AUSTRALIAN LAW JOURNAL

BOOK REVIEW

K L Hall & Ors (eds) *The Oxford Companion to the Supreme Court of the United States*, Oxford University Press, New York and Oxford, 1992, vi-xi Introduction; xii-xx Directory of Contributors; 1-954 Text in alphabetical order; 955-964 Constitution; 965-971 Nominations and appointments of Justices; 972-977 Appointments by Presidential Term; 978-987 Judicial succession; 988-990 Trivia and traditions; 991-1009 Case index; 1010-1032 Topic index. Recommended retail price $75 (hardcover).

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This is a fascinating book about what, for lawyers, is a most fascinating institution. Its editor-in-chief, Professor Kermit Hall, is Professor of History and Law at the University of Tulsa. Many distinguished United States lawyers contributed entries to the text, including some who are well known in Australia. That legal doyen, Erwin Griswold, former Dean of the Harvard Law School, adds lustre to the more than 350 contributors. Most of them are professors of law or of political science. Some are attorneys.

The format is simple. It follows that of other *Oxford Companions.* Subjects are arranged in strict alphabetical order. There is excellent cross-referencing within the individual entries. The entries range from case names, through subject matters of legal topics, the names of judges who have served and others who, although nominated, failed to secure confirmation in the Senate. The book is a large tome. But considering the history of the Court, which extends over 200 years, the number of the leading cases which are found in the 500 volumes of the *United States Reports* and the close inter-relationship of the Court and American history, it is truly remarkable that so much has been packed into a single book.

As with other productions in the Oxford series, the printing and presentation is superb. The cross-referencing by topics, in particular, is extremely thorough. This will make the text of use as a source book for comparative law material in other countries of the common law, including Australia. Perhaps for the next edition the

editors might consider breaking down the topic index into names and subjects. That would make it easier to scan topics to provide an easy path into the world of the Court's jurisprudence without the diverting interruption of the names of so many famous people who have been associated with the Court.

For those who just want to browse, the book yields countless hours of pleasure and fascinating detail. There is also enough trivia to break the spell of the serious business with which most entries, like the Court's docket, are concerned. Thus immediately following the entry on *Gwinn v United States* 238 US 347 (1915), a case concerning statutory voting restrictions based ostensibly on literacy, but actually directed at race, one stumbles over the entry on "gymnasium". As described, the Supreme Court's gym is sometimes called "the highest court in the land" (because of its location on the top floor of the Supreme Court building. There is a single shower, and it is apparently used at different hours by men and women.

The substantive entries all bear the name of the applicable author. They also appear to show stern editorial discipline. Indeed, they are models of brief exposition. To some of them are attached references to texts for further reading.

It is easy to look up the famous cases to find a potted history of how they came about, what they held and what followed them. *Marbury v Madison* 1 Cranch (5 US) 137 (1803) is possibly the most famous of the early cases, affirming the power of the Supreme Court in judicial review. Decided another way, the case would have changed American legal history. In this entry, and elsewhere in the text, there is appropriate reference to the colonial background and the common law legacy of the United States of America. In a sense, *Marbury v Madison* was not such an unusual assertion of curial power. Earlier and similar action by the Privy Council, in striking down colonial statutes, was fresh in the mind of the American judicial patriots.

Another leading decision, *Dred Scott v John F A Sandford* 60 US 393 (1857), upheld the legality of slavery. It helped to precipitate the Civil War, and later the 13th and 14th amendments to the US Constitution. In its entry, the decision is described as "the worst ever rendered by the Supreme Court". To those sceptical about judicial

power, the case demonstrates the dangers of too much enlargement of power of the unelected and unaccountable branch of government. The entry on the decision takes the reader to the author of the opinion, Justice Roger Taney. The visage which illustrates his entry portrays him for what he was: a prominent and aristocratic tobacco growing lawyer. But a great jurist as well, it seems. Despite *Scott*, Taney repeatedly makes it into the category of the "giants" of the United States. Indeed, it was Taney's brilliant craftsmanship which made his judgment in *Scott* so powerful.

There are also all of the recent decisions of note. Those Australian lawyers who have watched with fascinating the change of the Australian common law between *McInnes v The Queen* (1979) 143 CLR 575 and *Dietrich v The Queen* (1992) 67 ALJR 1 (HC) will turn to the famous story of *Gideon v Wainwright* 372 US 336 (1963). The Supreme Court appointed a prominent Washington lawyer, Mr Abe Fortas to argue the case which concerned the right to legal counsel in criminal trials. The sequel to the case is also told. At his retrial, Gideon was represented by appointed counsel. The latter uncovered new defence witnesses who discredited the prosecution witnesses. The second jury acquitted Gideon.

The entry on *Roe v Wade* 410 US 113 (1973), the decision of the Court on abortion, covers nearly five columns. It examines the aftermath of that opinion up to 1989. *Webster Reproductive Services* 492 US 490 (1989) also secures it own entry.

Tiring of substantive law, the reader can quickly discover the fascinating stories about the lives of the justices appointed, and rejected for appointment to the Court. Mr Gideon's lawyer, Abe Fortas, is an interesting case in point. The entry on him is very candid. Fortas was President Lyndon Johnson's lawyer. Wanting him on the Supreme Court, Johnson found another posting for Justice Arthur Goldberg, who had served less than three years. As successor to the great Justice Felix Frankfurter in the "Jewish seat", it was expected that Goldberg would stay longer. But he was "manoeuvred off" to make place for Fortas. Goldberg's post-Court career was described as "ignominious". So, for that matter, was that of Fortas. An extremely able man and a splendid advocate, he was forced to resign when embarrassing details

of his continuing association with President Johnson came out during the consideration of his nomination to succeed Earl Warren as Chief Justice.

The entries of the other great, and not so great, justices make fascinating reading because of their compressed detail and generally terse style. Oliver Wendell Holmes Jr (who served as an Associate Justice from 1902 to 1932) held the view that judges decided cases first and found their reasons afterwards. Their actual grounds for decision were, in his opinion, based on the "felt necessities" of their time as much as on precedent or purely logical calculation. To that extent Holmes recognised that judges, consciously or unconsciously, expressed the wishes of their social and economic class. He was a judge much affected by Darwin's evolutionary theory and notions of natural selection. Although many of his decisions poke boldly of the liberties of individual Americans, others seem more surprising by today's standards. Thus *Buck v Bell* 274 US 200 (1927) saw him writing for a nearly unanimous Court to uphold the eugenic sterilisation law of Virginia. Typically, he did so in vivid language which today we would deplore ("Three generations of imbeciles are enough").

There are many personalities whose careers are remembered in this book and who are probably well known to American lawyers but unknown, or virtually unknown, in Australia. Most will have but a dim recollection of William Howard Taft, the only man who served both as President and Chief Justice of the United States. Taft was serving as a Federal Judge when President McKinley recruited him to his Administration. Eventually, and rather reluctantly, Taft contested the 1908 Presidential election for the Republicans. He became a somewhat unhappy President. It is suggested that he appointed as Chief Justice a man not likely to last long and whose empty seat he hoped to fill (Edward White). Annoyingly enough, White lived long. It seemed that Thomas Jefferson's famous lament would be borne out. Speaking of the Supreme Court Judges, he had bitterly observed that "few die and none resign". Eventually, however, the central seat fell vacant. Taft was nominated and confirmed in a day. But as Chief Justice he was better known for his departmental innovation than for his legal doctrine. He resented dissenters.

The subject topics in the *Companion* provide a wealth of short legal analyses and references to authority. One interesting entry, for example, provides an excellent exposition of the history of approaches of the Supreme Court to constitutional interpretation. Another splendid note is on dissents. Civil law judges are often shocked by the availability - and still more by the tone - of judicial dissents in the common law. But even Australian and other Commonwealth judges are frequently amazed by the apparently personal and highly combative tone of the judicial dissents of the United States Supreme Court. Yet attempts to suppress dissent have never succeeded. Some Chief Justices, notably Earl Warren, worked long and skilfully to achieve unanimous decisions in vital cases. Perhaps the most important was *Brown v Board of Education* 347 US 483 (1954). It began the long haul of the American polity to legal equality for people of all races enforced by the courts. Other Chief Justices have been less successful in securing unanimity, including the present Chief, Rehnquist CJ. But, in an entry on opinion style, the latter emerges, with Antonin Scalia J as repeatedly the strongest writer of the Current Supreme Court:

> *"Their opinions delight in metaphor; they are piquant, witty and sometimes biting. From all that one gathers though, these qualities emerge when the Justices have the time to edit and rewrite the works of their clerks. What is more usual are the tendencies that all the modern Justices' opinions show: A plodding pedantic style that unnecessarily emphasises minor points and does not stop when the job is done."*

Styles change of course. Marshall wrote in the grand style of the 19th Century - "Orotund, divine-sounding, inherently law-giving". The leading judges of this century are, according to the entry, Holmes and Robert H Jackson. Yet Judge Richard Posner has criticised Holmes' "use of rhetorical devices in preference to close legal reasoning" . Similarly, Justice Cardozo has been criticised by Dean Griswold as writing "nice words but essentially meaningless". Frankfurter, for whom English was a second language, fell under the spell of ornate words. Black and Douglas used bold,

no nonsense styles. They were attacked for their pains by scholars as "result oriented" and "technically deficient". We have had such accusations in Australia, and not only in the past.

Why should we bother to buy this book in Australia in 1993? As a history of a court of unequalled power, the book displays a great deal of information which is easy to use as a reference and engaging simply to leaf through. Because the Australian Constitution was so heavily influenced by that of the United States, there are many common themes in our country which find reflection in the United States, and thus in the decisions of its highest court. There was a time, early in this century, when the Founding Fathers of the Australian Constitution were familiar with, and often cited, decisions on the United States counterpart provisions. Dixon and Evatt corresponded with Frankfurter. But then came the mid-century when the legal bonds with the United States seemed less fruitful. The citation of American and other foreign jurisprudence by the High Court of Australia, and other Australian courts, diminished. Now it is rising again. So again Australian lawyers must look to the American analogues. An easy port of entry to begin the search is this splendid compilation. For the non-lawyer, political scientist, social psychologist or simply informed citizens interested in the fascinating work of government, the book is simply written and most clearly presented.

There is another reason why Australian lawyers will find this text useful. It relates to what I have just said. Recent developments of constitutional law in Australia suggest that notions of implied fundamental rights formerly dismissed with a joke (see *Miller v TCN Channel 9 Pty Limited* (1986) 161 CLR 556, 579) must now be taken seriously. See *Australian Capital Television Pty Limited & Ors v The Commonwealth* (1992) 66 ALJR 695 (HC) and *Nationwide News Pty Limited v Wills* (1992) 66 ALJR 658 (HC). As well *fin de siècle* ruminations upon the Australian Constitution and its operation require of the informed lawyer and citizen a better knowledge of other constitutions. Where would one find a more appropriate place to start the search than with the oldest written democratic constitution continuously in

operation in the world today: that of the United States of America? The guardian of that constitution over more than two centuries has been the Supreme Court of the United States. True, it has made mistakes. The chief of them are faithfully recorded and critically epitomised in this work. But where the democratic branches of government have sometimes failed in the United States, the Supreme court has usually filled the vacuum; solving intractable problems such as electoral gerrymandering, racial inequality, abuses of police power and much else besides.

De Tocqueville, in an assessment written soon after the birth of the United States, declared himself to be unaware of any nation on the globe which had "hitherto organised the judicial power in the same manner as the Americans ... A more imposing judicial power was never constituted by any people." The fulcrum of that power was, and is, the Supreme Court of the United States. This book makes that institution more accessible. Even if Australian lawyers cannot quite share the veneration for the Supreme Court or for that matter the calumny that is heaped upon it in the United States, they can recognised in it an enduring contribution to the jurisprudence of the common law and a great exemplar of the Federal system of government. Likewise, it is a stimulus to our own thinking on analogous constitutional and legal problems because of the great similarities which the Australian legal tradition shares with that of the United States.

Unreservedly, I commend this book. Would that we could persuade Oxford University Press to invest for our much smaller legal market in an equivalent volume on the High Court and other courts of Australia. They too have a tale to tell of landmark cases, important principles and fascinating personalities. If one looks at the photographs and portraits of the jurists in the United States one can see a reflection of their antipodean equivalents. Earnest and upright. Dour and merry. Bold spirits and timorous souls together. And hardworking and honourable for the most part. The temporary occupants of the judicial seats change. But institutions that uphold the rule of law endure, as this book vividly demonstrates.

M D KIRBY