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Introduction

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In 1956, Geoffrey Sawer published the first of his two volumes on *Australian Federal Politics and Law, 1901–49*[1] – a work that has since become a classic reference in Australian constitutional scholarship. Sawer's central thesis was elegant in its simplicity: there is often a significant disconnect between the political priorities of federal governments in Australia and the opportunities for government action created by constitutional decisions of the High Court. In making this claim, Sawer made an immense contribution to our broader understanding of the political context for High Court decision-making. His work provided a meticulous and comprehensive account of the legislative context for the Court's decisions in the first few decades of its operation.

Since then, a number of works by Australian political scientists have enriched our understanding of the interrelationship between the High Court and Australian federal politics. In a defining book published in 1987, *Politics of the High Court: A Study of the Judicial Branch of Government in Australia*, Brian Galligan drew the attention of both lawyers and political scientists in Australia to the need to study the High Court as a political institution – an institution that both shapes, and is shaped by, politics. Part of the story Galligan told was a classic legal realist story: behind the rhetoric of Dixon-style 'legalism' on the part of the High Court of Australia, Galligan suggested, were a vast set of complex policy choices. Choices of this kind have had major political significance, and surfacing – and acknowledging – these choices is thus critical to assessing the Court's legitimacy. Another part of the story concerned the role of the Australian Labor Party in the Australian constitutional settlement: constitutional stability in Australia,

1 Geoffrey Sawer, *Australian Federal Politics and Law, 1901–29* (Melbourne University Press, 1956); Geoffrey Sawer, *Australian Federal Politics and Law, 1929–49* (Melbourne University Press, 1963).

Galligan suggested, has in large part been achieved by 'termina[ting] the main disruptive and reforming attempts of federal Labor governments'.[2]

Galligan's path-breaking study ended in 1984. In the 20 years since, Australia has witnessed two extended periods of Labor government: first under Hawke and Keating, and then Rudd and Gillard. It has also seen one of the most controversial – and at the same time openly policy-oriented – eras in High Court history: the Mason Court era. And Australia has seen waves of reaction, and counter-reaction, to that era in the Brennan, Gleeson, and French Courts. While others have studied the Court in this period from a political science perspective, they have done so with a different focus to Galligan.

In 1999, David Solomon published *The Political High Court*,[3] an engaging popular account of the High Court's decisions and their political consequences. Similarly, in 2000, in a book entitled *Judging Democracy*,[4] Haig Patapan published a detailed study of the constitutional decisions of the Mason and Brennan Courts and the 'new politics' of constitutional interpretation on those courts. Patapan's focus was again on the political *consequences* of – rather than influences or determinants on – High Court decision-making. He sought to identify a coherent theory of politics, or democracy, immanent in the Court's decisions. In 2006, Jason Pierce published a study of the Mason Court – *Inside the Mason Court Revolution: The High Court of Australia Transformed*[5] – more squarely in line with Galligan's original study. Pierce charted a marked shift, between the mid-1980s and 1990s in Australia, from an orthodox 'legal' or 'legalist' approach to the judicial role toward one that is more overtly 'political' or policy-oriented in nature. He explored a range of contextual factors that might explain this shift, including the external political context, suggesting that 'state and national governments encouraged, or were at least complicit with, components of the transformation'.[6] Pierce's study gave only brief consideration to the subsequent Brennan and Gleeson Court eras[7] and none at all to the French Court. In 2015, it seems more than overdue for us to renew and extend Galligan's original focus on broad trends in the relationship between politics and constitutional law in Australia.

This gap in Australian scholarship seems even more striking when one considers the increasing richness of the literature in the United States on the relationship between constitutional law and politics. In 1957, American political scientist Robert Dahl published an article entitled 'Decision-Making in a Democracy: The Supreme Court as a National Decision-Maker',[8] which showed a striking parallel between the decisions of the United States Supreme Court and the substantive policy positions or preferences of 'law-making majorities' in the

2 Brian Galligan, *Politics of the High Court: A Study of the Judicial Branch of Government in Australia* (University of Queensland Press, 1987) 22.
3 *The Political High Court: How the High Court Shapes Politics* (Allen & Unwin, 1999).
4 *Judging Democracy: The New Politics of the High Court of Australia* (Cambridge University Press, 2000).
5 (Carolina Academic Press, 2006).
6 Ibid 236.
7 Ibid 257–88.
8 (1957) 6 *Journal of Public Law* 279.

United States Congress. The 'policy making viewed on the Court', he suggested in a Galligan-style realist vein, are 'never for long out of line with the policy views dominant among the law-making majorities of the United States'.[9] He concluded the United States Supreme Court 'is inevitably a part of the dominant national alliance'.[10]

In 1960, in a more historical vein, Robert McCloskey published a path-breaking work entitled *The American Supreme Court*,[11] which mapped the relationship between the United States Supreme Court's constitutional jurisprudence and broader political and historical developments in the United States. The lesson to be drawn from this history, McCloskey argued, was consistent with Dahl's findings: the Supreme Court according to McCloskey is a 'political institution' and behaves accordingly: it consistently adjusts its decisions to fit political developments and constraints.[12] The Court, McCloskey suggested, 'seldom strayed far from the mainstreams of American life'. He suggested it was hard to identify a single instance 'when the [Supreme] Court has stood firm for very long against a really clear wave of public demand'.[13]

More recently, this work by Dahl and McCloskey has been updated and enriched by the detailed historical analyses of Lucas Powe and Barry Friedman. In *The Supreme Court and the American Elite, 1789–2008*,[14] Powe demonstrates the connection between the opinions and priorities of political elites in America and key Supreme Court decisions. In *The Will of the People: How Public Opinion Has Influenced the Meaning of the Constitution*, Friedman provides a richly detailed account of the parallels between elite *and* broader public opinion and the decisions of the United States Supreme Court – all the way to the Roberts Court.[15]

This book attempts to fill this gap in the Australian literature – in both temporal and comparative terms – by bringing together leading Australian constitutional lawyers and political scientists to reflect on the relationship between the constitutional jurisprudence of the High Court of Australia and broader currents in electoral politics and public opinion in Australia.

Defining the boundaries of the small 'c' constitution is notoriously difficult. One approach is to define such norms in terms of their degree of de facto political entrenchment; another in terms of their centrality in defining the sources of, and limits on, government power; and another still on the connection between such norms and fundamental aspects of national identity.[16] In Australia, it is

9 Ibid 285.
10 Ibid 293.
11 (University of Chicago Press, 1960).
12 Ibid 261. See also G Rosenberg Comment at ibid 682.
13 Ibid 260.
14 (Harvard University Press, 2009).
15 See, eg, Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (Farrar, Straus and Giroux, 2009) 369: 'the long-run fate of the Roberts Court is not seriously in doubt; its decisions will fall tolerably within the mainstream of public opinion, or the Court will be yanked back into line'.
16 Rosalind Dixon and Eric Posner, 'Limits of Constitutional Convergence' (2011) 11 *University of Chicago Journal of International Law* 399.

impossible to develop a meaningful understanding of the capital 'C' *Constitution* without some form of attention to small 'c' constitutional norms. Core parts of the Australian constitutional system, such as the institution of responsible government, are not mentioned in the text of the *Commonwealth Constitution*. Common law traditions and norms governing the rule of law, and protecting individual liberty, are arguably equally important and lacking express recognition in the *Constitution's* text.

Contributors to this book consistently raise important and serious methodological questions for any study of the constitutional law-politics relationship: for example, what does it mean to talk about 'national' majority opinion in a federal system? Can we, against such a backdrop, talk meaningfully about national political currents or opinion without denying our status as a federal system? And if so, what role is there for state governments or state-level breakdowns in opinion in answering this question? Michael Coper, for example, in Chapter 3 discusses the 2013 decision of the High Court to invalidate the Australian Capital Territory's same-sex marriage law (on the grounds of inconsistency with federal law) and notes that, while it may not have 'contradicted national sentiment', it 'contradicted the majority view of the local legislature'.[17] He similarly notes the tension between national and state opinion on issues such as live-betting. In discussing the Dixon Court, Helen Irving notes that: 'In invalidating few Commonwealth laws, the Dixon Court may be counted as "majoritarian", but the relatively high rate of invalidation of state laws must also be taken into account. State governments have their own majorities and mandates'.[18] In their chapter on the Gibbs Court, Nicholas Aroney and Haig Patapan note that:

> In a federation such as Australia, there are at least two orders of government: the Commonwealth and the States. What if there are different governments at each level, and what if these governments reflect differences in public opinion across jurisdictions? Is the High Court being countermajoritarian or promajoritarian when it strikes down (or upholds) federal (or state) legislation on federalism grounds?[19]

Similarly, what do we think about the Commonwealth Parliament as a proxy for national majority opinion given that governments enjoy varying degrees of support in the House of Representatives and the Australian Parliament is bicameral?[20] John Williams, for example, discussing the Griffith Court, refers to the instability of political arrangements within the Commonwealth Parliament in its early years: 'The early parliaments were marked by division within the non-Labor forces and factions within Labor. Given these circumstances, it is difficult to isolate a majoritarian mood that is either counter to or in harmony with the High Court's pronouncements'.[21] During the period of the Griffith Court there

17 See Coper in Chapter 3 at p. 56.
18 See Irving in Chapter 10 at p. 199.
19 See Aroney and Patapan in Chapter 12 at p. 241.
20 Ibid.
21 See Williams in Chapter 5 at p. 84.

were 10 governments. 'The relationship over this period between the Court, the various governments, and parliament is complex given the shifting majorities and inherent instabilities of Australian politics'.[22] Similarly, Tony Blackshield notes that 'Isaacs became Chief Justice at a turbulent time in Australian political life', in which the Scullin Government faced both an extremely hostile Senate and became progressively internally divided.[23] In discussing the Duffy Court, Gabrielle Appleby also notes that politics at the time 'was divided and unpredictable'.[24]

Another question is what it means to talk about the federal 'government' as a proxy for public opinion in a system of responsible government, where constitutional norms require a separation between the executive and legislative majority? Fiona Wheeler, for example, argues that while the Chifley Government suffered a long line of defeats at the hands of the Latham Court, it is still not easy to classify the Court as counter-majoritarian or to argue that the Latham Court – 'in striking down elements of Labor's "new order" – was inevitably out of step with national sentiment, at least in all cases'. Instead, Wheeler suggests that an argument can be made that the key cases of the Latham Court, 'far from disrupting the will of a majority, actually reflected the mood of the times'.[25] Likewise, in writing about the Mason Court, George Williams and Paul Kildea note that while there was strong criticism of the Court centring on the notion that 'the Court exceeded its legitimate bounds by appropriating to itself a power to remake the law, particularly the *Constitution*',[26] it was far from clear that in handing down decisions such as *Mabo*,[27] or recognising an implied right to political freedom, the Court was acting contrary to *popular* opinion: polls at the time indicated that the public was divided on *Mabo*, with neither solid majority support for it, nor broad public opposition against it. Surveys conducted regarding rights protection also indicated that Australians felt that rights were not sufficiently protected and believed the courts should have the 'final say' in deciding upon issues of basic rights and freedom, suggesting a public in favour of enhanced legal protections of rights and comfortable with the idea that the courts might be the institution that makes binding decisions about them.[28]

Finally, various contributors discuss what it means to talk about 'popular opinion' when public opinion is often unstable, voters have limited access to information or knowledge on constitutional questions, and there are so few reliable public opinion polls or surveys. Appleby, for example, notes that during the Duffy Court era, '[p]ublic opinion as measured at the ballot box varied widely'; there existed 'deep political and public divisions over questions of economic regulation and its social impact, amplified by the pressures of the Great

22 See John Williams in Chapter 5 at p. 95.
23 See Blackshield in Chapter 7 at p. 118.
24 See Appleby in Chapter 8 at p. 142.
25 See Wheeler in Chapter 9 at pp. 171–2.
26 See George Williams and Kildea in Chapter 13 at p. 244.
27 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 ('*Mabo*').
28 See George Williams and Kildea in Chapter 13.

Depression'.[29] Williams and Kildea note the absence of any specific opinion polls on issues such as freedom of expression in Australia, let alone the Court's role in interpreting the *Constitution* so as to protect such a right, and on key issues that defined the Mason Court era.[30] On other issues, such as the Court's *Mabo* decision recognising common law rights to native title, the results of various public opinion polls were extremely inconsistent.[31] Similarly, in Chapter 16 on the French Court, Anika Gauja and Katharine Gelber note the divergent public responses to decisions such as *M70* ('*Malaysia Declaration Case*'):[32] many media commentators criticised the decision but two public opinion polls showed opposition to the government policy set aside by the Court. Those poll results, the authors suggest, may have been affected by 'question wording and survey methodologies'.[33]

In raising these questions and challenges, the contributors provide a rich range of different answers and perspectives on the law-politics relationship in Australian constitutional history. Three of the chapters in this book address these questions for the full span of High Court history. Chapter 2, by Russell Smyth and Vinod Mishra, addresses this question from a quantitative perspective. The authors measure the rate at which the High Court has invalidated legislation, comparing that with a variety of political factors. For lawyers, there will be obvious downsides to this kind of method of 'counting heads' – but the method is a core part of the American literature on this topic. The basic findings of Smyth and Mishra are striking from the perspective of subsequent, more qualitative contributions: they find marked differences between different eras on the Court in the rate at which federal legislation is invalidated and the rate at which legislation passed by the political party in power at the relevant time is invalidated.

Chapter 3, by Michael Coper, focuses on the relationship between the formal processes of amendment in s 128 of the *Constitution* and the direction of the Court's jurisprudence. Coper notes two important cases in which s 128 has been successfully used to override decisions of the High Court and bring about a greater alignment over time between public opinion and the High Court's constitutional jurisprudence: the 1977 amendment to create a mandatory minimum retirement age, which overrode the Court's 1918 decision requiring lifetime judicial tenure; and the 1946 amendment designed to overrule the Court's invalidation of a national pharmaceutical benefits scheme in the *First Pharmaceutical Benefits Case*,[34] by giving the Commonwealth power with respect to a wide range of social services. In later chapters, other contributors set out in more detail the history of these various failed amendments, as well as the use (or non-use) by the Commonwealth Parliament at various times of more ordinary means of

29 See Appleby in Chapter 8 at pp. 142–3.
30 See George Williams and Kildea in Chapter 13 at p. 256.
31 Ibid 255–6.
32 *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144.
33 See Gauja and Gelber in Chapter 16 at p. 319.
34 *Attorney-General (Vic); Ex rel Dale v Commonwealth* (1945) 71 CLR 237 ('*First Pharmaceutical Benefits Case*').

legislative override, particularly in the context of various common law or small 'c' constitutional decisions. In the context of amendment, Coper notes instances in which such attempts at legislative override of Court decisions have failed, including the well-known 1951 attempt by the Menzies government to pass an amendment to override the Court's decision in the *Communist Party Case*[35] to allow for the banning of the Australian Communist Party.[36] A more complicated set of cases discussed by Coper are those in which amendments have failed to pass at a national referendum, but where the High Court has nonetheless developed constitutional law in a similar direction: in some cases, this could be said to have reflected national majority sentiment (as evidenced in the relevant referenda), but in others to ignore national majority opposition to equivalent change by the formal process of amendment.

Chapter 4, by Andrew Lynch, focuses on key dissenting judges and judgments in Australian constitutional history, with a view to considering the link between dissent and internal versus external political dynamics. The internal political dynamics within the Court are a central force behind dissenting judgments, Lynch suggests, but there is clearly some connection to external politics – in terms of the degree to which the 'great dissenters' were appointed by governments seeking to give voice to a perspective other than that dominant on the Court during the relevant period.

The remainder of the chapters are divided into 12 distinct periods, which correspond to eras of different Chief Justices on the High Court. There are, of course, obvious difficulties with this kind of periodisation, as Sir Anthony Mason notes in the Foreword: for one, it takes the Court, rather than the government or political institutions, as the relevant focus of periodisation or analysis. For another, it ignores important sources of continuity between different eras on the Court, many of which are driven by the tenures of influential members of the Court other than the Chief Justice. Some form of periodisation is necessary, however, if one is to undertake this kind of multi-authored project. For some eras, various authors find, the Chief Justice has also been a reliable bell-weather for the current of High Court decision-making. In other eras, the Chief Justice may have only spoken for himself and not for a majority of the Court. Each of the chapters on specific Courts addresses this issue directly by identifying whether the relevant period is being studied in a 'weak' or 'strong' sense – as merely a nominal denomination of a particular time-period or as an era in which the Chief Justice was either influential on, or broadly in sync with, the decisions of other Justices.[37]

In exploring these different eras, some authors suggest there is little discernible relationship between the constitutional jurisprudence of the High Court

35 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 ('*Community Party Case*').
36 The decision is discussed in more detail in the chapters on the Latham and Dixon Courts (see Chapters 9 and 10).
37 Cf Theunis Roux, 'The Langa Court: Its Legitimofs and Legacy' [2015] *Acta Juridica* (forthcoming). See also the discussion in Mark Tushnet, *The New Constitutional Order* (Princeton University Press, 2003).

and broader political currents. Instead, they suggest, the dynamics driving the Court's jurisprudence were often far more internal than external. Blackshield, for example, notes that while 'Isaacs became Chief Justice at a turbulent time in Australian political life', perhaps the most significant factor shaping the jurisprudence of the Isaacs Court was the appointment of Sir Owen Dixon. 'Almost from the moment of his appointment', Blackshield suggests, Dixon was the 'intellectual leader' of the Court.[38] Together with Rich and Starke JJ, Dixon J was the author of key decisions, such as the *ARU Case*,[39] which overturned key policies of the Scullin government (such as its extension of the powers of the Commonwealth Conciliation and Arbitration Commission).[40] In the early years of the Barwick Court, Galligan likewise suggests that the Court was predominantly 'the Dixon Court in its approach and doctrines'.[41] Similarly, in writing about the Brennan Court, Patrick Emerton and Jeffrey Goldsworthy suggest that while the Court both 'consolidated' various changes wrought by the Mason Court and significantly expanded the *Constitution*'s protection of judicial authority and independence in quite 'activist' ways, these trends 'seem more plausibly explained by the intellectual influence of particular judges, rather than by external political circumstances', including the appointment of two new Justices to the Bench by the Howard Government.[42]

In writing about the Gibbs Court, Aroney and Patapan doubt whether there is any immediate connection between the Court's decisions and surrounding political understandings. Instead, they suggest, the Court is best seen as a political institution, only in a more fundamental rather than immediate sense: as an institution that is shaped by internal political processes, 'an important part of the machinery of government in Australia', and delivers decisions with clear political and 'policy implications'.[43] At most, they suggest, the Court is likely to be influenced by its immediate political context where that context directly threatens the Court's own institutional legitimacy. For the Gibbs Court, that meant 'consolidating – and defending – its political power and legitimacy' in the face of the controversy surrounding Murphy J and the public role played by Barwick CJ in the dismissal of Prime Minister Gough Whitlam.[44]

Others suggest a potentially closer relationship between constitutional law and broader political currents and understandings, but one that is highly complex and defies any ready classification of the High Court's jurisprudence as generally 'pro'- or 'counter'-majoritarian. In writing about the Knox Court, Anne Twomey suggests that: 'The Knox Court reshaped the federal system of government, conferring greater power on the Commonwealth' and in so doing 'supported the aims of federal governments of all political persuasions, but appeared to be

38 See Blackshield in Chapter 7 at p. 119.
39 *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319 ('*ARU Case*').
40 *Commonwealth Conciliation and Arbitration Act 1904* (Cth)
41 See Galligan in Chapter 11 at p. 204.
42 See Emerton and Goldsworthy in Chapter 14 at pp. 261–3.
43 See Aroney and Patapan in Chapter 12 at p. 242.
44 See Aroney and Patapan in Chapter 12 at p. 243.

acting contrary to the wishes of the people who rejected such changes when put to them in referenda'.[45] Twomey also notes the degree to which this shift was the product of a distinct confluence between political nationalism and legal conservatism on the High Court.[46] In her chapter on the Duffy Court, Appleby suggests that during this period '[d]eference to democratic institutions is evident in some areas but not others', and that 'on questions of federalism and the parliamentary/executive relationship, the Court adopted a deferential interpretation that allowed the relevant political actors to resolve difficult economic and social questions', whereas 'on questions of government encroachment on the rights of minorities and vulnerable individuals, the Court stepped into the fray'.[47]

In the context of the Latham Court, Wheeler suggests that while 'doctrinal factors played an important part' in the decisions of the Latham Court, they did not 'lead inexorably to the results in question'.[48] Rather, for the wartime cases of the Latham Court, Wheeler suggests that the Court 'became part of the national project to defeat the enemy, explicitly interpreting the *Constitution* to support the government's carriage of the war';[49] and for various decisions invalidating Labor's post-war initiatives, 'conservative political resistance to socialism' seems to have been an important factor.[50] At the same time, Wheeler notes that the Latham Court's constitutional decision-making was also characterised by stark contrasts: 'deference to parliament and the executive during World War II followed by a vigorous approach to judicial review in the post-war period that saw the demise of key parts of the Chifley Government's policy platform'.[51] Irving, in her chapter on the Dixon Court, argues that: 'the Commonwealth government in power throughout the Dixon era was rarely displeased'.[52] Indeed, she suggests 'the conservative values of the Court appear to have aligned with the majority conservative culture of the time'.[53] At the same time, Irving notes the clear exception to this pattern provided by the *Communist Party Case*,[54] a decision decided during the Latham Court period, but 'led by Dixon', which 'demolished the centrepiece of [Menzies'] cherished plan to rid Australia of communism'.[55]

Galligan, in surveying the 'second phase' of the Barwick Court, suggests that the Court carried out its constitutional role 'broadly in accord with the overall federal mood'.[56] Despite the gap in the political views of Barwick CJ and some of his fellow Justices and the Labor Government under Whitlam, '[t]here was no repeat of the Chifley era of "Labor versus the *Constitution*", when the

45 See Twomey in Chapter 6 at p. 114.
46 See Twomey in Chapter 6 at p. 103.
47 See Appleby in Chapter 8 at p. 143.
48 See Wheeler in Chapter 9 at p. 172.
49 See Wheeler in Chapter 9 at p. 177.
50 See Wheeler in Chapter 9 at p. 176.
51 See Wheeler in Chapter 9 at p. 159.
52 See Irving in Chapter 10 at p. 180.
53 See Irving in Chapter 10 at p. 199.
54 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 ('*Communist Party Case*').
55 See Irving in Chapter 10 at p. 200.
56 See Galligan in Chapter 11 at p. 214.

High Court gutted the nationalisation program of the Labor Government and vetoed its more centralist legislation'.[57] At the same time, Galligan notes certain clear exceptions to this pattern in the areas of s 92 of the *Constitution* (and the Court's laissez faire reading of guarantee of freedom of interstate trade and commerce) and the interpretation of tax legislation.[58]

In the more modern era, Williams and Kildea suggest, in writing about the Mason Court, that: 'Even if its critics are right, and the Court did exceed is institutional bounds, it may be that it did so in a way that developed the law in conformity with community attitudes. It may even be that public opinion supported the Court moving beyond orthodox understandings of its role'.[59] At the same time, the chapter notes the degree to which there is limited evidence on what community attitudes were on many of the issues facing the Mason Court, and that there is insufficient evidence to conclude that the Mason Bench acted either contrary *or* in line with popular majorities. In discussing the Gleeson Court, Rosalind Dixon and Sean Lau argue that the Gleeson Court was 'in a very immediate sense a court of the Howard era', with five of the Justices who served with Gleeson CJ (including Gleeson CJ himself) appointed by Howard; and 'many key capital "C" Constitutional cases during the Gleeson Court era . . . upholding the politically conservative policies of the Howard Government'.[60] At the same time, the chapter argues that these decisions seemed far more the 'product of a commitment on the part of a majority of the Court to a distinct form of *legal*, rather than political conservatism'[61] – a small 'c' conservative legal philosophy that favoured judicial modesty or restraint, rather than strict textualism or originalism and deference to the Commonwealth Parliament. Further, where this form of legal conservatism clashed with Howard-style political conservatism – as it did in the migration area – it was this form of legal rather than political conservatism that tended to take precedence.

Similarly, in writing about the French Court to date, Gauja and Gelber note that: 'While some of the Court's decision-making can be analysed in a majoritarian versus countermajoritarian frame, other components cannot', and moreover that '[t]hose cases that are suited to this frame diverge in the sense that the definition of the "majority" at play differs considerably, with public opinion, legislative majorities, elite commentary, and partisanship all playing a role'.[62]

In drawing these connections, various authors explore two broad mechanisms as potential sources of alignment or non-alignment between the Court and broader political currents, in addition to amendment or legislative override: first, the process of judicial appointment; and second, the Court's self-conscious consideration of the broader political context.

57 See Galligan in Chapter 11 at p. 206.
58 See Galligan in Chapter 11 at pp. 214–16.
59 See George Williams and Kildea in Chapter 13 at p. 245.
60 See Dixon and Lau in Chapter 15 at p. 284.
61 See Dixon and Lau in Chapter 15 at p. 285.
62 See Gauja and Gelber in Chapter 16 at p. 326.