

Australia just got one step closer to a High Court selected on ideological grounds

Keep your eye on Amanda Stoker. The new assistant minister to the attorney-general has some big ideas about the future of Australian justice.



Scott Morrison's pre-Christmas ministerial shuffle has passed without much notice — unsurprising given that almost nobody in the country would be able to name any of the affected MPs. A bit of excitement in the Twitterverse about Alan Tudge being sent to education to underline the government's contempt for that sector, but that was about it.

For the aficionados, however, there was one minor elevation on which a marker should be placed. Queensland LNP Senator Amanda Stoker, who was given George Brandis' Senate seat when he retired in 2018, has risen from the backbench to the role of assistant minister to the attorney-general.

Stoker is what the media like to call a “firebrand”, and she has noisily established herself as an up-and-coming member of the religious right wing of the Coalition. She is anti-abortion, anti-euthanasia, anti-transgender and considers sexuality to be a “choice”. You get the idea.

In June, Stoker got national attention for drawing a crude parallel between the George Floyd murder and the Queensland government's COVID-19 lockdown rules, saying that Premier Annastacia Palaszczuk had her “knee on the throat” of local businesses.

In her new junior role, Stoker will not have any material power, but she will have a platform for pushing her ideological agenda.

Part of that agenda was revealed in a speech Stoker gave in June to the ultra-conservative Samuel Griffith Society (where Institute of Public Affairs interns get to wear long trousers and shout “Hurrah!” at each other) in which she gave clear voice to a cherished desire of the far right: to overtly stack the High Court with conservative appointees.

The US religious right has been assiduous for many years in its plan to take control of America's social fabric by filling the Supreme Court with judges who share its convictions. By the chance that Donald Trump got to appoint three judges in four years, they've achieved a 6-3 split between conservatives and "liberals".

Trump has been left disappointed by his appointees' failure to ignore the law and install him as president-for-life, but the big ideological battles are yet to come, in particular over whether the court will overturn the 1973 pro-choice decision in *Roe v Wade*.

Stoker is a big admirer of Trump's achievement, and is explicit about her wish to replicate it here. She has selected her target — a High Court decision that is anathema to the conservative mind — as the catalyst for her call to arms.

The case is that of Daniel Love and Brendan Thoms, two men of Aboriginal descent who were not Australian citizens. The High Court by a 4:3 majority earlier this year determined that Aboriginal Australians in their position cannot be "aliens" under Australian law and therefore cannot be deported.

The majority's reasoning was based on an extension of the logic of *Mabo* — that Aboriginal people's connection to Australia predates and transcends English colonisation and all that has followed, such that it is a nonsense to suggest that they could ever be alien to this land.

That made Stoker cross-eyed with anger, as it did the whole conservative right. She considers it "judicial activism", the putting of words into the constitution that the founding fathers did not contemplate.

That identifies the battle ground for bench-stacking — the contest between "activist" and "originalist" judges, the same as in the US. The conservative argument, promoted by Stoker, is that what we want are judges who won't rule according to their personal moral codes, politics or preferences, but who will just do as the express language of the constitution says. If the constitution gives bad law, then it can be changed by referendum. In the meantime, judges should apply it as it was written.

Accordingly, Stoker said in her speech, conservatives need to get their act together and find judges for the High Court who can be relied upon to be strictly black letter. It'd be a quicker process here than in America, because our judges must retire at 70 (and there are only seven of them).

The originalist argument is both disingenuous and specious. Disingenuous because it's a cover for the true agenda, which is purely ideological. And specious because the law does not exist in a moral void.

Stoker is entitled to her view that the Love/Thoms decision was wrong; [as I wrote at the time](#), the minority opinions were solidly argued and there is no clear solution to the problem of unceded Aboriginal sovereignty. However, her opinion on that subject is no more rooted in what the framers of the constitution thought than that of the majority judges.

The fact is, the constitution said bugger all about Aboriginal people, except to confirm that they weren't to be counted among the human population or have any rights. It gave the Commonwealth power over "aliens", who it didn't define. The founding fathers would have never considered that the scenario of Love/Thoms could ever even arise.

Because the constitution treated Aboriginal Australians as non-people, it offers no assistance to present-day judges in determining how their unique status reconciles with the law. Whatever answer our courts come up with will involve value judgements. Any pretence otherwise is silly.

Stoker wants something we should never have: a judiciary selected on ideological grounds. Her wish is for the opposite of what she claims. Keep an eye on her.

ABOUT THE AUTHOR

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