

American Constitutional



Fresh from a year in Harvard, Associate Professor Helen Irving reflects on the marked difference in status the Americans afford their constitution compared to the way we see our own. Story by **Fran Molloy**.

For Associate Professor Helen Irving (PhD '87, LLB '01), holding the Chair in Australian Studies at Harvard University for a year was not only a great honour, but also an opportunity to delve deeper into her fascination with constitutional law, in the heart of the world's largest academic law library.

In taking the Harvard chair, she followed in the footsteps of many illustrious Australians, including Manning Clark, Gough Whitlam (BA '38, LLB '46, DLitt '81), Geoffrey Blainey, and Emeritus Professor Leonie Kramer (MA '89).

Professor Irving returned earlier this year from Harvard to the University of Sydney's Faculty of Law, where she teaches several constitutional law subjects and is the director of the Julius Stone Institute of Jurisprudence.

"I'm really interested in questions about how constitutions acquire legitimacy as sources of authority in their own right – and how they replace personal, religious or other forms of traditional authority," she explains.

She adds that this is an enormously interesting time to study constitutional law. "Around three quarters of all the world's constitutions have been written in the last 20 years," she says.

profile: Helen Irving (PhD '87, LLB '01)

Her latest book, *Gender and the Constitution*, will be released in the US later this year.

Her own journey to become an expert in constitutional law has taken a winding path – but the various qualifications that led her to her current position could not have been planned better, feeding as they do into the heart of this specialist branch of law.

Professor Irving holds four degrees. Her initial degree, a BA with first class Honours in politics at Melbourne University, earned her the Dwight Prize in Political Science.

She followed this with a scholarship year at the University of Lausanne in Switzerland, and then completed a Master of Philosophy in Social Anthropology at Cambridge before completing a PhD in History and an LLB, both at Sydney.

Professor Irving taught politics for many years and remarks that the strong intersection between constitutional law and Australian politics piqued her interest in constitutional history.

“At the end of the 19th century, the actual process of framing the Australian constitution was intriguing – how did the Australian people agree upon what they would write and accept as the legal authority under which the Australian nation would be created?”

Professor Irving was heavily involved in the republican campaign leading up to the 1999 Australian republic referendum, and then in the 2001 Centenary of Federation. She was awarded the Centenary Medal in 2003, for services to the Centenary of Federation.

In March this year she delivered on campus the inaugural lecture for the returning Harvard Chair, taking the opportunity to reflect on the similarities between the US and Australian constitutions – and the different roles they hold within each national culture.

“The framers of the Australian constitution copied a lot from the American constitution, particularly with respect to the federal system and the judicial system,” she says.

Despite those similarities, she says that the two constitutions differ widely in their cultural status and their relationship to national identity.

“We don’t revere our constitution, in Australia,” she says. “Most Australians haven’t read the constitution and most have probably never even seen it.”

She sees the US as a very textual culture, which understands and reveres the power and authority of the word in a way that Australia doesn’t.

One recent news event that has put the spotlight on constitutional law has been the focus on the controversial case of David Hicks, held in Guantanamo Bay until his 29 May return to Australia and tried as an unlawful combatant by the US Government.

“From the perspective of future history, it will be impossible to disentangle the legal process from the political climate surrounding the federal government and the Bush administration,” she says.

She believes that there has been significant damage caused by processing people in Guantanamo Bay, specifically to avoid engaging the protections of the US constitution.

“Both in the US and in Australia we have to be very careful about the growth of unchecked executive power.

“Looking back, I think that constitutional historians will see the Hicks case as a worrying example of the growth of executive power and the way in which constitutions with otherwise admirable and strong bills of rights can be set aside for a certain political goal,” she explains.

“It’s a sad day for those who believe in the authority of constitutions.”

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