*[27] Both these cases were decided after Evatt J. had returned to Parliament, and there was no longer any doubt of Dixon's intellectual domination of the Bench.

Galligan finds it significant that Evatt J. had a career in parliamentary politics both before and after his service as a member of the High Court; Sir John Latham, the Chief Justice, who generally agreed with Evatt J., rather than Dixon J., on s.92, had also served in Parliament, and Galligan suggests that these two Justices, because of their experience, had a more "realistic" appreciation of the political significance of their judgments.

In *Attorney-General (Vic.)* v. *The Commonwealth,*[28] the High Court, through a "legalistic" interpretation of s.81 of the Constitution, found significant welfare legislation to be invalid. Galligan's summary of the events of these years was that:

> [t]he judicial branch presided over the direction of the nation's government at this crucial period of change when upheavals in the old order had allowed some scope for transition to the new. By successfully upholding its conservative, free enterprise view of the Constitution, however, the judiciary was instrumental in restricting the Labor government's initiatives to state welfarism and overruling its attempts to implement selective socialism ... from a political point of view the High Court was completely successful. It adjudicated in a routine manner the divisive issues that polarized the community, and legitimated its decisions in such a way that neither the court itself nor the constitution it upheld were placed in jeopardy.[29]

Galligan's analysis of the significant constitutional litigation goes further than this, of course, but is all directed to showing the complex web of circumstances and events which made the events possible.

Galligan finds it surprising that after the most significant confrontation between the Australian Labor Party and the High Court, the party continued to accept the decision of the Court in such cases as the *Pharmaceutical Benefits* case,[30] the *Airlines* case,[31] and the *Bank Nationalisation* case[32] which together struck down most of the party's initiatives in social welfare and economic reorganization during the post-war period. Galligan demonstrates how these

26 (1936) 55 CLR 1.
27 (1948) 76 CLR 1 (hereinafter *Bank Nationalisation* Case).
28 (1945) 71 CLR 237 (hereinafter *Phamaceutical Benefits* Case).
29 Note 3 *supra,* 119.
30 Note 28 *supra.*
31 Note 24 *supra.*
32 Note 27 *supra.*

decisions were reached by the Court through a process of legalistic reasoning as to the meaning of sections 81 and 92 of the Constitution, which allowed the judges to introduce their own personal values into their decisions.

It is always difficult to identify "values", especially in the context of a consideration of values inherent in judgments where the overt reasons are quite different from the real or value-based reasons. Galligan simply shows in this book that the High Court has adopted an approach which allows values opposed to those enshrined in the policy of the Australian Labor Party to flourish. The party rejected initiatives from the more "radical" Ministers (Calwell and Ward) to restructure the Court and "pack" it with judges more sympathetic to the values and policies of the Australian Labor Party, and accepted the arguments of the Attorney-General, Evatt, a former Justice of the Court, that it was more important to retain the legitimacy and status of the High Court as an institution.

He makes use of a number of biographies of various judges,[33] and examines their personal characteristics. There is little doubt that the values manifest in the judgments were in tune with the personal values of many of the Justices, but the implementation of those values is not attributed to personal impropriety. Rather, the values became established because the judicial techniques comprehended by the term "legalism" were inherent in the professional socialisation of the judges, and any techniques which might have allowed fuller scope for reformist policies would have seemed wrong. The reader is left with the impression that the legitimation of political conservatism was not often a conscious objective of the judges, but rather that few, if any, of them were entirely unhappy with the result of what seemed to them to be a natural process.

The weakness of the book is its theoreticism. Like so much contemporary work in the "social sciences", it appears to assume that to be accepted within the intellectual community, it must adopt a theory, and test that theory by reference to the evidence — in this case historical evidence. Theory is important and valuable, because in formulating theories, their proponents may uncover perspectives which assist in understanding the historical basis of the contemporary social order. One result of the reaction against formalism in study of the law has been the growing realisation that law cannot always be made the subject of "scientific" study in the same way that, say, the surface of the earth may be. Human behaviour is seldom completely "rational" and cannot be made so; law, whatever else it may be, is quintessentially a human activity. Politics is equally human, and perhaps cannot be explained by using models which are totally logical and rational. It does seem a mistake even to attempt to explain matters either "legal" or "political" by suggesting that they fit into a single "model" which is logically sound, and apparently rational, though any significant attempt at analysis of political phenomena will take account of relevant theories in seeking an explanation.

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33 Most of these are summarised, and augmented, in G.L. Fricke, *Judges of the High Court* (1986).

Though Galligan is correctly sceptical of the theories advanced by others, he comes close to falling into the trap of positing his own theory as an explanation for the whole of a collection of social phenomena. The reader senses at times that he is aware of the danger and struggles to avoid it. Though at times he does make some concessions, he seems unnecessarily reluctant to admit that factors other than the role of the High Court may have contributed to a society in which people have been content to accept the frustration of reforms proposed by the reformist party, rather than to adopt a political stance of active resistance. The most important contribution the book makes is that it identifies and explains the *legitimating* role of the High Court in the political process, in a way that has not been done previously. While Sawer was able to describe the mutual effect of the constitutional law developed by the High Court and Australian politics, Galligan has been able to analyse the techniques which the Court has used to escape popular abhorrence.

Galligan demonstrates how conservative forces within Australian society have been able, through the instrumentality of the Court, to avoid the consequences of reformist legislation. The tactics of the (then) British Medical Association (Australian Branch) to defeat reforms to the provision by the state of more wide-reaching health care,[34] and of the private, and largely foreign-owned, banks to defeat the proposals of the Chifley government to nationalise them,[35] relied heavily on the use of constitutional litigation.

Yet constitutional litigation has also opened the way to causes which could be described as "progressive" or "reformist". The most usual example is *Australian Communist Party* v. *The Commonwealth* [36] but Galligan sees that the *Engineers* case itself, and subsequent cases in which the legislative powers of the Commonwealth Parliament have been given a wide interpretation, are the result not only of the efforts of the "radical nationalists" Isaacs and Higgins. If the *Engineers* doctrine is part of the body of constitutional principle governing Australia, then the decision in the *Dams* case[37] was inevitable. The *Engineers* case was, in Galligan's words, a "belated response to the changed political environment"[38] in 1920; the environment, in that respect, had hardly changed by 1983, though then it was not the progressives who claimed to be frustrated by the High Court, but the conservatives.

This book leaves little doubt that the legalism of the High Court has been an important factor in Australian politics. It describes how the constitutional

34 In the *Pharmaceutical Benefits* Cases: *Attorney-General (Vic.)* v. *The Commonwealth* (1945) 71 CLR 237, and *British Medical Association* v. *The Commonwealth* (1949) 79 CLR 201.

35 In the *Bank Nationalisation* Case, *The Commonwealth* v. *Bank of New South Wales* (1949) 79 CLR 497.

36 (1951) 83 CLR 1 (hereinafter *The Communist Party* Case).

37 Note 14 *supra*.

38 Note 3 *supra*, 97.

framework inevitably produced judicial review, and shows how, in developing legal techniques to be applied in the process of judicial review, the High Court has been a factor in allowing anti-labor and non-progressive forces to frustrate reform initiatives. The techniques, well explained and described, which constitute "legalism" have, no doubt, given considerable legitimacy to institutional factors which have added to the overall stability of the Australian social order. Galligan's claim that the constitutional law of Australia, as developed by the High Court, has been the principal obstacle to reformist initiatives is, however, a little extreme, and the evidence he produces is far too limited to exclude the possibility that other factors may have been of equal, or greater, significance in the development of Australia as a relatively conservative, stable society.

Nevertheless, this is a valuable and learned study, which crosses the boundaries of several disciplines, and is therefore able to bring to bear on the subject-matter perspectives which no single discipline would provide. Interdisciplinary study needs to take account of social theory, but in the development of understanding of the world, it is surely more important that we gain insights on particular occurrences than to do so in a totally rational and theoretically ordered way.