

REVIEW OF *THE CAMPAIGN AGAINST THE COURTS: A HISTORY OF THE JUDICIAL ACTIVISM DEBATE* (TANYA JOSEV, FEDERATION PRESS, 2017, ISBN 9781760021436)

SUSAN BARTIE*

Courts ... are the distinctive institutional locus of lawyers' activity, their decisions the distinctive core of lawyers' knowledge, and their perceived independence is the main source of whatever perceptions there may be of the law's authority and autonomy.¹

Tanya Josev's monograph, *The Campaign against the Courts*, is a rich historical examination of the social meaning of the term 'judicial activism' within the United States and Australia. It is a new comparative study of the many actors and contingencies that shaped public perceptions of the constitutional role of courts in these democracies over the last century. And it is a timely reminder of the symbolic and political significance of courts to a nation. In earlier ages governments and rulers used the composition, practices and even costume of the judiciary to signal a country's growing independence, strength and breaks with religious ties.² In contrast Josev documents how politicians and the media invoked 'judicial activism' as a derogatory label in their conservative campaigns. Rather than lauding the judiciary as bastions of the rule of law, these critiques condemned 'activist' judges for their alleged elitism and for threatening the democratic fabric of a nation. In essence Josev's work is a fascinating comparative account of the judiciary's complex role in the culture and history wars.

Arranged in two parts, Josev begins with an analysis of the origins of the term 'judicial activism.' She examines how US historian Arthur Schlesinger in *Fortune* magazine settled on this term to describe US Supreme Court judges who demonstrated a preparedness to strike down legislation. He distinguished this group from judges who showed a willingness to uphold legislation, who he identified as 'champions of self restraint'. Despite Schlesinger's careful study, including interviews with judges and some American legal realists, Josev explains that following publication both academics and judges condemned his categorisations. The problem, according to Josev, was that Schlesinger's categorisations focused on outcomes rather than methods. He smoothed over or ignored cases that contradicted his thesis and overlooked the way that his categorisations were inconsistent with some of the judge's existing alliances.

Schlesinger was a historian not a lawyer. Josev suggests that his lack of legal training, failure to engage with judicial method or conduct rigorous empirical analysis meant that his categorisations were overly simplistic and ultimately meaningless. Josev's history demonstrates that instead of providing new insight into judicial practices, Schlesinger created a catchphrase that then became a tool for condemning the judiciary. She explains how Nixon, Reagan and others in the US enlisted the phrase, using it as a

* Faculty of Law, University of Tasmania, Private Bag 89, Hobart, Tasmania, Australia, 7001.
Email: susan.bartie@utas.edu.au

¹ Robert W Gordon, 'Are Lawyers Friends of Democracy?' in Scott L Cummings, *The Paradox of Professionalism: Lawyers and the Possibility of Justice* (Cambridge University Press, 2011) 31, 48.

² Rob McQueen, 'Of Wigs and Gowns: A Short History of Legal and Judicial Dress in Australia' (1999) 16(1) *Law in Context* 31, 31–44.

slogan to suggest in different ways that judges and cause lawyers in the 1960s onwards formed an elite alliance that upheld the interest of marginalised groups at the expense of the majority.

The second half of *The Campaign against the Courts* is devoted to the Australian experience. Josev expertly weaves together a comprehensive analysis of the major judicial cases along with political, journalistic and scholarly debate that deployed the ‘activist terminology’. She explains that even though many High Court decisions throughout the 20th century possessed the US ingredients that provoked ‘activism’ charges, it was the Mason era and the High Court’s decision in *Mabo*³ that inspired Australian use of the term. By exploring the commentary and different uses of ‘activism’ and responses to it by both the judiciary and academy, the book provides new insights into modern Australian politics. By collecting together the major voices for and against the charge of activism, Josev also provides a strong foundation for understanding the debate’s social significance.

Josev’s point is not to defend a particular brand of judging or to provide better descriptors. She identifies the contours of the campaign against the courts and suggests that the campaign is misguided. She does not, however, suggest that courts are beyond scrutiny or criticism. Instead her reader is left with the sorry knowledge that much of the public debate about the role of courts in the 20th century has been meaningless. The casualty is not so much the courts but Australian and US citizens. Her work confirms once again that in contemporary politics, the end — gaining political power — always justifies the means. The label ‘judicial activism’ has become yet another tactic within the game of professional politics in liberal democracies. The terms of the political debate obscure, rather than elucidate, the central issues.

Josev’s immensely readable work demonstrates how historical approaches can provide penetrating accounts of the role of law within society. By concentrating on a part of law that has captured the imagination of the public and politicians, Josev’s book reveals how the culture and political dynamic within the United States and Australia play a defining role in creating the judiciary’s legacy. It is a model contribution to historical law and society scholarship. It therefore seems fitting that this book is released in the same year that we are presented with a collection of work of one of the great US legal historicists: Robert Gordon.⁴ Gordon has contributed vitally to the foundations of this field in the United States. In the introduction to Gordon’s collection he explains that all of the essays, written over the course of his career, ‘make some version of the same point: that the historicised past poses a perpetual threat to the legal rationalisations of the present’.⁵ In the same vein, by demonstrating that the meaning of ‘activism’ is dependent upon social and historical conditions, Josev challenges current political rationalisations of the judiciary. In so doing she demonstrates the value of historicism to rational debates and discussions of the role of law in Australia and the need for more Australian works of this kind. It is hoped that Josev’s work will demonstrate the limitations of the analytical tradition and encourage an expansion of this field in Australia.

³ *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

⁴ Robert W Gordon, *Taming the Past: Essays on Law in History and History in Law* (Cambridge University Press, 2017).

⁵ *Ibid* 5.

Josev's book should be of great interest to public law and jurisprudential scholars as well as political scientists and historians. It is a valuable resource for teachers of legal reasoning or introduction to law and I have already put it to use in a legal history subject. In fact, both academics and the general public alike should read it. Josev is a historian and as Tom Griffiths recently explained:

Historians generally don't try to hide behind jargon or intimidate others with professional bullying. They aim to give voice to common experience and seek to communicate with the widest audience.⁶

It is perhaps for this reason that Josev may succeed where legal scholars have failed, by mounting a challenge to the political campaign against the courts that may capture the public imagination.

I particularly welcome Josev's examination of the legal academy's role in both the political debate and in encouraging new approaches and explanations of judicial reasoning. I hope that, in future works, this component of the book can be widened and deepened, perhaps through broader considerations of the extent that Australian legal academics have cast themselves as public intellectuals and educators of the public. A further companion work might also consider the way that many Australian law professors have, to put it in the words of Laura Kalman, 'kept the faith in ... the ability of courts to change society for what judges believe is the better'.⁷ In sum, *The Campaign against the Courts* is an enjoyable, thought provoking and very welcome addition to Australian legal history.

⁶ Tom Griffiths, *The Art of Time Travel: Historians and their Craft* (Black, 2016) 4.

⁷ Laura Kalman, *The Strange Career of Legal Liberalism* (Yale University Press, 1996) 4.