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ARTICLES

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CONTENTS

Administrative Functions of Implementation, Control of Administrative Decisions, and Protection of Rights <i>Ricardo Perlingeiro</i>	1
The <i>Engineer's Case</i> Centenary: SCOTUS and the Origins of Australia's Scabrous Constitutional Signature <i>Benjamin Franklen Gussen, Sahar Araghi</i>	27
Apportionment, Allegiance, and Birthright Citizenship <i>John Vlahoplus</i>	107
A Structuralist Concept of the Rule of Law <i>Alani Golanski</i>	119
Law as a Language, Law as an Art: Reflections on James Boyd White's <i>Keep Law Alive</i> <i>H. Jefferson Powell</i>	155
Justice Holmes and the Question of Race <i>Thomas Halper</i>	171

ADMINISTRATIVE FUNCTIONS OF IMPLEMENTATION, CONTROL OF ADMINISTRATIVE DECISIONS, AND PROTECTION OF RIGHTS

Ricardo Perlingeiro*

ABSTRACT

This essay includes a comparative analysis of the traditions of administrative law in Latin American and their impact on the contemporary scene and trends in the general orientations of its administrative justice systems. This analysis is limited to Latin American countries of Iberian origin under the jurisdiction of the Inter-American Court of Human Rights (“I/A Court H.R”). The method followed by the author is to point out the roles attributable to the administrative authorities and to attempt to identify a distinction in Latin America between the “administrative function of implementation”, “control of the legality of administrative decisions” (unrelated to any adjudicative function) and the “protection of rights” (by means of an adjudicative function) while examining their historical genesis and possible future trends. From that perspective, the text discusses certain administrative powers, such as disciplinary or other regulatory powers, and their forms of concrete application; the prerogatives and instruments of the authorities and of their decision-making employees in the exercise of the functions of implementation; the control of administrative decisions by those authorities themselves and by external bodies; and judicial and extrajudicial protection of rights against administrative decisions. The author concludes that Latin American administrative law, despite the fact that its civil-law substantive roots have always coexisted with judicial review typical of common law, is currently tending, on the one hand, to approximate the U.S. model of administrative adjudication and, on the other, to adapt to I/A Court H.R case law with respect to the administrative function of implementation in harmony with the fundamental right to good administration which, combined with a critical re-examination of diffuse control of the legality of administrative rules in court, would safeguard the true role of adjudicating bodies (administrative authorities or courts) in their function of protecting individual rights for the sake of more fair and equitable administrative justice.

KEYWORDS

Latin America, Comparative Law, Administrative Justice, Courts

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CONTENTS

I. INTRODUCTION	3
<i>A. Retrospective Bases for a Comparative Study.....</i>	3
1. <i>Is Administrative Law Based on a Civil Law System Compatible with</i> <i>Judicial Review Typical of Common Law?.....</i>	3
2. <i>Administrative Due Process Clause and Judicial Deference</i>	4
3. <i>Latin America’s Search for Its Own Identity for Implementations,</i> <i>Control of Decisions and Adjudications</i>	5
<i>B. Prospective Bases for a Comparative Study</i>	6
1. <i>The Influence of the I/A Court H.R. for New Latin American</i> <i>Administrative Law.....</i>	6
2. <i>Approximations of Latin American Law with the “Administrative</i> <i>State” in the United States.....</i>	7
II. ADMINISTRATIVE IMPLEMENTATION FUNCTIONS	8
<i>A. Individual and Collective Dimensions of Implementation Functions</i> <i>8</i>	
<i>B. Political and Non-Political Executive Decisions.....</i>	8
<i>C. Principle of Legality as Guideline for the Implementation</i> <i>Functions</i>	9
<i>D. Personal and Institutional Prerogatives in the Implementation</i> <i>Function.....</i>	10
<i>E. Front-Line Decisions in the Exercise of Powers Depriving Individuals</i> <i>of Rights</i>	11
<i>F. Front-Line Decisions for an Applicant to Receive a Benefit</i>	12
III. CONTROL OF ADMINISTRATIVE DECISIONS	13
<i>A. Collective Dimension (Control of Legality) versus Individual</i> <i>Dimension (Adjudication).....</i>	13

<i>B. Spheres of Decision-Making for the Control of Administrative Decisions</i>	14
<i>C. Procedural Parameters for Control of Administrative Legality</i>	15
<i>D. Concentrated Control of Administrative Decisions with General Effects</i>	16
<i>E. Tendencies Extracted from Conventionality Control by the Authorities</i>	16
IV. ADMINISTRATIVE AND JUDICIAL PROTECTION OF RIGHTS (VIA ADJUDICATION).....	17
<i>A. Balance Between Administrative and Judicial Adjudication</i>	17
<i>B. An Opposed Claim as a Condition Precedent for Adjudication</i>	18
<i>C. Adjudication as Legal Fiction</i>	19
<i>D. (In)effective Protection of Rights in the Administrative Sphere</i>	20
<i>E. (Deceptive) Protection of Rights in the Judicial Sphere</i>	21
V. CONCLUSIONS	22

I. INTRODUCTION

This essay includes a comparative analysis of the origins of administrative law in Latin America and their impact on the contemporary scene and trends in the general orientations of the its administrative justice systems. This analysis is limited to Latin American countries of Iberian origin under the jurisdiction of the Inter-American Court of Human Rights (“I/A Court H.R”). Throughout the chapter, I point out the roles attributable to the administrative authorities and to attempt to identify a distinction in Latin America between the “administrative function of implementation”, “control of the legality of administrative decisions” (unrelated to any adjudicative function) and the “protection of rights” (by means of an adjudicative function), while examining their historical genesis and possible future trends.

This text reflects my own view of laws, case laws and administrative practices, which do not always match the dogmatic model accepted in Latin American countries. Therefore, it contains new approaches, such as the difference between ‘protection of rights’ and the ‘control of legality of decisions’, mainly founded in the individual collective dimensions of administrative implementations and adjudications (sections II.A and III.A, B, C and D). However I believe my role is predominantly descriptive from the point of view of the Inter-American Human Rights System, which have gradually become present in Latin American administrative law. I specifically focus on the concentrated control of administrative decisions (itens III.D and E), on the reassignment of adjudicative powers to extrajudicial bodies (item IV.A), and on the decisions of implementations subject to the due process clause (item II.C) – all these being tendencies of the Latin American administrative law.

A. RETROSPECTIVE BASES FOR A COMPARATIVE STUDY

1. Is Administrative Law Based on a Civil Law System Compatible with Judicial Review Typical of Common Law?

In Latin America, the substantive bases of administrative law remain rooted in French law. For the last 200 years, Latin American administrative law writings have been guided by French administrative law and by the laws of countries whose legal systems are based on it, such as Italy and Germany.¹

The interest of Latin American legal scholars in English and American law has focused on the judicial system, in which the jurisdiction of the ordinary courts extends to conflicts between citizens and the administrative authorities. That approach was once considered more appropriate to liberalism,² as opposed to the French model of *justice retenue*, which existed before the 1872 reform,³ and was

¹ JOSÉ DOMINGO AMUNÁTEGUI RIVERA, RESÚMEN DE DERECHO ADMINISTRATIVO APLICADO A LA LEJISLACION DE CHILE 91 (1900); Jorge Fernández Ruiz, *Presentación* to HARTMUT MAURER, DERECHO ADMINISTRATIVO ALEMÁN XXXVIII (María José Bobes Sánchez trans., Universidad Autónoma de México 2012).

² JEAN RIVERO, CURSO DE DIREITO ADMINISTRATIVO COMPARADO 153 (Revista dos Tribunais 2d ed. 2004) (1995).

³ TEODOSIO LARES, LECCIONES DE DERECHO ADMINISTRATIVO 210 (1852); PAULINO JOSÉ SOARES DE SOUSA (VISCOUNT OF URUGUAY), ENSAIO SÔBRE O DIREITO ADMINISTRATIVO

only meant to allow public administrative authorities to review their own decisions.

Many of the origin Iberian countries in Latin America that gained their independence in the early 19th Century began to adopt the U.S. constitutional model,⁴ especially its unified judicial system in which courts enjoy jurisdiction over both private law and administrative law. That system was then *continentalised* in Europe by the 1831 Belgian Constitution. The countries that adopted the U.S. model, where it is still force, include Mexico, Chile, Argentina, Paraguay, Costa Rica, Peru, El Salvador, Bolivia, Brazil, Panama, Nicaragua, Honduras and Ecuador. Countries having both general courts and specialized administrative courts are the exception in Latin America: Guatemala, Dominican Republic, Colombia and Uruguay.⁵

The main peculiarity of Latin American law is the problematic co-existence of administrative law inspired by the civil-law legal system and the judicial model inspired by the common-law system.

2. Administrative Due Process Clause and Judicial Deference

Moreover, the 1970 U.S. Supreme Court case of *Goldberg v. Kelly*⁶ confirmed that the Due Process clause was applicable to dispute resolution in the administrative sphere by reinterpreting the Fifth and Fourteenth Amendments of the U.S. Constitution. In the wake of that decision, which met with great enthusiasm, Latin American constitutions and laws began incorporating the notion of due process vis-à-vis administrative authorities.⁷

Despite such normative provisions in Latin America, however, prerogatives intended to enable acting with a *certain degree* of independence and impartiality, on the model of U.S. Administrative Law Judges (LAJ), have not been instituted in favor of public officials invested with the bureaucratic decision-making powers. Nor has Latin American law been endowed with *administrative tribunals*, such as those developed in other common-law countries, especially in the United Kingdom, as part of the Judiciary, and in Australia and in Canada, linked with a non-political executive.

On the other hand, the Latin American courts, in absence of a specialized jurisdiction, tend to have less administrative expertise than European courts. Consequently, they generally treat administrative disputes as though they were private-law disputes. As Abram Chayes puts it,⁸ the courts end up focusing on the bilateral nature of the dispute, merely the complaint formulated and the corresponding defence, instead of on the underlying structural basis, namely the public interest, which is a typical focus of an administrative law case even when the complaint is brought by an individual against a governmental agency.

178 (1862); JOSÉ MARÍA DEL CASTILLO VELASCO , ENSAYO SOBRE EL DERECHO ADMINISTRATIVO MEXICANO, vol 2, 275 (1st ed 1876,).

⁴ RUY BARBOSA, HABEAS CORPUS 275 (1892).

⁵ Ricardo Perlingeiro, *A Historical Perspective on Administrative Jurisdiction in Latin America: Continental European Tradition versus US Influence*, 5 BRIT. J. AM. LEGAL STUD. 241, 269 (2016).

⁶ *Goldberg v. Kelly*, 397 U.S. 254 (1970).

⁷ Perlingeiro, *supra* note 5, at 274.

⁸ Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1281 (1976).

It should be noted that in the common-law world, the basic principles of administrative law have been worked out by the ordinary courts by analogy from the principles of private law.⁹ According to Dicey, the possibility of suing government officials in the ordinary courts according to principles of private law is an essential element of the rule of law. Such conflict resolution is not true anymore, and is now facilitated in common-law systems by providing a fair hearing in the administrative phase, considered fundamental to judicial deference.¹⁰

The question is therefore sensitive in Latin American law, especially because courts not specialized in administrative law, reacting to the absence of a fair hearing in the administrative sphere, do not show deference to the administrative authorities and therefore review their administrative decisions in their entirety¹¹, as it is done in administrative courts based on the French model of administrative justice.

That is the main factor of disequilibrium in the Latin American legal system: if the courts are neither specialized nor inclined to show *deference* to administrative decisions, a large number of administrative law disputes end up being regulated by the principles of private law.

3. Latin America's Search for Its Own Identity for Implementations, Control of Decisions and Adjudications

As a logical corollary of the current situation, Latin American courts have ended up fragmenting the non-political executive's duty of guaranteeing equal treatment before the law. Decision-making is performed by administrative authorities according to administrative law principles based on law, public policies and discretionary administrative powers, with a focus on the public interest. However, claimants are often confronted with administrative decisions that are neither issued with guarantees of due process in the administrative sphere nor are subject to review by quasi-judicial administrative bodies. Such decisions are likely to undergo full judicial review by ordinary courts, which tend to focus on the bilateral nature of the case (private-law principles) rather than on the structural basis of the public interest (public-law principles).

Latin American law must search for its own identity capable of transcending its European heritage because certain characteristics of the French matrix, with its broad powers of review of administrative decisions and the absence of quasi-judicial authorities, are incompatible with the English matrix of administrative law (with its courts of general jurisdiction).

⁹ BERNARD SCHWARTZ, *FRENCH ADMINISTRATIVE LAW AND THE COMMON-LAW WORLD* 3 (1954).

¹⁰ PETER CANE, *ADMINISTRATIVE LAW* 44, 96 (5th ed. 2011); PETER L. STRAUSS, *ADMINISTRATIVE JUSTICE IN THE UNITED STATES* 546 (3rd ed. 2016).

¹¹ *Barbani Duarte et al. v. Uruguay*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 234, ¶ 204 (Oct. 13, 2011); Corte Suprema de Justicia de San José de Costa Rica [Supreme Court of Costa Rica], Exp. 04-011636-0007-CO, Res. 03669-2006 (Sentencia, 15 Mar. 2006). Available at: https://salaprimera.poder-judicial.go.cr/phocadownload/Divulgacion/Institucionalidad_del_agotamiento_de_la_via_Administrativa.pdf (Costa Rica); STF, Agravo de Instrumento 800.892, Relator: Min. Dias Toffoli, 12.03.2013. Available at <http://portal.stf.jus.br/processos/downloadPeca.asp?id=138174353&ext=.pdf> (Braz.).

Latin America's greatest historical challenge in administrative law has been to establish guidelines defining the institutional roles assigned to the legislature, political executive, non-political executive ("the bureaucracy"), tribunals and courts for the creation of legislation and implementation of laws, including the creation of administrative rules, and adjudicatory protection of rights, without departing from the Rule of Law as a prerequisite for administrative law and from the guarantees of due process as a basis for fair and equal administrative justice, starting from certain well-established structures in both the civil-law and common-law systems.

I recognize that the public decision-making functions will be allocated to powers typical of the State, in keeping with the realities of each legal system.¹² I am also referring to the divergent notions of administrative law with respect the broader distinction between *law made* by the legislature, political executive and courts both in the civil-law and common-law worlds.

The decisive question in Latin America therefore seems to me to consist of defining each of the above-mentioned branches of the State and their prerequisites, in accordance with the historical evolution of the essential basis of Latin American administrative law, in such a way that the allocation of powers to different spheres of public decision-making does not cause either a duplication or an absence of functions in practice.

To do so, it is not enough for an administrative authority to be empowered to protect rights: it must also have the various structural bases needed to perform qualified, independent and impartial adjudication; it is not enough for a court to claim to produce decisions with general effects if it lacks the corresponding democratic constitutional legitimacy; it is not enough for a court to opt for deference to the administrative authorities if such authorities are incapable of protecting rights or implementing statutes effectively.

Nor does the principle of separation of powers suffice to explain certain contemporary phenomena such as the highly decentralized internal structure of public administration in the U.S.¹³ Peter Cane therefore prefers to speak of "systems of government (diffuse vs. concentrated distribution of power) and regimes of control (*checks-and-balances* vs. *accountability*)" in his splendid work *Controlling Administrative Power: An Historical Comparison*.

As noted, the difficulty in understanding the diversity of the authorities' roles in relation to other spheres of power is certainly not unique to Latin American administrative law, but the difficulty is more obvious in Latin American countries which are former Iberian colonies because of the inadequate combination of two rather complex and distinct judicial models.

¹² Michael Asimow, *Five Models of Administrative Adjudication*, 63 AM. J. COMP. L. 3, 27 (2015).

¹³ PETER CANE, *CONTROLLING ADMINISTRATIVE POWER: AN HISTORICAL COMPARISON* 7 (2016); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 573 (1984); Bilac Pinto, *Separação de poderes*, 6 REVISTA DE DIREITO ADMINISTRATIVO 243, 250 (1946).

B. PROSPECTIVE BASES FOR A COMPARATIVE STUDY

1. The Influence of the I/A Court H.R. for New Latin American Administrative Law

The case law of the I/A Court H.R. takes precedence over national law in countries under its jurisdiction. It has recently been established that the *control of conventionality* is far reaching and involves all national authorities, be they executive, legislative or judicial bodies.¹⁴ Moreover, the implementation of national laws must comply with the interpretation by the I/A Court H.R. of the American Convention on Human Rights (ACHR) (called a *block of conventionality*).¹⁵

The Court was faced with a question of special interest for administrative law in the case of *Claude Reyes et al. v. Chile*,¹⁶ in which the partial implementation of Article 8(1) of the ACHR was recognized for *front-line administrative decisions*: the Court ruled that they are subject to the due process clause, but only to the extent necessary to avoid an arbitrary decision, since they are considered typical functions of administrative implementation and do not imply real adjudication.

It is also worth mentioning that the above-cited case of *Claude Reys v. Chile*, resulted in the Model Inter-American Law on Access to Public Information, approved by the Organization of American States - OAS,¹⁷ in which administrative committees are promoted and designed with prerogatives of independence in order to decide on appeals, protecting rights by means of adjudicatory functions, much like government agencies of the US administrative state.

2. Approximations of Latin American Law with the “Administrative State” in the United States

As we have seen, such perspectives indicate the tendencies in Latin American administrative law, which are converging with the principle of good administration enshrined in Article 41 of the EU Charter of Fundamental Rights (“CFR”), while also approximating the due process clause in the administrative sphere, as in the above-cited case of *Goldberg v. Kelly*.

It is also clear that Latin American law is moving towards a judicial model similar to the U.S. model of an administrative state with quasi-independent agencies,¹⁸ which is consistent with a jurisdiction system that is unified but open to *judicial deference*.

¹⁴ Expelled Dominicans and Haitians v. Dominican Republic, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 282, ¶ 471 (Aug. 28, 2014).

¹⁵ Cabrera-García & Montiel-Flores v. Mexico, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 220, ¶ 33-5, 42, 44, 59 (Nov. 26, 2010).

¹⁶ Claude Reyes et al. v. Chile, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 151, ¶ 119-20 (Sept. 19, 2006).

¹⁷ OAS, AG/RES. 2607 (XL-0/10) (2010).

¹⁸ Agustín Gordillo, *Los Tribunales Administrativos Como Alternativa a la Organización Administrativa*. RAP 955 (2005). Caio Tácito, *Presença Norte-Americana No Direito Administrativo Brasileiro*, 129 REVISTA DE DIREITO ADMINISTRATIVO 21, 21 (1977).

That is why this *Latin American* comparison includes brief examinations of the administrative law of common-law countries, especially the United States, as a relevant source for reflecting on the development of administrative law in Latin American countries such as Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, El Salvador, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, the Dominican Republic, Uruguay and Venezuela, former colonies of Spain and Portugal and subject to the jurisdiction of the Inter-American Court of Human Rights.

II. ADMINISTRATIVE IMPLEMENTATION FUNCTIONS

A. INDIVIDUAL AND COLLECTIVE DIMENSIONS OF IMPLEMENTATION FUNCTIONS

The expression *administrative implementation functions* refers to the executive powers typical of administrative authorities, which are expressed through an exercise of power guided by the public interest, including front-line decisions.

One type of implementation has an *individual dimension* and occurs at the initiative of the applicant, such as an administrative decision that grants or denies an individual application.

To provide more context for the topic in Latin American law, however, I bring another type of administrative decision as a form of *implementation*, namely *ex officio* decisions by the authorities in which I find a *collective dimension*, such as: the publication of decisions with general effects (including administrative norms) and a decision that leads to deprivation of an individual's right in the interest of society.

Decision-making with general effects, which is included under the heading of *administrative acts* in Latin American law, does not require prior adjudication because it does not per se result in an infringement of individual rights, except through a legal fiction. Administrative acts with general effects tend towards abstraction; only a decision with concrete effects on an individual can create a risk of infringing the individual's rights.

In the case of a decision that deprives an individual of rights, implementation merely refers to the front-line decision that gives rise to the proceeding in question, which is necessarily followed by an *adjudication* for the *protection of rights*, so that the applicants may defend themselves against the front-line decision before the final decision restricting their rights.

In this context, *implementation*, both in its individual dimension and collective dimension, does not require a prior fair hearing.

B. POLITICAL AND NON-POLITICAL EXECUTIVE DECISIONS

In 19th Century Latin America, administrative decisions likely to have general effects were associated with *actes du gouvernement*, the equivalent of *US political questions*,¹⁹ and are now considered to be *public policies* inherent to a *political*

¹⁹ Castillo Velasco, *supra* note 3, at 8.

executive power and *non-justiciable* decisions on the principle that the ordinary courts lack sufficient expertise and democratic legitimacy to replace them.

Thus, from the standpoint of contemporary Latin American law, I associate the expression *non-political executive power* with administrative decisions concerning individuals, i.e., decisions that put into practice – vis-à-vis specific persons – norms and decisions having general effects. It is such decisions concerning individuals, inherent to a *non-political executive power*, that, in principle, challenge the public function of adjudicatory protection of rights; the other decisions, those inherent to a *political executive power*, are likewise subject to control, but of a different kind.

In fact, the reason why a decision of general effect, associated with the governmental decision, can generate personal responsibility of the ruler (administrative, civil, criminal responsibility) is the fact that such a decision cannot be motivated completely by criteria that are extraneous and immune to law.²⁰

Moreover, the discretionary policy-making margin for the decision-making authorities, now under pressure from fundamental rights, implies that, in a contemporary reading, the expression *governmental decisions* is nothing more than an attempt to maintain that such decisions do not result in infringement of rights to exempt them from control through *adjudicatory protection of rights*, while maintaining other modes of control, such as the type that can render decision-makers personally responsible.

Thanks to an elastic view of the right to a fair trial,²¹ which restricts *governmental decisions* to only a few cases, such as in international relations, contemporary Latin American law has arrived at the opposite extreme from the extensive conception of *governmental decisions* having the same practical effects as *poder gracioso* (discretionary power).²² That broad conception, originating in the early 19th Century, was stimulated by the French doctrine of the *political end* and granted the authorities immunity against individuals.²³ In that respect, it does not differ from what remains of the other doctrines of *actes du gouvernement* and *U.S. political questions*.²⁴

The tendency to reduce the definitional scope of governmental decisions can also be explained by a constant, growing and regrettable trend towards *justiciability* through control of the legality of the administrative decisions. However, it is now open to debate whether adjudication can be applied to public policies and other administrative decisions with general effects that remained concealed in the broad concept of governmental decisions in the past. I will return to this point in section III.A below.

²⁰ OTTO MAYER, DERECHO ADMINISTRATIVO ALEMÁN 1 at 3-5 (1982).

²¹ American Convention on Human Rights ('Pact of San José, Costa Rica'), art. 8.1, Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter ACHR].

²² TEODOSIO LARES, LECCIONES DE DERECHO ADMINISTRATIVO 7-8 (1852); THEMÍSTOCLES BRANDÃO CAVALCANTI, INSTITUIÇÕES DE DIREITO ADMINISTRATIVO BRASILEIRO 2 at 140-52 (1936).

²³ GASTON JÈZE, LOS PRINCIPIOS GENERALES DEL DERECHO ADMINISTRATIVO 281 (1928); CAVALCANTI, INSTITUIÇÕES DE DIREITO ADMINISTRATIVO BRASILEIRO 2 at 37-9 (1936).

²⁴ GASTON JÈZE, LOS PRINCIPIOS GENERALES DEL DERECHO ADMINISTRATIVO 275 (1928); BERNARD SCHWARTZ, FRENCH ADMINISTRATIVE LAW AND THE COMMON-LAW WORLD 332 (1954).

C. PRINCIPLE OF LEGALITY AS GUIDELINE FOR THE IMPLEMENTATION FUNCTIONS

The principle of administrative legality in Latin America, under German influence, currently manifests itself with dual connotations: the primacy of legality, asserting that the Constitution prevails over administrative norms and laws; and the *Grundsatz des Vorbehalts des Gesetzes* originating in Prussian law,²⁵ according to which the decision-making capacity of administrative authorities is limited by the intention of the legislators.

Thus, implementation decisions under Latin American law, which used to be aimed solely at putting the law into practice in the literal sense, now tend to be guided by considerations of constitutionality and fundamental rights or principles such as equal treatment, legal certainty and protection of legitimate expectations.

Moreover, according to the case law of the I/A Court H.R. applicable in Latin America, not only the courts but also the administrative authorities must adhere to the ACHR, on the terms interpreted by the I/A Court H.R. itself.

The implementing decision-makers are therefore subject to the duties of transparency, publicness, efficiency and morality as well as their duties to grant interested parties a prior hearing and explain the grounds for their decisions in order to prevent arbitrariness and to enable the injured individuals to challenge the decisions.

Less importance is attached to *discretionary power* and *margin of appreciation* since the choices available to the authorities are no longer unrestricted within the margins defined by law but rather shaped by the supremacy of fundamental human rights, which, when conflicting, lead the decision-makers to apply the criteria of proportionality and to weigh the conflicting public interests to identify the overriding interest.

It is therefore apparent that implementation decisions tend to avoid conflicts as much as possible, i.e., to anticipate the functions of control and protection of rights, in keeping with the fundamental principle of the right to good administration²⁶ and the recent reading of ACHR Art. 8.1 by the I/A Court H.R. There is a tendency to give greater legal force to implementation decisions by investing public resources in a prior administrative phase, without prejudice to subsequent reviews, which consequently would be fewer in number.

D. PERSONAL AND INSTITUTIONAL PREROGATIVES IN THE IMPLEMENTATION FUNCTION

Thus, the authorities' decisions are no longer subject to the sole criteria of strict administrative legality but must also comply with the constitution and international conventions. This results in a practical problem: how, in practice, will administrative authorities and their bureaucrats in decision-making positions be able to challenge *administrative laws and norms* (enacted by higher authorities) that they consider contrary to the applicable laws, constitution or conventions? Are the administrative institutions

²⁵ HERMAN GERLACH JAMES, PRINCIPLES OF PRUSSIAN ADMINISTRATION 155 (1913).

²⁶ Charter of Fundamental Rights of the European Union, art. 41, Dec. 18, 2000, 2000 O.J. (C364/1).

sufficiently independent from the other spheres of power and economic interests? Are the decision-makers sufficiently qualified, independent and impartial for that?

In Latin America, civil servants used to have difficulty defending their rights²⁷ but after a gradual reorientation they are now generally recruited through public competitions based on technical expertise and have stable positions. Consequently, they do not lose their job unless found guilty of an offense in a disciplinary proceeding. However, most key decision-making positions are being filled by career civil servants and non-civil servants depending on political criteria and the degree of confidence of the institution's director, who does not have to explain the grounds for his decision; such employees are often removed from office on the same basis.²⁸ The holder of the key decision-making position, whether a career bureaucrat or not, will lack stability in that position.

The lack of expertise is being made up for by the availability of legal advisors, but firstly their legal opinions are not binding on the decision-maker and, secondly such arrangements may give the impression that, in practice, the decision is made by the legal advisor rather than by the administrative decision-maker.

The lack of tenure results in the vulnerability of civil servants exercising a certain range of powers, because tenure is a *sine qua non* for independence, which, in turn, is an instrument of impartiality and also lends the appearance of impartiality.

It should also be noted that impartiality is becoming necessary not only in adjudicatory functions but even more so in administrative implementation functions. Since the implementing decision-makers constantly make difficult choices between private interests and public interests, they must remain equally distant from both.

Decision-makers and authorities need to enjoy independence from such interests (external independence). Decision-makers must be provided with adequate remuneration and the authorities must be integrated to institutions endowed with sufficient administrative and financial autonomy. Contrary to the example of Ecuadorian law,²⁹ such civil servants need independence within the institution to which they belong, thanks to tenured positions and guarantees that they will not be subject to direct or indirect orders from their hierarchical superiors that might prove contrary to their personal beliefs during decision-making (i.e., guaranteeing internal independence).

E. FRONT-LINE DECISIONS IN THE EXERCISE OF POWERS DEPRIVING INDIVIDUALS OF RIGHTS

Front-line decisions in the exercise of powers depriving individuals of rights are often confused with adjudicatory decisions. That is a mistake because they are subject to different principles. Adjudication is shaped by principles inherent in due process and is designed to require the State to issue a decision that resolves a conflict in which it is involved.

An *implementing decision* is therefore any administrative decision other than an adjudicatory decision, which means that an implementing decision is not necessarily based on true procedural due process.

²⁷ JOSÉ ANTÔNIO PIMENTA BUENO, *DIREITO PÚBLICO BRASILEIRO* 25 (1857).

²⁸ Lei No. 8.112 art. 149, de 11 de Dezembro de 1990, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 12.12.1990 (Braz.); Law No. 19653 art. 49, Diciembre 13, 2000, DIARIO OFICIAL [D.O.] (Chile).

²⁹ Decreto No. 2428/2002 art. 10 (2002) (Ecuador).

In the exercise of regulatory or disciplinary administrative powers, front-line decisions are examples of administrative implementation decisions concerning individuals: the preliminary investigation phase, in which the authority's staff investigates whether an individual should be targeted for a sanction or other regulatory order and makes a front-line decision accordingly. The same is true of the authorities' power to revoke *ex officio* decisions which benefitted an individual and have come to be considered illegal through reevaluation of the questions of fact and law.

The decisions related to such powers are issued *ex officio* and not preceded by a fair trial, although due process is subsequently ensured through the adjudicators' duty to place the burden of proof on the prosecuting decision-makers and to guarantee the right of defence prior to any adverse decision.

Thus, during a preliminary investigation, the authorities have no duties to the investigated parties beyond those generally required of implementation functions, since no adjudicatory function is involved.

In Latin America, the absence of a clear dividing line between implementation and adjudication in the exercise of administrative powers restricting individual rights has caused misconceptions in two different respects: 1) the presumption of legality of administrative condemnatory decisions, which in fact should be preceded by a genuine fair hearing, without exposing the applicant to the risk of reversal of the burden of proof, and 2) court orders that require administrative authorities to always precede their front-line decisions by a complete fair hearing, based on an out-of-context interpretation of the statutory and constitutional norms of due process in the administrative phase. Since it is not the nature of a front-line decision to be preceded by a fair hearing, the authorities fail to comply with the judicial decisions, so they are paralyzed and the disciplinary proceedings end up being time-barred.

F. FRONT-LINE DECISIONS FOR AN APPLICANT TO RECEIVE A BENEFIT

Benefits claimed by citizens are granted through an application decided on by a front-line decision-maker. Such is the case of pension and healthcare benefits, participation in public competitions to fill vacancies in (public) universities and schools, or government jobs.

As explained in the previous section, a front-line decision, as an implementing decision, is not preceded by a complete fair hearing. However, if a front-line decision regarding an application for a benefit indirectly causes harm either by denying or granting the applicant's claim, the decision is subject to appeal in a fair hearing typical of adjudicatory functions.

A grey area between implementation and adjudication has also formed here in Latin America. Only recently, statutes that made a judicial appeal conditional on a prior front-line decision were questioned by constitutional courts, which argued that such laws unduly restrict the constitutionally guaranteed right to adjudication in a court of law. That argument is clearly based on the false premise that a front-line decision has the same value as an administrative adjudicatory decision.³⁰

³⁰ STF, RE631.240, Relator: Min. Luís Roberto Barroso, 03.09.2014 (Braz.). Available at <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=7168938>.

In fact, if despite being provided for by law adjudication in the administrative sphere does not fully satisfy the due process clause, it means that individuals should have access to another sphere of power of review. In general, it is the law courts that provide such a space in Latin America.

However, front-line decisions on the required benefits cannot be replaced by courts or adjudicators under any circumstances, or else there would be a disproportionate reversal of institutional roles: the channel of courts or adjudicators is not the most suitable, because they lack the special qualifications for initial evaluation of an application.³¹ Adjudicatory decisions are not necessary so long as the adjudicators are empowered to order the implementing authorities to rule on the application. In that case, it is possible to obtain adjudication directly without a previous front-line decision, unless the authorities fail to take action for an extended period, which is equivalent to a rejection of the request.³²

III. CONTROL OF ADMINISTRATIVE DECISIONS

A. COLLECTIVE DIMENSION (CONTROL OF LEGALITY) VERSUS INDIVIDUAL DIMENSION (ADJUDICATION)

In fact, no decision issued by a governmental authority is exempt from control of *legality*³³ regarding both the existence of the facts on which the authority bases its decision and the laws and other norms interpreted and applied.³⁴ However, I think that administrative decisions, stripped of the potential to automatically infringe the rights of an individual, could be handled by a system of *non*-adjudicatory control commensurate with the bases on which such decisions are developed.

The distinction that I propose between the control of the legality of administrative decisions and the adjudicatory protection of rights mainly lies in their collective and individual dimensions. The control of administrative decisions is always from a general perspective, whereas the protection of rights is individual by nature. Even in the case of the control of an administrative decision affecting an individual, the interest at stake is not individual. Rather, society has a general interest in seeing the authority correctly implement the administrative norm and law.

In other words, the control of administrative decisions is unsuitable to protect the rights of individuals, since it is comparable to *political control*.³⁵ The exercise of control of administrative decisions, including decisions affecting individuals,

³¹ Corte Suprema de Justicia de San José de Costa Rica [Supreme Court of Costa Rica], Exp. 04-005845-007-CO, Res. 6866-2005 (Sentencia, 1 Jun. 2005) ¶ VIII, A (Costa Rica).

³² Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 11/02/2014, “Biosystems S.A. c. Estado Nacional - Ministerio de la Salud – Hospital Posadas / contrato administrativo”. Available at <http://www.saij.gob.ar/corte-suprema-justicia-nacion-federal-ciudad-autonoma-buenos-aires-biosystems-sa-salud-hospital-posadas-contrato-administrativo-fa14000096-2014-02-11/123456789-690-0004-lots-eupmocsollaf> (Arg.).

³³ ALLAN RANDOLPH BREWER CARÍAS, ESTADO DE DERECHO Y CONTROL JUDICIAL 9 (1987).

³⁴ Arts. 3-5 of Euro-American model code of administrative jurisdiction.

³⁵ GASTON JÉZE, LOS PRINCIPIOS GENERALES DEL DERECHO ADMINISTRATIVO 246 (1928).

is closer to implementation, i.e., the *ex officio* exercise of administrative powers such as *autotutela* (the authority's power to review its own decisions), than to an adjudicatory function. It is not the right of the individual that is at stake in the control of administrative decisions, but rather the collective interest. Hence, the control of decisions is an *ex officio* act, whereas the protection of individual rights must be initiated by the interested parties.

Unless there is an intersubjective dispute (conflict between individuals or entities) in practice, the controlling entity exercises a quasi-consultative or normative function in light of the general effects of its decision on the legality of an administrative decision. This means that despite the control of decisions exercised by courts, tribunals or the legislature, unless it concretely involves the infringement of an individual's right, such control is classifiable as a governmental function *interna corporis* in relation to society.

Adjudication is a governmental function that is only indispensable to satisfy individual or *individualizable* rights. Procedural due process protects the individual against the State, not vice-versa, and it is not a power of certain public bodies against other public bodies.

Although the function of protecting rights is a form of control over the authorities, such control is only indirect. An administrative authority's act that has been found to be illegal in an adjudicatory proceeding is an indirect prerequisite for protection of rights. Yet not even the prerequisite to recognize an individual's rights can or should always be evaluated by the adjudicator, because adjudication directed at the individual is not always compatible with the collective dimension of the control of administrative decisions.

B. SPHERES OF DECISION-MAKING FOR THE CONTROL OF ADMINISTRATIVE DECISIONS

I do not intend to argue that the courts or other adjudicatory bodies lack democratic legitimacy to rule on the control of administrative decisions. It is not my objective here to indicate which spheres of power and bodies are competent to control the legality of the authorities. That is a question to be submitted to the political and cultural organization of each State.

Actually, my objective is to point out that a system of control of the legality of decisions does not become adjudicatory just because it can be decided by a court (Nunes 1943, 5), and that the individual's right is the decisive factor in adjudication, since an adjudicator's primary mission is the protection of rights, rather the control of legality of administrative decisions.

The credibility enjoyed by each sphere of authority or administrative entity in a society also depends on that question. It is well known that in countries where the authorities have lost their credibility and structural framework, it may be necessary to assign jurisdiction to the courts to decide on the control of *legality of administrative decisions*.

In Brazil, the *ação de improbidade administrativa* is an example of a case where the legislators, who do not fully trust the administrative authorities in the exercise of disciplinary powers, created a judicial proceeding at the initiative of the

Public Prosecutor's Office with the same effect.³⁶ There has been an increase in the number of laws concerning *ações populares (actio popularis)*.³⁷

These are court claims related to administrative issues in which any citizen has standing to sue, even if he is not directly interested in the subject matter of the dispute, since such actions are based rather vaguely on a democratic system of direct participation.³⁸ This means that the relative importance of the role played by the courts in a given society depends on the *credibility* of the other sphere(s) of power.³⁹

Although such role reversal is understandable, it is sometimes disproportionate and may cause institutional dysfunctions. The price of co-existing with adjudicatory decisions that are neither democratic nor egalitarian may be too high.⁴⁰ Moreover, legislators should refrain from imposing non justiciable issues on courts and quasi-judicial bodies by assigning them jurisdiction over problematic claims which an adjudicator is not qualified to settle without additional training and democratic legitimacy as typical prerequisites for judicial deference.

C. PROCEDURAL PARAMETERS FOR CONTROL OF ADMINISTRATIVE LEGALITY

Allowing the courts and adjudicatory authorities to rule on administrative questions with general effects, including when raised as the basis of an individual's claim,⁴¹ encourages the courts and adjudicators to make policies or interfere with existing public policies, in a questionable procedure. The function performed by adjudicators in relation to claims that are primarily directed against laws or administrative actions with general effects is a function that, rather than solely involving the principles of the fair trial, should approximate, as much as possible, the democratic principles guiding the spheres of power designed to create laws and administrative norms. This includes the exercise of a discretionary margin for policy-making decisions involving difficult choices such as budgetary decisions.

The effectiveness of the control of administrative decisions having general effects depends on the expertise and, above all, on the democratic aptitude of the decision-maker exercising the control. In addition, an appropriate proceeding is needed to ensure that the decision resulting from the control produces general effects

³⁶ Lei No. 8.429, de 20 de Novembro de 1992, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 21.11.1992, art. 1 (Braz.).

³⁷ CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 5.73 (Braz.); Law No. 8.508/2006 arts. 10.1.d. & 10.2 (Costa Rica); L. 1/437 art. 135, enero 18, 2011, Diario Oficial [D.O.] (Colom.). On the emergence of *actio popularis* in Brazil, see Miguel Seabra Fagundes, *Da Ação Popular*, 6 REVISTA DE DIREITO ADMINISTRATIVO 1, 18 (1946).

³⁸ On the connection between popular participation, credibility of institutions and dictatorial regimes, see CARL JOACHIM FRIEDRICH, CONSTITUTIONAL GOVERNMENT AND DEMOCRACY: THEORY AND PRACTICE IN EUROPE AND AMERICA 536 (1941).

³⁹ PETER L. STRAUSS, ADMINISTRATIVE JUSTICE IN THE UNITED STATES 430-31 n. 89 (3d ed. 2016).

⁴⁰ Jerry L. Mashaw, *Judicial Review of Administrative Action: Reflections on Balancing Political, Managerial and Legal Accountability*, DIREITO GV L. REV. 153, 167-68 (2005).

⁴¹ Law No. 19.549, Apr. 3, 1972, 27 de Abril de 1972 B.O. 6, art. 24 (Arg.); Law No. 8.508/2006 art. 36.3 (Costa Rica); L. 1/437 art. 189 ¶ 2, enero 18, 2011, Diario Oficial [D.O.] (Colom.); Law No. 152-87/1987 art. 129 (Hond.); Law No. 189-87/1988 art. 30 (Hond.).

accordingly.⁴² In this case, the arguments set out by the parties and adjudicators in a traditional adjudicatory proceeding will not be decisive unless those same parties and adjudicators have sufficient legitimacy to impose a binding decision on the collectivity.

The *collective dimension* of the control of decisions includes the repercussions and indirect effects on society of an administrative decision initially addressed to specific individuals. From the aggrieved individual's perspective, such decisions challenge the governmental function of protecting rights through adjudication. From the perspective of indirectly affected third-parties, they call into question the control of administrative decisions with general effects.

In the case of an administrative decision concerning an individual, the control of that decision should always be directed against government bodies, never against individuals, even if the decision favors the latter. If, as the result of a control, the controlling body indicates that the sphere of a certain right of an individual may be infringed, it is up to the initial authority or to the controlling body itself to provide the applicant with a fair hearing – the right to adjudication. In such situations, the decision by the controlling body will be final for the controlled authority, but equivalent to a *front-line decision* vis-à-vis the aggrieved individual.

D. CONCENTRATED CONTROL OF ADMINISTRATIVE DECISIONS WITH GENERAL EFFECTS

It seems to me that the legal systems that adopt concentrated control of constitutionality of laws and of legality of administrative norms have greater affinities with the notion that the control of administrative norms is subject to a differentiated procedure with respect to adjudication.⁴³ I am convinced that there is a procedural incompatibility in maintaining two essentially different means of control⁴⁴ in the same proceeding before the same decision-making body: the protection of rights with its individual dimension via the adjudication function and the control of decisions with its collective dimension and nature of the implementation function. In this context, there are interesting examples in the laws of Panama, the Dominican Republic and Nicaragua.⁴⁵

Moreover, allowing an individual's claim based mainly on a question of general interest (validity of the law and administrative norm) to be decided in favor of the individual alone, which partakes of the nature of the adjudication function, amounts to splitting administrative law in two: one part in relation to the claimants, another in relation to the non-claimants. Adjudicators should not lend themselves to that role.

⁴² Ricardo Perlingeiro, *A Impugnação Judicial de Atos Administrativos Na Defesa de Interesses Difuso, Coletivo e Individuais Homogêneos*, 7 REVISTA DE DIREITO DO ESTADO 255, 255 (2007).

⁴³ JESÚS GONZÁLEZ PÉREZ & JUAN CARLOS CASSAGNE, LA JUSTICIA ADMINISTRATIVA EM IBEROAMÉRICA 55 (2005).

⁴⁴ Juan Carlos Cassagne, *Perspectivas de la Justicia Contencioso-Administrativa en Argentina en el Siglo XXI*, in LA JUSTICIA ADMINISTRATIVA 117, 124-25 (2003).

⁴⁵ Law No. 135/1943 (Procedimiento Gubernativo) arts. 29-42 (Pan.); Ley No. 350, 18 May 2000, Ley de Regulación de la Jurisdicción de lo Contencioso – Administrativo [R Law of Regulation of the Jurisdiction of Administrative Litigation] tit. II, art. 17(1)-(2), tit. IV, chs. I-II, arts. 35-45, LA GACETA, DIARIO OFICIAL [L.G.], 25-26 July 2000 (Nicar.); Law No. 1494/1947 arts. 7(a)-(b) (Dom. Rep.).

E. TENDENCIES EXTRACTED FROM CONVENTIONALITY CONTROL BY THE AUTHORITIES

A new light has been cast on this topic by I/A Court H.R. starting from the premise that if the administrative implementation and adjudication authorities lack the power to exercise constitutionality control under the laws of their respective States, then they will also lack the power to exercise conventionality control *fully*, i.e., they will have no way to stop implementing a national law on the grounds that it is anti-conventional. In that case, according to the I/A Court H.R., the authorities will request a preliminary decision on conventionality from the body competent to make the constitutionality control decision:⁴⁶ “a solution halfway between absolutely diffuse control and concentrated control”.⁴⁷

In countries that adopt a system of concentrated constitutionality control, as in Continental Europe, such a measure goes unnoticed because the thesis of the I/A Court H.R. is quite consistent with such a system.

In Latin America, countries that adopt a system of diffuse judicial control of constitutionality under the influence of U.S. constitutionalism, however, the administrative implementation and adjudication authorities are in an uproar because they lack authority to rule on a conventional or constitutional question that challenges the national law and must therefore await the decision of a judicial body of constitutional control. In general, however, any judicial body can rule on any constitutional or conventional matter immediately, which encourages filing claims in court and creates opportunities for further fragmentation of administrative law.

I therefore hope that the interlocutory request for a ruling on conventionality submitted by the authorities will serve as a reference so that interlocutory requests for rulings on legality and constitutionality (involving administrative questions with general effects) will become part of Latin American administrative law in relations with the administrative and judicial sphere.

IV. ADMINISTRATIVE AND JUDICIAL PROTECTION OF RIGHTS (VIA ADJUDICATION)

A. BALANCE BETWEEN ADMINISTRATIVE AND JUDICIAL ADJUDICATION

The *protection of rights* via adjudication is a typical but not an exclusive attribute of the courts. Adjudication is understood to be a fundamental human right under art. 8 of the ACHR (in harmony with art. 6 of the European Convention on Human Rights (ECHR) and art. 14 of the International Covenant on Civil and Political Rights (ICCPR)), and since the conditions established by such norms have been complied with the function exercised will be considered legitimate irrespective of the sphere of State power from which it originates.

⁴⁶ I/A Court H.R., n. 15, paras 37,39.

⁴⁷ Sergio García Ramírez, *The Relationship between Inter-American Jurisdiction and States (National Systems): Some Pertinent Questions*, 5 NOTRE DAME J. INT’L & COMP. L. 115, 145 n.139 (2015).

However, allowing the assignment of adjudication to any one sphere of power does not amount to authorizing it simultaneously in several spheres of power. That would involve an overlap of public resources for the same purpose and would weaken legal certainty with a delay in dispute resolution.

In the case of government bodies intended to protect an individual's rights against administrative implementation decisions, their *adjudicatory* function gains greater credibility as their adjudicators prove themselves to be qualified, independent and impartial.⁴⁸ Even if the terms of *adjudication* or *protection of rights* are associated with a government body lacking those pillars of qualifications, independence e impartiality, it will be characterized as an *implementation function* or *quasi-judicial decision* and, in such cases, it will have to be supplemented accordingly by another sphere of power later on.

In a way, that is what is happening with the doctrine of judicial deference, which is facilitated by the existence of quasi-independent entities, such as the LAJ in the USA, which decides on questions of fact in the administrative agencies while the courts tend to rule exclusively on other points of the claim. That approach prevents the redundancy and overlap of *adjudications*.

In other words, in a legal system in which the courts have the last word on the protection of individual rights, the greater deference is shown by the courts to the adjudicatory administrative authorities, the clearer will be the signal that such authorities are exercising their adjudicatory functions effectively. And vice-versa: the weaker the due process guaranteed by such authorities, the less the courts can show deference and the more intensely they will exercise their power of *judicial review* over the administrative decisions. The amount of judicial deference therefore acts as a gauge of the qualifications, independence and impartiality of the public body designed to protect rights through adjudication.⁴⁹

In this context, the *exhaustion of administrative remedies* doctrine, i.e., making access to a qualified, independent and impartial court conditional on completion of a prior adjudicatory proceeding in the administrative sphere, is not justifiable unless there is no risk that the individual will be deprived of guarantees of due process in the administrative sphere. As explained in section IV.D of this essay, such a risk really exists in Latin America.

B. AN OPPOSED CLAIM AS A CONDITION PRECEDENT FOR ADJUDICATION

Adjudication is a public authority's proceeding designed for dispute resolution. In turn, a *dispute* susceptible to adjudication presupposes a conflict of interests characterized by a claim that is *opposed*. Thus, administrative conflict exists if an authority, in the exercise of its administrative power, opposes an individual's claim: it is opposition that gives rise to the right to adjudication. An individual's application can be opposed in three different ways to justify adjudication: real, presumed, and fictitious opposition. An example of *real opposition* is denial of an individual's application, and an example of *presumed opposition* is an authority's failure to respond to an individual's application within a reasonable time.

⁴⁸ AGUSTÍN A. GORDILLO, *TRATADO DE DERECHO ADMINISTRATIVO Y OBRAS SELECTAS X-14* (1 ed. 2013).

⁴⁹ PETER CANE, *CONTROLLING ADMINISTRATIVE POWER: AN HISTORICAL COMPARISON* 268 (2016).

Another example of *presumed opposition* is submitting individuals or entities to judgment by an administrative authority that ends up depriving them of their individual rights. An administrative decision that gives rise to a disciplinary proceeding accompanied by a penalty may be equated with a *frontline decision* that places the applicant in an unfavorable situation. Such decisions are subject to appeal, giving the individual the right to adjudication, and do not correspond to a *real opposition* to the individual's rights, but rather places him in an unfavorable position (that of the accused) based on a rebuttable presumption of guilt. Of course, the accused is allowed to apply for an adjudication in pursuit of a more *favorable status* of non-accused in a disciplinary proceeding.

The primary example of fictitious opposition is part of daily life in Latin American: an individual's claim is denied by an authority that has no margin of appreciation or discretionary power to reach a more favorable decision for the applicant. I shall attempt to explain this paradox. On the one hand, the laws lead citizens to suppose that the authorities are competent to decide on an application, which suggests that there is a single administrative channel to satisfy their claims. On the other hand, although it is not very clear, the laws do not assign jurisdiction to those same authorities to decide on certain incidental aspects of the individual's claim, the evaluation of which is vital in order to grant the claim.

This occurs whenever an individual's claim is based on fundamental rights and the authority is unable to interpret the law beyond its literal meaning, or when an individual's claim is based on a law incompatible with an administrative rule that is binding on the authority. In such cases, government agencies have no authority to cease implementing the rules and to grant the individual's claim. In practice, the authority is induced to prefer the administrative rule over the law and over fundamental rights.

In this context, the administrative authority *opposes* an individual's claim not because it disagrees with that claim but rather in order to comply with the relevant law or administrative rule.

That is a problem of the allocation of powers to the spheres of governmental decision-making. If an individual's claim is denied solely because of a law that is binding on the authority without the possibility of real opposition, it is because, in reality, the opposition does not arise from the will of the authority, but rather from a law or administrative rule itself.

In such cases, it is therefore the law or administrative rule that should be called into question, not the administrative decision.

C. ADJUDICATION AS LEGAL FICTION

In fact, the legal fiction discussed above involves typical cases pertaining to *control of administrative decisions* rather than *protection of rights via adjudication*, creating an artificial atmosphere of dispute, by giving the adjudicators the combined authority to decide on both an individual's rights and questions of public interest at the same time. Indirectly, a system with unresolved issues is being created based on a general 'any person' standing provision.⁵⁰

⁵⁰ Peter Cane, *Open Standing and the Role of Courts in a Democratic Society*, 20 SING. L. REV. 23, 49-50 (1999).

If an individual's claim is derived from an interpretation or challenge of a norm that is not yet accessible to other members of society, then it is truly an abstract claim of general scope disguised as the claim of an individual. If handled by the adjudicator to the sole benefit of the claimant, such a claim not only *privileges* the claimant over the rest of society⁵¹ but also has the practical result of creating two different types of administrative actions: one *adjudicated* administrative action based on the adjudicators' opinions, and another *non-adjudicated* administrative action shaped by laws that are still in force.

In contrast, an adjudicatory decision effective *erga omnes* regarding one of the grounds of an individual's claim (the constitutionality of a law or the legality of an administrative rule) as found in certain countries⁵² could violate a number of other rights that are not immediately apparent. These include conflicting fundamental interests that impose difficult choices: there would be a big risk of the adjudicators sacrificing such interests without weighing them properly.⁵³

D. (IN)EFFECTIVE PROTECTION OF RIGHTS IN THE ADMINISTRATIVE SPHERE

Adjudication by the State is a fundamental human right that mainly depends on the availability of qualified, independent and impartial adjudicators. In Latin America, however, adjudication is mainly practiced by courts that are not specialized in administrative law. With rare exceptions, Latin American has no administrative adjudicatory institutions that satisfy all three criteria of being qualified, independent and impartial.

Although the Latin American judicial system has traces of the influence of U.S. law, the number of laws recognizing structures such as the U.S. LAJs and Canadian and Australian administrative tribunals belonging to the Executive Branch is still low. The few examples of Latin American *quasi-judicial bodies*, besides the Brazilian maritime tribunal,⁵⁴ concern the right of access to official information, with the support of the Model Inter-American law on Access to Public Information. Such quasi-judicial bodies on information law are found in Chile, El Salvador, Honduras, and Mexico.⁵⁵

⁵¹ AGUSTÍN A. GORDILLO, *DERECHOS HUMANOS XIV-7*, 8 (6th ed. 2007)

⁵² Law No. 8.508/2006 arts. 130(3) & 185 (Costa Rica); L. 1/437 art. 189, enero 18, 2011, Diario Oficial [D.O.] (Colom.); Ley Federal de Procedimiento Contencioso Administrativo [LFPCA] 52(5)(c), Diario Oficial de la Federación [DOF] 01-12-2005, últimas reformas 27-01-2017 (Mex.); Ley No. 350, 18 May 2000, Ley de Regulación de la Jurisdicción de lo Contencioso – Administrativo [Law of Regulation of the Jurisdiction of Administrative Litigation] tit. VI ch. X, art. 95, LA GACETA, DIARIO OFICIAL [L.G.], 25-26 July 2000 (Nicar.); Law No. 27.444/2001 art. 6(1) (Peru).

⁵³ Cane, *supra* note 48, at 45.

⁵⁴ STF, Agravo de Instrumento 11.094, Relator: Min. Bento de Faria, 28.05.1934, 153. Available at: <http://bibliotecadigital.fgv.br/ojs/index.php/rda/article/download/8140/6950> (Braz.); STF, Agravo de Instrumento 62.811, Relator: Min. Bilac Pinto, 20.06.1975, 24.9.1975, 116. Available at: <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=22116> (Braz.).

⁵⁵ Ricardo Perlingeiro et al., *Principles of the Right of Access to Official Information in Latin America*, in *THE RIGHT OF ACCESS TO PUBLIC INFORMATION: AN INTERNATIONAL COMPARATIVE LEGAL SURVEY* 115 (Hermann-Josef Blanke & Ricardo Perlingeiro ed., 2018).

In general, despite having the objective of resolving conflicts and giving applicants an opportunity to express their opinions, the Latin American proceedings within administrative authorities do not encourage adjudication. They are essentially administrative functions of implementation, and are subject to full judicial review.

It is not a coincidence that Spanish and Portuguese (as well as Italian) laws distinguish between *proceso* and *procedimiento*: the term *proceso* designates the activity of adjudication conducted by independent and impartial authorities or judges; *procedimiento* (procedure) refers to an activity that merely has the appearance of adjudication, because, in fact, it is conducted by authorities that lack prerogatives of independence.

In Latin America, however, proceedings in the administrative sphere do not really guarantee a *fair hearing*, which is the exclusive province of the ordinary courts of law, resulting in serious legal consequences which have not yet been properly assimilated by the administrative law of Latin American countries.

Based on laws and on the Constitution, individuals are claiming the right to due process of law before the administrative authorities, especially to defend themselves against disciplinary and regulatory administrative powers aimed at depriving citizens of rights. Since the Latin American national authorities are unable to offer guarantees of due process, such as a hearing by a competent, independent and impartial *adjudicative body*, previously established by law, the practical result is that disputes are transferred to the courts for a full and final decision regarding administrative powers; i.e., the disciplinary and regulatory powers, when opposed by the applicants, are exercised entirely by the courts.

A similar situation has occurred with claims based on applications for government benefits. If the request is denied by a front-line decision, the law provides for the remedy of reconsideration by the same decision-maker as well as an appeal to a hierarchically superior body. In practice, however, being aware of the absence of independent or quasi-independent adjudicators in the administrative sphere, the applicants go directly to court to try their luck in the only sphere of power that can offer fair adjudication: the courts.

E. (DECEPTIVE) PROTECTION OF RIGHTS IN THE JUDICIAL SPHERE

In the past few years, the Latin American courts have been playing an unrestrained leading role in administrative law, with functions that go beyond the protection of rights and are shaping *differentiated* administrative law vis-à-vis the claimants.

Such self-confidence in activism is not unique to Latin American law. In certain situations, it is considered a general problem even in administrative justice systems typified by closed judicial review. I am referring to the immunity of judges by which they are exempted from the responsibilities inherent in the administrative authorities in the exercise of their powers of implementation.⁵⁶

Yet the particularity of Latin America is the absence of an adjudicatory proceeding in the administrative phase associated with courts that are not specialized in administrative law as the sole alternative to administrative adjudication.

Moreover, a combination of circumstances exacerbating the above-mentioned situation requires urgent reflection on Latin American law:

⁵⁶ PETER L. STRAUSS, ADMINISTRATIVE JUSTICE IN THE UNITED STATES 455 (3rd ed. 2016).

The adjudicators' lack of confidence in the implementing authorities, which are trusted as little by society as they are by the courts, especially since the Latin American authorities and civil servants lack the prerogatives necessary to act independently;

a system of diffuse constitutionality control in court that encourages diffuse control of the legality of administrative rules and that assigns to the courts the power to rule on the individual aspects of a claim and, in the same proceeding, incidentally, the power to rule on fundamental elements of the claim that are collective in nature;

judicial decisions on an individual's claims based on questions of a collective nature (laws and administrative rules), sometimes effective *inter partes* and thus criticized for serving as an instrument disrupting the duty of equal treatment before the administrative authorities, sometimes efficacy *erga omnes* and thus criticized for lacking sufficient democratic legitimacy.⁵⁷

In this situation, society insists that the courts should have superpowers, which their members end up believing that they really possess.⁵⁸ The courts are applauded by the media for confronting highly controversial issues from the point of view of an individual conflict, so that they are called courageous dispensers of the justice that is denied by the villainous authorities. Such decision-making is deceptive, however, since the courts' behavior discourages scrutiny of the collective structural basis and determinants of the intersubjective dispute, bases which are involved in public policies established by laws and administrative rules that are only partly taken into consideration. Thus, when the judicial decisions are not unenforceable, an innumerable set of fundamental rights are compromised that are hidden from view in such dysfunctional adjudication.

V. CONCLUSIONS

The basic institutional roles of power will be more likely to be maintained if the original decision-making bodies acquire the necessary administrative expertise and democratic legitimacy in the eyes of society. That would lead to a more fair and equitable administrative justice system.

By reinterpreting the systems of control and distribution of powers in a manner adapted to Latin American realities, especially in Brazil, the effective exercise of the decision-making functions of implementation, control of legality of administrative decisions and adjudicatory protection of rights may be conceived independently from their allocations to the traditional branches of State power.

⁵⁷ On *erga omnes* efficacy from an individual claim, see Law No. 350/2000 (Regulación de la jurisdicción de lo contencioso-administrativo) art. 95.2 (Nicar.); Law 1437/2011 (Código de Procedimiento Administrativo y de lo Contencioso Administrativo) art. 189 (Col.); Law 8508 (Código de Procesal Contencioso-Administrativo) art. 130.2 (C.Rica)

⁵⁸ LUIZ WERNECK VIANNA ET AL., QUEM SOMOS: A MAGISTRATURA QUE QUEREMOS 136-45 (2018).

In fact, it is not necessarily the courts and other adjudicatory bodies that are endowed with the greatest democratic legitimacy and are best qualified to exercise the power of review (control of legality) over the other State institutions, while incidentally exercising the power of review under the pretext of protecting rights.

What is at stake is not the court's legitimacy to make laws or intervene with activism. Rather, the crux of the matter is that a court or other adjudicatory bodies should not be allowed to make laws that are effective *erga omnes* regarding an administrative question having general effects based on an individual case without having adequate legitimacy and qualifications. Nor should they be allowed to serve as instrument of disruption of the principle of equal treatment in administrative law to make laws having an effect specifically limited to the claimants.

Throughout history, power structures have been instituted based on aptitude for certain functions:

The functions of implementing the law and controlling the implementation of laws should be exercised by bodies having the proper expertise (especially for decisions affecting an individual) and democratic legitimacy (especially for decisions with general effects).

The function of protecting rights requires adjudicators who are qualified, independent and impartial in relation to the challenged decision-makers.

Such aptitudes provide the basis for distributing institutional roles among the various spheres of power and reduce the risk of gaps or redundancies in the exercise of such roles. This equation should not be tampered with, or else it might cause distortions in the legal system.

Moreover, there is a real distinction between rights-protecting procedures and decision-control procedures: the corresponding procedural basis needs to be related to the substantive nature of the right to be protected and of the decision to be controlled. In fact, adjudicators are guided by the clause of due process of law and aim at remedying the right infringed by an individual administrative decision. However, the controllers use a procedure that is similar to the procedure that leads to the creation of the decision that they are controlling, and thus is not necessarily subject to due process, which would be considered a legal fiction here since the administrative decision control is merely a higher-level implementing decision.

Incidentally, whereas the protection of rights is intended to safeguard the interests of individuals and is effective *inter partes*, the control of administrative decisions is intended to safeguard the public interest and is effective *erga omnes*. No attempt should be made to change the nature of things.

In this way, the power of legal interpretation by adjudicators in administrative law finds its limits in the individual barriers of the dispute to be settled. If the adjudicators' legal interpretation may benefit or harm third parties, it is because the adjudicator may be encroaching on the sphere of authority of other decision-makers because the question should be subject to abstract control rather than adjudication. An adjudicator's interpretation that undermines the content of a law or administrative rule and fills in an omission in a law or rule is an action equivalent to the annulment or creation of a rule, deserving to fall under the authority of a body of an appropriate type rather than an adjudicator.

In this context, it is ideal for the jurisdiction to be concentrated in a single body with the aptitudes needed to rule on administrative questions of general interest.

A procedure of diffuse jurisdiction for administrative legality control presupposes a plurality of bodies ruling simultaneously on the same case and is therefore only compatible with the adjudicatory protection of individual rights.

Consequently, Latin America questions the U.S. system of diffuse constitutionality control in court, which indirectly encourages diffuse control, with concrete effects, of administrative norms before any judicial bodies. The idea of separation between the protection of rights and the control of administrative decisions has a parallel in the concentrated constitutionality system, as currently configured in Continental Europe.

Finally, despite being obvious, although seldom remembered and reflected on, it should be noted that the more citizens feel that the implementers are respecting fundamental rights and constitutional guarantees, the less they will call upon adjudicators, controllers and reviewers of front-line decisions. Since it is better to avoid conflicts by means of forward-looking measures than to remedy them with retrospective measures, the implementing decision-makers should have prerogatives similar to those held by the adjudicating and controlling authorities.

The negative aspect for the future of Latin American administrative law is the absence of signs that indicate that courts will cease to have jurisdiction over claims of a structural nature of the authorities under review, mainly in cases of individual claims. Therefore, there is still a risk of a dysfunction in the basic State roles.

The positive aspect, on the other hand, is that, under the I/A Court H.R. case law, Latin American administrative law transfers part of the adjudicatory power to the authorities and tends to give the implementing authorities guarantees for decision-making with greater respect for fundamental rights. This should reduce the role played by the ordinary courts and prevent conflicts vis-à-vis administrative adjudicators.

Likewise according to the I/A Court H.R. case law, implementing and adjudicating authorities lack the authority for full conventionality control, which should be exercised in a concentrated manner before the national bodies with powers of constitutionality control. That should be a guideline in Latin America, leading to future concentrated control of administrative rules and decisions of general effect, including with respect to the claims of individuals, by instituting a procedure for interlocutory decisions on the legality or constitutionality of norms. That would result in a procedural separation between the adjudicatory protection of rights and the control of administrative decisions.

In short, a Latin American model of administrative justice aimed at fair and equitable administrative law should be based on: (i) the administrative decision control inspired by the European-style concentrated control of norms, (ii) combined with a U.S.-style decentralized adjudicatory system of rights protection, regardless of the branch of power to which it is allocated, (iii) together with a system of administrative decision implementation that is subject, as much as possible, to the primacy of fundamental rights, as illustrated by the international legal system of human rights.

THE *ENGINEERS CASE* CENTENARY: SCOTUS AND THE ORIGINS OF AUSTRALIA'S SCABROUS CONSTITUTIONAL SIGNATURE

Benjamen Franklen Gussen*
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ABSTRACT

Since the Engineers Case decision in 1920, the role of the United States Constitution in interpreting the Australian Constitution has been diminished, leading to inefficiencies in High Court of Australia (HCA) dealing with constitutional issues. To explain this thesis, the article looks at the 7,657 cases decided by the HCA, from the first case in 1903, to the 31st of August 2020, the centenary of the Engineers Case. The analysis identifies outliers that have much higher complexity (in terms of word-length) than the other judgments. This complexity has one common denominator: comparative analysis with the United States Constitution. The article explains why this common denominator has resulted in such complexity, and concludes with possible research extensions on the roles of the Australian judiciary in embracing SCOTUS jurisprudence when interpreting the Australian Constitution.

KEYWORDS

High Court of Australia (HCA), Supreme Court of the United States (SCOTUS), The Engineers Case, Constitutional Signature, Complexity

CONTENTS

I. INTRODUCTION	29
II. OVERVIEW OF HIGH COURT CASES 1903-2020	31
III. FIRST TIER OUTLIERS	33
1 <i>Ward</i>	33
2. <i>Work Choices Case</i>	36

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IV. SECOND TIER OUTLIERS	40
1. <i>Tasmanian Dam Case</i>	40
2. <i>Bank Nationalization Case</i>	45
3. <i>Momcilovic</i>	49
4. <i>Coal Vend Case</i>	52
5. <i>Jihad Jack Case</i>	54
V. THIRD TIER OUTLIERS	59
1. <i>Pastoral Leases Case</i>	59
2. <i>Pape</i>	64
3. <i>Mabo [No 2]</i>	67
4. <i>War Crimes Act Case</i>	70
5. <i>School Chaplains Case</i>	76
VI. A COMMON DENOMINATOR?	77
VII. REMOVING THE INEFFICIENCY IN INTERPRETING THE AUSTRALIAN CONSTITUTION	88
7.1. <i>The Lingering Effect of the Engineers Case</i>	90
7.2. <i>The Proposed Approach</i>	91
7.3. <i>An Application of the Proposed Approach</i>	98
VIII. THE WAY FORWARD.....	105

I. INTRODUCTION

Australia is the youngest of the three great Anglo-American federations, which allowed the framers of its *Constitution*¹ to borrow from the federal designs found in the United States and Canada. The vertical distribution of legislative powers in the *Australian Constitution*, however, is designed after the US model, where the residual powers are assigned to the States rather than to the federal government as found in the *Canadian Constitution*.² The original intention of the framers was to afford Australians the same protections provided US citizens. However, looking back at over 100 years of High Court of Australia (HCA) jurisprudence under what came to be known as the *Engineers Case*,³ the analysis suggests an emerging constitutional crisis, where the interpretation of the *Australian Constitution* is leading to inefficiencies in resolving a number of key constitutional issues.

The issue is the marginalization of the role of United States jurisprudence in interpreting the *Australian Constitution*. In designing the *Australian Constitution*, the framers relied heavily on the *United States Constitution*, and (arguably) to a lesser extent on the *Canadian Constitution*, and on British constitutional doctrines, such as responsible government.⁴ The reliance on United States jurisprudence in interpreting the *Australian Constitution* was also a distinctive feature of HCA reasoning in its early days. Over time, however, especially after the *Engineers Case*, the HCA visited United States jurisprudence mostly only to distinguish how the *Australian Constitution* should be interpreted from the interpretation of the *United States Constitution*.

To explain this emerging constitutional crisis, the article furnishes specific evidence of the complexity inherent in the analysis of Australian (Commonwealth) constitutional law. The analysis is focused on the HCA given its original constitutional jurisdiction under section 76(1) of the *Australian Constitution*.⁵ This is not the first article that offers empirical analysis of the judgments of Australian courts.⁶ However, the article is novel in that it provides statistical evidence as to

¹ Commonwealth of Australia Act, 1900 (Imp), 63 & 64 Victoria, c. 12, § 9 (U.K.).

² For a detailed analysis of this point, see BENJAMEN FRANKLEN GUSSEN, AXIAL SHIFT: CITY-SUBSIDIARITY IN THE 21ST CENTURY 391-414 (2019).

³ *Amalgamated Soc'y of Eng'rs v Adelaide SS Co Ltd* ("Engineers Case") (1920) 28 CLR 129 (Austl.).

⁴ See Benjamen Franklen Gussen, *On the Hardingian Renovation of Legal Transplants*, in LEGAL TRANSPLANTS IN EAST ASIA AND OCEANIA 84 (Vito Breda ed., 2019); Benjamen Franklen Gussen, *Reflections on La Fata Morgana: Watsonian "Prestige" and Bagehotian "Efficiency"*, 12 J. COMP. L. 80 (2017).

⁵ The Australian Law Reform Commission has described the inclusion of constitutional matters in s 76 rather than s 75 as "an odd fact of history." See AUSTRALIAN LAW REFORM COMMISSION, ALRC REPORT 92, JUDICIAL POWER OF THE COMMONWEALTH: A REVIEW OF THE JUDICIARY ACT 1903 AND RELATED LEGISLATION 258, ¶ 12.16 (2001):

Most observers of the judicial system would regard constitutional adjudication as one of the most important tasks of the High Court. It is an odd fact of history that a jurisdiction now regarded as essential to the role and function of the High Court should not be listed in the Court's entrenched jurisdiction under s 75 of the Constitution. Rather, conferral of that jurisdiction on the High Court is at the discretion of Parliament under s 76(i).

⁶ See, e.g., Russell Smyth & Mita Bhattacharya, *What Determines Judicial Prestige? An*

the complexity of constitutional legal issues, using all High Court cases, from the very first case,⁷ up to the last case decided before the *Engineers Case* centenary (31 August 2020).⁸

As to the optimal interpretive approach, the article proposes moving beyond the traditional common law approach to interpreting the *Australian Constitution* and returning to the originalist approach that cleaves particularly closely to United States jurisprudence. An example is the Janus-faced approach to international law in Australia,⁹ a smiling internationally-turned face, and a frowning nationally-turned face. Hence, while the executive government is interested in participating in international treaties, once the treaty is signed, “there is usually some reluctance to actually implement the treaty into domestic law”,¹⁰ with more concern “typically expressed about international legal standards relating to the environment or human rights, but it is much more rarely articulated about international laws relating to trade and business.”¹¹ This Janus-faced approach is partly because of the lack of references to international law in the *Australian Constitution*, save for the external affairs power in section 51(xxix) and the grant of jurisdiction to the HCA by section 75(i) in matters “arising under any treaty.”¹² A harmonization with SCOTUS jurisprudence can reduce the complexity of interpreting these sections of the *Australian Constitution*. Article VI of the *United States Constitution* explains that “all Treaties ... shall be the supreme Law of the Land”, without transformation, balanced by “a considerable reluctance to enter into treaties (to some extent the result of the constitutional procedure for treaty participation).”¹³

The article proceeds as follows. Section II provides an overview of all HCA cases from 1903-2020 (inclusive). Sections III to V discuss the HCA cases with the highest complexity. Section VI provides a synthesis of the preceding analyses. Section VII discusses the optimal approach to interpreting the *Australian Constitution*. The last section outlines our future research in relation to the findings.

Empirical Analysis for Judges of the Federal Court of Australia 5 AM. L. & ECON. REV. 233 (2003); Andrew Lynch, *The Gleeson Court on Constitutional Law: An Empirical Analysis of its First Five Years*, 26 U. N.S.W. L. J. 32 (2003); Paresh Kumar Narayan & Russell Smyth, *What Explains Dissent on the High Court of Australia? An Empirical Assessment Using a Cointegration and Error Correction Approach*, 4 J. EMPIRICAL LEGAL STUD. 401 (2007).

⁷ *Dalgarno v Hannah* (1903) 1 CLR 1 (Austl.) (decided 11 November 1903).

⁸ *Mondelez Austl Pty Ltd v Automotive Union* (2020) 94 ALJR 818 (Austl.) (decided 13 August 2020).

⁹ Hilary Charlesworth, *International Law and Australian Law in the 21st Century*, 6 NEWCASTLE L. REV. 1, 4 (2002).

¹⁰ *Id.* at 1, 4.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* (citing the U.S. CONST. art. VI. *But see* Chief Justice Marshall’s comments in *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 313–14 (1829)). The proposed harmonization is not a normative statement, but one approach to reduce the observed complexity, in line with the first issue as to the relevance of US jurisprudence. *See also*, Hilary Charlesworth et al., *Deep Anxieties: Australia and the International Legal Order*, 25 SYDNEY L. REV. 423 (2003).

II. OVERVIEW OF HIGH COURT CASES 1903-2020

The article tests the hypothesis that constitutional analysis in Australia exhibits a level of complexity significantly higher than that seen in other substantive and procedural areas of law. The article uses a metric that can capture the complexity of constitutional law efficiently, opting for “a deceptively simple yet powerful characteristic”¹⁴ of legal judgments: their length. Cases with constitutional issues necessitate more complex legal analysis, which could be measured by the length of these cases in words.

Figure 1 provides the complexity of HCA judgments from 1903-2020 (inclusive). During this period, there were 7,657 judgments. The word ‘scabrous’ in the title refers to the rough surface seen in Figure 1. In other words, we can see spikes in the length of judgments that resemble the prickly hairs on the surface of cactus leaves.

The term ‘constitutional signature’ (in the title to this article) refers to the relationship between the distinctive spikes seen in Figure 1, and the constitutional issues identified by the HCA in the catchwords of each case.¹⁵ The article uses these words as reported by the HCA, rather than by other law reports. The designation of an issue as constitutional means that the legal analysis relates to the *Australian Constitution* or to one of the state constitutions. Some issues, while also discussing constitutional issues as human rights, are not designated as constitutional given that the legal analysis is based on instruments other than the federal and state constitutions. For example, the extinguishment of native title could be considered as relating to a constitutional issue. However, its analysis is based on the NTA¹⁶ and related common law doctrines. Therefore, extinguishment of native title is reported by the HCA under a separate heading (aboriginals).¹⁷

The HCA judgments in the observation period (1903 – 2020) were ranked based on their length, and the outliers were defined as cases with a length roughly ten times the average length of all cases in the observation period. The justification for this definition comes directly from Figure 1 and the distribution of cases with a length of 80,000 words or above.

One can identify three tiers of outliers in Figure 1. The first has judgments with length over 120,000 words. The second tier has judgments with length above 100,000 but below 120,000 words. The third tier has judgments between 80,000 and 100,000. Table 1 lists the 12 outliers (ranked chronologically).

Note how it took eight years to get to the first outlier (from the beginning of HCA sitting in 1903). It then took 37 year to get to the second outlier, and 35 years to get to the third. After that, it took only eight year to the fourth outlier, and only one year to get to the fifth. This shorter period between outliers continued until

¹⁴ Ryan C. Black & James F. Spriggs, *An Empirical Analysis of the Length of U.S. Supreme Court Opinions* 45 Hous. L. Rev. 621, 624 (2008); Dietrich Fausten et al., *A Century of Citation Practice on the Supreme Court of Victoria*, 31 MELBOURNE U. L. REV. 733 (2007).

¹⁵ As recorded by the Australian Legal Information Institute (Austlii) (*High Court of Australia Cases*, AUSTRALIAN LEGAL INFORMATION INSTITUTE, <https://www.austlii.edu.au/cgi-bin/viewdb/au/cases/cth/HCA/> (last visited June 3, 2020)).

¹⁶ *Native Title Act 1993* (Cth) (“The NTA”) (Austl.).

¹⁷ See, e.g., *Western Australia v Ward* (2002) 213 CLR 1 (Austl.).

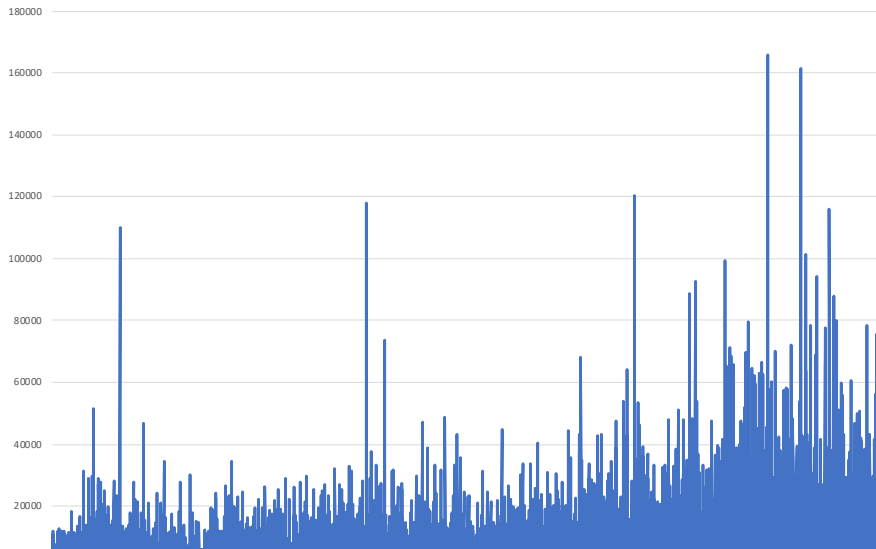


Figure 1: Length of HCA judgments (in words) from 11 November 1903 (the first judgment) to 31 August 2020 (the centenary of the *Engineers Case*) (inclusive).

Table 1: HCA outliers in the period from 1903–2020 (in chronological order).

Case name and citation
<i>R v Associated Northern Collieries</i> (“ <i>Coal Vend Case</i> ”) (1911) 14 CLR 387 (22 December 1911)
<i>Bank of NSW v Commonwealth</i> (“ <i>Bank Nationalization Case</i> ”) (1948) 76 CLR 1 (11 August 1948)
<i>Commonwealth v Tasmania</i> (“ <i>Tasmanian Dam Case</i> ”) (1983) 158 CLR 1 (1 July 1983)
<i>Polyukhovich v Commonwealth</i> (“ <i>War Crimes Act Case</i> ”) (1991) 172 CLR 501 (14 August 1991)
<i>Mabo v Queensland [No 2]</i> (1992) 175 CLR 1 (3 June 1992)
<i>The Wik Peoples v Queensland</i> (“ <i>Pastoral Leases Case</i> ”) (1996) 187 CLR 1 (23 December 1996)
<i>Western Australia v Ward</i> (2002) 213 CLR 1 (8 August 2002)
<i>New South Wales v Commonwealth</i> (“ <i>Work Choices Case</i> ”) (2006) 229 CLR 1 (14 November 2006)
<i>Thomas v Mowbray</i> (“ <i>Jihad Jack Case</i> ”) (2007) 233 CLR 307 (2 August 2007)
<i>Pape v Commissioner of Taxation</i> (2009) 238 CLR 1 (7 July 2009)
<i>Momcilovic v the Queen</i> (2011) 245 CLR 1 (8 September 2011)
<i>Williams v Commonwealth [No1]</i> (“ <i>School Chaplains Case</i> ”) (2012) 248 CLR 156 (20 June 2012)

the last outlier in 2012. In a nutshell, the incidence of these outliers has increased since the 1990s. Moreover, the most complex outliers occurred in 2002 and 2006, coinciding with increase in the occurrence frequency of these outliers. In other words, HCA judgments were becoming more complex starting from the 1990s and exhibited maximum complexity around the beginning of the new millennium.

Out of the 12 outliers identified in Table 1, 10 have constitutional law issues. The two exceptions are *Coal Vend Case* and *Pastoral Leases Case*. Based on the evidence we have so far, we can already see that when judgments are complex, it is

likely that constitutional law issues are present. However, this article is interested in identifying a common denominator which can explain the reason for the complexity of cases shown in Table 1 above. The article will proceed by looking at each tier of outliers separately, and then by bringing findings from each tier together to identify a common denominator. The article includes in the analysis the two cases with no constitutional issues to illustrate their relevance to the other cases.

III. FIRST TIER OUTLIERS

The first tier has two cases. The first is *Ward*.¹⁸ The second is *Work Choices Case*.¹⁹

I *WARD*

The case arose from an application by Ben Ward on behalf of the Miriwoong and Gajerrong People for a native title determination under the NTA.²⁰ Some of the area brought for determination was already subject to existing pastoral leases. On 2 February 1995, the application was lodged by the Native Title Registrar for determination by the Federal Court as stipulated for under the NTA. On 24 November 1998, the primary judge, Justice Lee, found that native title exists in the determination area based on a communal “right to land.”²¹ Before a determination by the Full Court of the Federal Court of Australia, and in reliance on an amendment of the NTA,²² the Parliament of Western Australia passed legislation²³ to validate certain acts extinguishing native title. The Full Court set aside the orders of Justice Lee. On 4 August 2000, special leave was granted to appeal to the HCA. The judgment confirmed the approach taken by the Full Court of the High Court.

The four judgments in *Ward* deal with three areas of law: Aboriginals, appeals, and Commonwealth constitutional law. The first area relates to extinguishment of native title to land, the NTA, validity of past acts and rights in relation to land or water. The second area relates to the Federal Court of Australia, while the third relates to territories and the relationship between Commonwealth and territory laws. Chief Justice Gleeson and Justices Gaudron, Gummow and Hayne delivered one judgment. Justices McHugh, Kirby and Callinan each delivered a separate judgment.

The complexity in *Ward* arises from three sources. First, there is the tension between the federal and state governments as a result of the federal design in the *Australian Constitution*.²⁴ This is represented by the inconsistency between state

¹⁸ *Western Australia v Ward* (2002) 213 CLR 1 (Austl.).

¹⁹ *New South Wales v Commonwealth* (“*Work Choices Case*”) (2006) 229 CLR 1 (Austl.).

²⁰ *Native Title Act 1993* (Cth) (“The NTA”) (Austl.).

²¹ *Ward v Western Australia* [1998] FCA 1478 (24 November 1998) ¶¶ 258-260 (Lee J) (Austl.).

²² *The Native Title Amendment Act 1998* (Cth) (“NTA”) (Austl.) (assented to 27 July 1998).

²³ *The Titles Validation Amendment Act 1999* (WA) (Austl.).

²⁴ For a detailed analysis of this tension, see Benjamin Franklen Gussen, *Australian Constitutionalism Between Subsidiarity and Federalism*, 42 *MONASH U. L. REV.* 383 (2016). For a comparison between Australia, the United States and Canada on the tension inherent in their respective federal constitutional designs, see Benjamin Franklen Gussen, *Reflections on La Fata Morgana: Watsonian “Prestige” and Bagehotian*

and federal legislation.²⁵ Second, there is the tension underlying Aboriginal rights in Australia. The case reflected the complexity of the native title concept under common law and how it can accommodate the protection of rights such as “cultural knowledge.”²⁶ The third source of complexity in *Ward* is the role of international law in informing domestic views on Indigenous rights, especially the *International Convention on the Elimination of all Forms of Racial Discrimination*.²⁷

The constitutional issues that arose in *Ward* reflect the potential operational inconsistency between the NTA and the state and territory validation acts on the one hand, and the RDA²⁸ on the other. The RDA is inconsistent with state legislation to the extent that state legislation permits transactions with land that would otherwise extinguish native title rights and interests. The RDA invalidates the state legislation to that extent. In addition, the RDA requires disregarding territory laws that impose a discriminatory burden or prohibition.

The HCA judgments in *Ward* suggest that the doctrine of operational inconsistency was at the heart of this case. The majority judgment discussed the inconsistency due to the operation of section 109 of the *Australian Constitution*,²⁹ as well as section 122 of the *Australian Constitution* relating the inconsistency of territorial laws.³⁰ In particular, section 10(1) of the RDA states that:

If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, color or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, color or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, color or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, color or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, color or national or ethnic origin.³¹

The RDA depends upon settled principles relating to inconsistency under section 109 of the Constitution. Section 10 of the RDA ensures that persons of a particular race enjoy a right enjoyed by persons of another race, or enjoy the right to the same extent. Any state or territory legislation that impedes the exercise or enjoyment of the rights conferred by section 10 is therefore inoperative.³²

For section 10 to be a valid law of the Commonwealth, it must be supported by the external affairs power (section 51[xxix]), given that the section cannot be

“Efficiency”, 12 J. COMP. L. 80 (2017); Benjamin Franklen Gussen, *On the Hardingian Renovation of Legal Transplants, in LEGAL TRANSPLANTS IN EAST ASIA AND OCEANIA* 84 (Vito Breda ed., 2019). See also BENJAMIN FRANKLEN GUSSEN, *AXIAL SHIFT: CITY SUBSIDIARITY AND THE WORLD SYSTEM IN THE 21ST CENTURY* (2019).

²⁵ Compare the *Titles Validation Amendment Act 1999* (WA) (Austl.), and the *Racial Discrimination Act 1975* (Cth) (Austl.).

²⁶ *Ward*, 213 CLR at 84-85 (Gleeson CJ, Gaudron, Gummow & Hayne JJ) (Austl.).

²⁷ *Id.* at 388-91 (Callinan J, arguing the irrelevance of international law).

²⁸ *Racial Discrimination Act 1975* (Cth) (“RDA”) (Austl.).

²⁹ *Ward*, 213 CLR at 100-108 (Gleeson CJ, Gaudron, Gummow & Hayne JJ) (Austl.).

³⁰ *Id.* at 108-109, 166 (Gleeson CJ, Gaudron, Gummow & Hayne JJ).

³¹ *Racial Discrimination Act 1975* (Cth) s 10 (Austl.).

³² *Ward*, 213 CLR at 288 (Callinan J) (Austl.).

supported by the race power in section 51(xxvi) because the RDA applies to all races.³³ However, the only way the external affairs power will support section 10 is if the provision can be regarded as implementing the obligations asserted in the *International Convention on the Elimination of all Forms of Racial Discrimination*,³⁴ specifically the obligations in Articles 2 and 5.³⁵

Some commentators perceived the case to marginalize the role played by international law in native title determination:

Several of the justices also found that international law should play only a limited role in determining the rights of Australia's indigenous people. This approach has wide ramifications, demonstrated by the majority finding that there is no native title right to resources, nor a right to protect indigenous cultural knowledge. However, there are conflicting views from the Bench on the relevance of international law in this area. Justice Callinan's dissenting judgment is vociferous in rejecting any application of international law or precedent.³⁶ Justice Kirby, however, pays particular regard to the connection between indigenous rights and international human rights.³⁷

The complexity in *Ward* stems from the earlier High Court controversial decision in *Pastoral Leases Case*,³⁸ which will be analyzed in detail in this article under second-tier cases. A narrow majority held in *Pastoral Leases Case* that the rights granted by pastoral leases and native title rights were not necessarily inconsistent. Whether or not the grant of a pastoral lease extinguished native title rights depended upon the particular rights conferred by the lease and the incidents of the relevant native title. Therefore, the High Court decision was a surprise to most people, that native Australians could only be dispossessed of their land "only after a federal court had held that a native title right claimed in relation to a particular place was necessarily inconsistent with the rights of the pastoral lessee."³⁹ Extinguishment had to proceed on case-by-case basis. The federal Parliament responded to *Wik* by enacting the NTA amendment⁴⁰ to confine the reasoning in the *Wik* decision to narrow areas. The reasoning of the majority in *Ward*, however, demonstrates that the *Wik* reasoning survived in relation to pastoral and mining leases.⁴¹

³³ *Ward*, 213 CLR at 279 n 819 (Callinan J) (Austl.).

³⁴ International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 60 U.N.T.S. 195 [hereinafter ICERD].

³⁵ *Ward*, 213 CLR at 279-80 n 819 (Callinan J) (Austl.).

³⁶ His honor refers to *Stanford v. Kentucky*, 492 U.S. 361 (1989), where the United States Supreme Court rejected the use of international norms in determining the scope of the Eighth Amendment. See *Ward*, 213 CLR at 391 n 1086 (Callinan J) (Austl.).

³⁷ Kate Stoeckel, *Case Note: Western Australia v Ward & Ors*, 25 SYDNEY L. REV. 255 (2003). See also Garth Nettheim, *International Law and Native Title in Australia*, 27 U. QUEENSL. L. J. 167 (2008).

³⁸ *The Wik People v Queensland* ("Pastoral Leases Case") (1996) 187 CLR 1 (Austl.). See *infra* Part V. See the comments in *Ward*, 213 CLR at 67 (Gleeson CJ, Gaudron, Gummow & Hayne JJ) (Austl.).

³⁹ *Ward*, 213 CLR at 214 (McHugh J) (Austl.).

⁴⁰ *Native Title Amendment Act 1998* (Cth) (Austl.).

⁴¹ See Stoeckel, *supra* note 37.

The majority judgment in *Ward* was alive to the complexity of the legal issues involved.⁴² The inherent complexity in *Ward* is said to exist in relation to the connection of Aboriginal Australians to country. This relationship, however, is a ‘constituent’ one. It brings to the fore the way the *Australian Constitution* is meant to regulate the relationship between Aboriginal rights and State and Commonwealth laws. Inevitably, the native title issue prompts analysis of specific issues under the *Australian Constitution*. This is confirmed by Justice Kirby’s comments on the complexity of amendments to the NTA,⁴³ and Justice Callinan’s comments on the complexity of the relationship between the RDA and the NTA.⁴⁴

In summary, the complexity observed in *Ward* reflects the uncertainty created by the earlier *Pastoral Leases Case* decision,⁴⁵ and the constitutional validity of both Commonwealth and state legislation when the subject matter is under international law protections, such as Aboriginal (native title) rights. The comparative analysis in the case with the *United States Constitution* suggests that the observed complexity is related to the United States approach to Aboriginal rights and to the incorporation of international law treaties into domestic law.

The same complexity is evinced by the 2006 *Work Choice Case*, discussed below.

2. WORK CHOICES CASE

The *Work Choices Case* is the second case in the first-tier outliers as identified in Figure 1 above (outliers with word length over 120,000). Similar to the complexity in *Ward*, the complexity in *Work Choices* comes from three sources. First is the federal compact and the tension between federal and state legislation, this time in the area of industrial relations. Second, the industrial rights pertaining to workers. And third, the international law instruments informing the evolution of said rights in Australia.

The case, which is about a 2005 amendment to an industrial relations Act,⁴⁶ arose from the Howard government attempt to have the six Australian States cede their jurisdiction over industrial relations to the Commonwealth.⁴⁷ The explanatory memorandum to the amending Act explained the problem with the status quo in the following terms:⁴⁸

⁴² *Ward*, 213 CLR at 93 (Gleeson CJ, Gaudron, Gummow & Hayne JJ) (Austl.).

⁴³ *Ward*, 213 CLR at 252 (Kirby J).

⁴⁴ *Ward*, 213 CLR at 255-56 (Callinan J).

⁴⁵ Even here, Justice McHugh makes a comparison with the United States Supreme Court decisions in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) and *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955), arguing that “[the decision in *Wik*] subjected the Court to unprecedented criticism and abuse, though the criticism and abuse were mild compared to that directed to the United States Supreme Court [in *Brown v. Bd. of Educ.*]”. See *Ward*, 213 CLR at 213 (McHugh J) (Austl.).

⁴⁶ *Workplace Relations Act 1996* (Cth) (Austl.).

⁴⁷ STEPHEN KENNER, “*Work Choice*”: *A Watershed for Australian Industrial Law or for Federation?* ¶ 28 (June 6, 2007). Revised paper delivered to the 20th biennial LAWASIA Conference, Hong Kong, 5-8 June 2007, Labour Law Session, transcript available at <http://forms.wairc.wa.gov.au/files/DiscussionPapers/Commissioner%20Kenner%20-%20Lawasia%20Paper%2018-4-07.pdf>.

⁴⁸ Explanatory Memorandum, *Workplace Relations Amendment (Work Choices) Bill 2005* (Cth) 4 (Austl.).

The existing system of six different industrial relations systems creates confusion for enterprises with workplaces in more than one State, resulting in compliance obligations under different industrial laws. The limitations of operating with six different systems have been recognized by numerous stakeholders and commentators from a wide political spectrum for many years.

The memorandum then cites the International Monetary Fund (IMF):⁴⁹

These problems were recently noted by the International Monetary Fund, which commented:

Further reforms of industrial relations are needed to expand labor demand and facilitate productivity gains. Labor market reforms to date have substantially reduced rigidities, but centralized awards still set minimum working conditions in 20 areas through the requirement that conditions in collective and individual contracts not fall below those in awards – the no disadvantage test – and large employers face up to six different industrial relations systems at the Federal and State levels.⁵⁰

The context leading to the case is as follows. In the 2004 federal election, the Howard Liberal–National Coalition (unexpectedly) won control of the Senate, which permitted the enactment of a far-ranging series of reforms to labor laws, put forward in a broad federal regime. These comprised a 2005 Act tagged as ‘Work Choices’, which relied heavily upon the section 51(xx) head of power—the previous, more limited, federal regime relied upon the section 51(xxxv) head of power (industrial disputes extending beyond the limits of one State). The Act represented a “national system” in an attempt to harmonize industrial rights in Australia. And this attempt was opposed by the States. This disagreement sowed the seeds for the High Court challenge. The basis for the challenge is that the original Act was passed under the conciliation and arbitration power (section 51[xxxv] of the *Australian Constitution*), while the 2005 amendment⁵¹ was enacted under the corporations power (section 51[xx] of the *Australian Constitution*). The main issue in the case was the potential inconsistency between State and Commonwealth laws under section 109 of the *Australian Constitution*.⁵²

In 2006, the Work Choices amendment was challenged in the High Court unsuccessfully by the five States and two unions. A central aspect of the 2007 election was the Australian Labor Party’s promise to abolish Work Choices—which it did upon forming government.

The States of New South Wales, Western Australia, South Australia, Queensland and Victoria, and the Australian Workers’ Union and the Australian Workers Unions of Employees, Queensland (AWU), and Unions NSW and others

⁴⁹ *Id.* at 4.

⁵⁰ IMF, *Australia: 2005 Article IV Consultation*, Staff Report and Public Information Notice on the Executive Board Discussion (Aug. 24, 2005).

⁵¹ *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) (Austl.).

⁵² Tony Blackshield, *New South Wales v Commonwealth*, 31 MELB. U. L. REV. 1135 (2007).

(Unions NSW) argued that various provisions in the industrial relations Act,⁵³ as amended by the 2005 Act,⁵⁴ were invalid. The crux of the argument was that the amendments were based on a wide interpretation of the Commonwealth corporation power, an interpretation that does not accord with the text of section 51(xx). In other words, the Commonwealth amendments were basically intended to oust the operation of state laws with respect to corporations.⁵⁵

In *Work Choices*, by a five-to-two majority, the HCA held that the amending Act is constitutionally valid. According to the catchwords reported by the HCA,⁵⁶ there is only one substantive area in this judgment: Commonwealth constitutional law. Under this area, there are 42 legal issues.

Sections 5 and 6 of the 2005 Act⁵⁷ sought to apply the Act to section 51(xx) corporations that employed labor, and their employees, and established minimum employment entitlements. The majority upheld the validity of the Act under the section 51(xx) power. The HCA adopted Justice Gaudron's dissent in *Re Pacific Coal*.⁵⁸ This holding means that section 51(xx) confers on the federal Parliament a plenary (comprehensive) power with respect to those corporations that the subsection describes. The HCA rejected the argument that the corporations power was limited by the existence of the conciliation and arbitration power, or limited to relations external to any given corporation. The Court, therefore, held that the corporations power can be used to regulate the relationship between corporations and their employees. One of the objectives of the use of this power to pass the 2005 amendments was explained in the following terms:

In the Explanatory Memorandum circulated when the Workplace Relations Amendment (Work Choices) Bill 2005 was introduced, the first of the major changes to be implemented by the Bill was said to be to 'simplify the complexity inherent in the existence of six workplace relation jurisdictions in Australia by creating a national workplace relations system based on the corporations power that will apply to a majority of Australia's employers and employees'.⁵⁹

The use of the corporations power was justified to harmonize workplace laws across Australia. The dominant rationale for the approach taken to the 2005 amendments was (economic) efficiency.⁶⁰

In his dissent, Justice Kirby found the 2005 Act invalid because the law was clearly a law with respect to the reconciliation and arbitration (industrial disputes) power, and it would be unconstitutional to base the law on the corporations power.⁶¹

⁵³ *Workplace Relations Act 1996* (Cth) (Austl.).

⁵⁴ *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) (Austl.).

⁵⁵ KENNER, *supra* note 47, at 57.

⁵⁶ In the AustLII Adobe/A format.

⁵⁷ *Workplace Relations Amendment (Work Choices) Act 2005* (Austl.).

⁵⁸ *In re Pacific Coal* (2000) 203 CLR 346, 375 (Austl.). *See also In re Dingjan* (1995) 183 CLR 323, 365 (Gaudron J) (Austl.).

⁵⁹ *Work Choices Case* (2006) 229 CLR 1, 68. *See* Explanatory Memorandum, Workplace Relations Amendment (Work Choices) Bill 2005 (Cth) 1 (Austl.).

⁶⁰ *Work Choices Case*, CLR at 114 (Austl.).

⁶¹ *Id.* at 205-06.

This ensures that the law comes under the scrutiny of the safeguards under the reconciliation and arbitration power: interstateness and independent resolution.⁶² As to Justice Callinan his dissent was based on the holistic nature of the constitution, and the safeguards that the 2005 Act needs to observe. In addition, Justice Callinan argued that even if the corporations power is a valid head of power for the 2005 amendments, the power is still subject to the safeguards under section 51(xxxv).⁶³

Both Justice Kirby and Justice Callinan viewed the use of the corporations power as a distortion of the federal balance inherent in the *Australian Constitution*.⁶⁴ Justice Kirby believed there is 'an implicit assertion that to give the ordinary scope to the legislative power with respect to the particular persons mentioned in section 51(xx) could or would distort [the federal] balance.'⁶⁵ Justice Callinan agreed:

[T]he unnuanced interpretation of the corporations power now embraced by a majority of this Court, released from the previous check stated in the industrial disputes power (and other similar constitutional checks), has the potential greatly to alter the nation's federal balance.⁶⁶

The majority, however, thought that:

References to the 'federal balance' carry a misleading implication of static equilibrium, an equilibrium that is disturbed by changes in constitutional doctrine such as occurred in the Engineers' Case, and changes in circumstances as a result of the First World War.⁶⁷

The explanatory memorandum for the amending bill suggests that harmonization with international law was a significant part of the rationale for the proposed "national system" under the amendment.⁶⁸ The memorandum explains how the legislation gives effect to the *Convention on the Elimination of all Forms of Discrimination against Women*,⁶⁹ the *Convention concerning Discrimination in respect of Employment and Occupation*,⁷⁰ and the *International Covenant on Economic, Social and Cultural Rights*.⁷¹ The point is that the tension seen between the federal and state governments has its origins in the need for conformity with IMF recommendations and with international law obligations.

In summary, *Work Choices* illustrates the inherent complexity of the relationship between the Commonwealth and the States. While *Ward* illustrated these issues on a canvas of Aboriginal rights, *Work Choice* provides the same complexity with a

⁶² *Id.* at 243.

⁶³ *Id.* at 384.

⁶⁴ *Id.* at 245, 384.

⁶⁵ *Id.* at 116.

⁶⁶ *Id.* at 244.

⁶⁷ *Id.* at 73.

⁶⁸ Explanatory Memorandum, Workplace Relations Amendment (Work Choices) Bill 2005 (Cth) ¶¶ 2017, 2029 (Austl.).

⁶⁹ Convention on the Elimination of all Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

⁷⁰ Discrimination (Employment and Occupation) Convention, June 25, 1958, 111 I.L.O.

⁷¹ International Covenant on Economic, Social and Cultural Rights, Dec. 18, 1966, 993 U.N.T.S. 3 [hereinafter ICCPR].

background of workers' (industrial) rights. Both cases illustrate the tension between domestic and international law under the dualist tradition that exists in Australia.

IV. SECOND TIER OUTLIERS

Five other outliers exceeded 100,000-words in judgment, but these are significantly below the first two outliers in terms of wordcount, and hence in terms of their complexity. These outliers are *Tasmanian Dam*, *Bank Nationalization*, *Momcilovic*, *Coal Vend*, and *Jihad Jack*.

1. TASMANIAN DAM CASE

To understand the significance of this case, we need to delve deeper into its context.⁷² The case was decided at a time of “a changing Australian society and a changing local and international world view, including increasing concerns about the natural environment.”⁷³ It is a time when environmental rights were given legal expression through the concept of “world heritage”, making environmental concerns more an international rather than a domestic concern.⁷⁴ It is therefore understandable that the advent of this *Weltanschauung* created institutional conflict between the federal government and the State of Tasmania on the hand, and personal conflict that divided protestors who blocked the dam construction worksites, and the Tasmanian authorities that sought to remove these protestors.⁷⁵

This historical perspective suggests the case has three types of complexity. The first is illustrated by the recurring tension brought by the protection of two sets of rights, namely environmental and Aboriginal rights. The second type is evinced by a recurring tension between vertical tiers of government. While the third complexity is elucidated by the dualist tradition in Australia, where international treaties have to be transformed into domestic law through Commonwealth legislation.

The *Tasmanian Dam Case* was brought about by the federal government blocking the construction of a dam in Tasmania. The context is as follows. On 22 August 1974, Australia became one of the first countries to ratify the 1972 UNESCO Convention concerning the Protection of World Cultural and Natural Heritage.⁷⁶ Article 4 of the Convention states that parties to the Convention have “the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage ...”.⁷⁷ Pursuant to this duty, the Commonwealth passed legislation⁷⁸ for the protection of Aboriginal archaeological sites situated within listed areas.⁷⁹

⁷² Michael Black, *The Tasmanian Dam Case: An Advocate's Memoir*, 24 GRIFFITH L. REV. 22 (2015).

⁷³ *Id.* at 24.

⁷⁴ *Id.* at 22, 26.

⁷⁵ *Id.* at 22, 24.

⁷⁶ Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 23, 1972, 1037 U.N.T.S. 151 [hereinafter World Heritage Convention]. The USA was the first to ratify on Dec. 7, 1973. See World Heritage Convention at 152.

⁷⁷ World Heritage Convention, *supra* note 64, art. 4.

⁷⁸ *World Heritage Properties Conservation Act 1983* (Cth) (Austl.).

⁷⁹ *Tasmanian Dam Case*, 158 CLR at 65 (Austl.).

In addition, Article 34 of the Convention provides:

The following provisions shall apply to those State Parties to this Convention which have a federal or nonunitary constitutional system: (a) with regard to the provisions of this Convention, the implementation of which comes under the legal jurisdiction of the federal or central legislative power, the obligations of the federal or central government shall be the same as those for those States Parties which are not federal States: (b) with regard to the provisions of this Convention, the implementation of which comes under the legal jurisdiction of individual constituent States, countries, provinces or cantons that are not obliged by the constitutional system of the federation to take legislative measures, the federal government shall inform the competent authorities of such States, countries, provinces or cantons of the said provisions, with its recommendation for their adoption.

The following year, the Commonwealth passed further legislation⁸⁰ to transform the Convention into national law. On the behest of the Tasmanian government, the Australian government made a request under the Convention for listing an area of national parks in south-western Tasmania. However, before the request was accepted in December 1982, the Tasmanian government withdrew its support for the listing,⁸¹ and passed an Act⁸² to authorize the construction of a dam, the Franklin Dam, over around 2 per cent of the total list area (769,355 hectares),⁸³ and work commenced in July 1982 (only two days after the 1982 Act came into force). The dam was thought necessary to “enable the State to achieve economic growth and to increase the opportunities for employment” by generating electricity at low cost.⁸⁴

In March 1983, the Commonwealth passed regulations,⁸⁵ under the 1975 Act, prohibiting the construction of the Dam. In May 1983, the Commonwealth enacted further protections,⁸⁶ which prohibited the destruction or damage of any property that could be included in the World Heritage Listing. On 26 May 1983, the Governor-General proclaimed that the 1983 Act applied to the Franklin Dam. Soon after, the Commonwealth initiated proceedings in the HCA for a declaration that the construction was illegal. The Tasmanian government cross-claimed seeking a declaration that the Commonwealth 1975 and 1983 Acts and Regulations were invalid.

In the High Court, each one of the seven HCA judges delivered a separate judgment. The justices provided different opinions as to the extent of the external affairs power, section 51(xxix), and hence the validity of the Commonwealth legislation under this head of power.⁸⁷

Inter alia, in his dissenting judgment, and with whom Justices Wilson and Dawson concurred,⁸⁸ Chief Justice Gibbs found the 1982 Act passed by

⁸⁰ *National Parks and Wildlife Act 1975* (Cth) (Austl.).

⁸¹ *Tasmanian Dam Case*, 158 CLR at 3 (Austl.).

⁸² *The Gordon River Hydro-Electric Power Development Act 1982* (Tas) (Austl.).

⁸³ *Tasmanian Dam Case*, 158 CLR at 64 (Austl.).

⁸⁴ *Id.* at 60.

⁸⁵ *World Heritage (Western Tasmania Wilderness) Regulations 1983* (Cth) (Austl.).

⁸⁶ *World Heritage Properties Conservation Act 1983* (Cth) (Austl.).

⁸⁷ *Tasmanian Dam Case*, 158 CLR at 5 (Austl.).

⁸⁸ *Tasmanian Dam Case*, 158 CLR at 188 (Wilson J), 307, 318 (Dawson J) (Austl.).

Tasmania to be valid.⁸⁹ His Honor looked at whether the Convention imposes any legal obligations upon Australia.⁹⁰ After consulting a number of secondary

⁸⁹ *Id.* at 120.

⁹⁰ In particular, Articles 4, 5 and 6 of the Convention. These Articles are reproduced below for completeness:

Article 4:

Each State Party to this Convention recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage referred to in Articles 1 and 2 and situated on its territory, belongs primarily to that State. It will do all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and co-operation, in particular, financial, artistic, scientific and technical, which it may be able to obtain.

Article 5:

To ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage situated on its territory, each State Party to this Convention shall endeavor, in so far as possible, and as appropriate for each country:

- (a) to adopt a general policy which aims to give the cultural and natural heritage a function in the life of the community and to integrate the protection of that heritage into comprehensive planning programmes;
- (b) to set up within its territories, where such services do not exist, one or more services for the protection, conservation and presentation of the cultural and natural heritage with an appropriate staff and possessing the means to discharge their functions;
- (c) to develop scientific and technical studies and research and to work out such operating methods as will make the State capable of counteracting the dangers that threaten its cultural or natural heritage;
- (d) to take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage; and
- (e) to foster the establishment or development of national or regional centres for training in the protection, conservation and presentation of the cultural and natural heritage and to encourage scientific research in this field.

Article 6:

1. Whilst fully respecting the sovereignty of the States on whose territory the cultural and natural heritage mentioned in Articles 1 and 2 is situated, and without prejudice to property right provided by national legislation, the States Parties to this Convention recognize that such heritage constitutes a world heritage for whose protection it is the duty of the international community as a whole to co-operate.
2. The States Parties undertake, in accordance with the provisions of this Convention, to give their help in the identification, protection, conservation and presentation of the cultural and natural heritage referred to in paragraphs 2 and 4 of Article 11 if the States on whose territory it is situated so request.
3. Each State Party to this Convention undertakes not to take any deliberate measures which might damage directly or indirectly the cultural and natural heritage referred to in Articles 1 and 2 situated on the territory of other States Parties to this Convention.

resources,⁹¹ the Chief Justice reached the conclusion that the Convention “imposes any legal obligation on Australia to take action to protect the Parks from possible or actual damage.”⁹² This is so given that “If the conduct which those articles purport to prescribe was intended to be legally enforceable, the obligations thereby created would be of the most onerous and far reaching kind.”⁹³ Even if there were any legal obligations created by the Convention, the Chief Justice observed, then Article 34 of the Convention would mean that the legal jurisdiction for implementing the Convention is that of Tasmania, given the wholly domestic nature of the matters with which the Convention deals with. In other words, the Chief Justice found that the Commonwealth external affairs power in section 51(xxix) does not support certain sections of the Commonwealth 1975 and 1983 Acts.⁹⁴ Citing legal precedents, the Chief Justice argued that the external affairs power is directed at implementing the Convention not at compliance with the Convention.⁹⁵

Moreover, the Chief Justice found that these Acts also go beyond the race power in section 51(xvi), reasoning that “[a]rtefacts and relics of such antiquity are of significance to all mankind; a law for their protection is not a special law for the people of anyone race.”⁹⁶ Justice Wilson agreed with the Chief Justice using a similar argument.⁹⁷ Justice Dawson also agreed with the Chief Justice, arguing that the laws which are contained in the 1983 Act are not special laws for the Aboriginal race,⁹⁸ because “The Aboriginal sites in relation to which those prohibitions may operate are, by definition, part of the cultural or natural heritage of the nation. The laws are not laws for the protection of Aboriginal sites or artefacts or relics.”⁹⁹

On the other hand, the majority held that the Tasmanian Act was invalid; that Article 34(a) of the Convention imposed an obligation on the Commonwealth to implement provisions of the Convention by legislation.¹⁰⁰ For Justice Murphy however, Article 34 was not material given that it “does not determine which organ in a federal State should discharge its obligation.”¹⁰¹ Justice Brennan found that Article 34 was not consistent with the constitutional law in Australia,¹⁰² and that the power to implement the Convention came under the Commonwealth.¹⁰³ Justice Deane found that “Article 34 acts on the distribution of powers under the Constitution ... under [the *Australian Constitution*] distribution of powers, the carrying into effect of the Convention is within the paramount legal jurisdiction of the Commonwealth Parliament by virtue of the express grant of legislative power contained in section 51 (xxix).”¹⁰⁴

⁹¹ *Tasmanian Dam Case*, 158 CLR at 90 (Austl.).

⁹² *Id.* at 92.

⁹³ *Id.* at 90.

⁹⁴ *Id.* at 102 (citing *National Parks and Wildlife Conservation Act 1975* (Cth) (Austl.), and *World Heritage Properties Conservation Act 1983* (Cth) (Austl.)).

⁹⁵ *Airlines of NSW Pty Ltd v New South Wales* (1965) 113 CLR 54, 118 (Kitto J) (Austl.); *R v Burgess* (1936) 55 CLR, 608, 659-660 (Starke J) (Austl.).

⁹⁶ *Tasmanian Dam Case*, 158 CLR at 111 (Austl.).

⁹⁷ *Id.* at 203.

⁹⁸ *Id.* at 321.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 6.

¹⁰¹ *Id.* at 178.

¹⁰² *Id.* at 228.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 263.

Moreover, the majority held that the protection of Aboriginal sites was within the legislative power of the Commonwealth under section 51(xxvi) of the *Constitution*. For Justice Mason, “A law which protects the cultural heritage of the people of the Aboriginal race constitutes a special law for the purpose of par. (xxvi) because the protection of that cultural heritage meets a special need of that people.”¹⁰⁵ Similarly, Justice Murphy stated that “Parliament was entitled to act on the view that a law to preserve the material evidence of the history and culture of the Tasmanian Aboriginals is a law with respect to the people of the Tasmanian Aboriginal race, or with respect to the people of the Aboriginal race of Australia.”¹⁰⁶ For Justice Brennan, the race power “does not place a limitation upon the nature of the benefits which a valid law may confer, and none should be implied”¹⁰⁷ and “I would not construe par. (xxvi) as requiring the law to be ‘special’ in its terms; it suffices that it is special in its operation.”¹⁰⁸ Justice Deane found that “subject to any general constitutional restrictions, s. 51 (xxix) of the Constitution confers upon the Commonwealth the legislative power necessary for carrying the Convention into effect including the power to make laws for procuring the performance within Australia of all or any of the obligations assumed by Australia under it.”¹⁰⁹

The HCA majority also held that the Commonwealth 1975 Act and 1983 Regulations were a valid exercise of the external affairs power (section 51(xxix)) in as far as giving effect to the Convention. Justices Mason and Murphy took a broad view of the external affairs power. Justice Mason opined that “...the notion that the subject-matter of a treaty must be of international concern remains an elusive concept”,¹¹⁰ and found that the section 51(xxix) “confers legislative power on the Commonwealth Parliament to implement and give effect to the provisions of the Convention.”¹¹¹ Justice Murphy also stated that “The [external] power extends to the execution of treaties by discharging obligations or obtaining benefits, but it is not restricted to treaty implementation”,¹¹² and that “The world’s cultural and natural heritage is, of its own nature, part of Australia’s external affairs.”¹¹³ In other words, the “Tasmanian wilderness area is part of world heritage.”¹¹⁴ For Justice Brennan, “the acceptance by Australia of an obligation under the Convention suffices to establish the power of the Commonwealth to make a law to fulfil the obligation.”¹¹⁵ Justice Deane was also of the opinion that the race power “includes the power to make laws protecting the cultural and spiritual heritage of those people by protecting property which is of particular significance to that spiritual and cultural heritage.”¹¹⁶

¹⁰⁵ *Id.* at 159.

¹⁰⁶ *Id.* at 181.

¹⁰⁷ *Id.* at 243.

¹⁰⁸ *Id.* at 245.

¹⁰⁹ *Id.* at 264.

¹¹⁰ *Id.* at 123.

¹¹¹ *Id.* at 136.

¹¹² *Id.* at 170.

¹¹³ *Id.* at 172.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 219.

¹¹⁶ *Id.* at 276.

The plurality (Mason, Murphy and Deane) also held the 1983 Act¹¹⁷ to be a valid exercise of the external affairs power. Justices Brennan and Deane, however, considered that parts of the Act were too wide to be an appropriate implementation of the Convention.¹¹⁸

In summary, the case exhibits complexity sourced in tension between competing rights, especially environmental and Aboriginal rights.

2. BANK NATIONALIZATION CASE

The *Bank Nationalization Case* illustrates an analytical complexity arising from two sets of rights. First there is property rights and the “on just terms” compensation for compulsory acquisition (what is referred to in the United States as eminent domain under the Fifth Amendment “just compensation”).¹¹⁹ Second, there is the individual rights theory that was used in the case to explain the operation of section 92 of the *Australian Constitution* (free trade guarantee interstates).¹²⁰ In addition to these rights, a third layer of complexity came through the vertical tension inherent in the *Australian Constitution* between federal and state jurisdiction.

In the *Bank Nationalization Case*, the Banks of New South Wales and Austalasia and some of their shareholders, and the States of Victoria, South Australia and Western Australia brought proceedings against the Commonwealth of Australia arguing that certain provisions of the Commonwealth banking Act¹²¹ were invalid.¹²² The objects of the Act, as stated in section 3, include “(a) the expansion of the banking business of the Commonwealth Bank as a publicly owned bank conducted in the interests of the people of Australia and not for private profit; (b) the taking over by the Commonwealth Bank of the Banking business in Australia of private banks and the acquisition on just terms of property used in that business; (c) the prohibition of the carrying on of banking business in Australia by private banks.” The Act allowed for the compulsory acquisition by the Commonwealth Bank of shares in all private banks operating in Australia.

Under the Act, the Treasurer could bring compulsory acquisition under section 24 of the Act. He could then give a notice under section 13(1) and displace the original directors (section 17). Nominee directors could then be put in place (section 18) to make an agreement for compensation (under section 43 (1)) with the approval of the Treasurer. In the event that no agreement is reached, a private bank may make a claim in writing to the Commonwealth Bank for compensation

¹¹⁷ *World Heritage Properties Conservation Act 1983* (Cth) (Austl.).

¹¹⁸ *Id.* at 5, 236, 266-67.

¹¹⁹ *See Bank Nationalization Case*, 76 CLR at 341 (Dixon J) (Austl.).

¹²⁰ Note that the individual rights theory interpretation of s 92 lasted only until 1988 when the HCA replaced it in favor of an economic interpretation of the section. *See Cole v Whitfield* (1988) 165 CLR 360 (Austl.). For an analysis of this interpretation, *see* Gonzalo Villalta Puig, *Intercolonial Free Trade: The Drafting History of Section 92 of the Australian Constitution*, 30 U. TAs. L. REV. 1 (2011); Peter Connolly, Inaugural Address at the Samuel Griffith Society Proceedings in Melbourne (July 24, 1992) (transcript available at <https://static1.squarespace.com/static/596ef6aec534a5c54429ed9e/t/5c95a071f9619a337b77329a/1553309827967/Vol1.pdf>).

¹²¹ *Banking Act 1947* (Cth) (Austl.).

¹²² *Bank Nationalization Case* (1948) 76 CLR 1 (Austl.).

(section 43 (3)).¹²³ In a nutshell, the Act vests the Commonwealth Bank with the function of assessing and paying compensation to the shareholders. The effect of these provisions was to enable Commonwealth Bank control over board of directors to the end of disposing any business by these banks to the Commonwealth Bank. The main legal argument by the plaintiffs was that these provisions were unconstitutional because the mechanism for determining the compensation was not “on just terms” as required under section 51(xxxi) of the Australian Constitution.¹²⁴ Section 51(xxxi) of the *Constitution* states that:

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:
(xxx) the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws;

The whole Court found the Act invalid. For the plurality, the invalidity arises from conflict with section 51(xxxi) as it fails in the provision of just terms for the acquisition of shares in private banks.¹²⁵ The invalidity according to Justices Rich and Williams is because the purpose of the 1947 Act is not related to section 51(xiii)—there is lack of any legislative power authorizing the Act.¹²⁶ Justice Starke

¹²³ *Id.* at 175-76.

¹²⁴ The Act also gives the Federal Court of Claims an exclusive jurisdiction to decide on proceedings brought under the Act. The vesting of this exclusive jurisdiction was found by the HCA to be invalid given that the Commonwealth Bank was a person sue on behalf of the Commonwealth and therefore comes under the HCA jurisdiction in s 75(iii) of the *Australian Constitution*. This part of the case is less relevant to our analysis and will therefore not be covered in any detail.

¹²⁵ *The Bank Nationalization Case*, 76 CLR at 3 (Latham CJ, Dixon & McTiernan JJ) (Austl.).

¹²⁶ *Id.* Note that Justices Rich and Williams were also of the opinion that the Act was inconsistent with s 105A of the Constitution. Section 105A state the following:

- Agreements with respect to State debts
- (1) The Commonwealth may make agreements with the States with respect to the public debts of the States, including:
 - (a) the taking over of such debts by the Commonwealth;
 - (b) the management of such debts;
 - (c) the payment of interest and the provision and management of sinking funds in respect of such debts;
 - (d) the consolidation, renewal, conversion, and redemption of such debts;
 - (e) the indemnification of the Commonwealth by the States in respect of debts taken over by the Commonwealth; and
 - (f) the borrowing of money by the States or by the Commonwealth, or by the Commonwealth for the States.
 - (2) The Parliament may make laws for validating any such agreement made before the commencement of this section.
 - (3) The Parliament may make laws for the carrying out by the parties thereto of any such agreement.
 - (4) Any such agreement may be varied or rescinded by the parties thereto.
 - (5) Every such agreement and any such variation thereof shall be binding upon the Commonwealth and the States parties thereto notwithstanding anything contained in this Constitution or the Constitution of the several States or in any

stated that the Act is not authorized by section 51(xiii), (xxxi), (xxxix), together or separately.¹²⁷

Based on precedents interpreting the meaning of “banking”, Chief Justice Latham agreed with the plaintiffs’ that banking is a business.¹²⁸ He also agreed that the federal power in section 51(xiii) is limited and is interpreted to make States “free to set up State banks” and to require the Commonwealth to “remove obstacles to the operation of such banks in other States.”¹²⁹ Notwithstanding, “State law cannot prevent the Commonwealth acquiring property”,¹³⁰ including shares and assets in State banks. Therefore, the 1947 Act was “valid under s. 51 (xiii) of the Constitution.”¹³¹ However, the Chief Justice explained that “[a] power to acquire property from one person does not include a power to abolish the rights of creditors of that person”,¹³² and therefore “the provisions for the discharge of the private banks from liabilities ... cannot be supported as laws made under the power to make laws for the acquisition of property: s. 51 (xxxi) of the Constitution.”¹³³ The Chief Justice then stated that the compulsory acquisition was invalid given Commonwealth appointment of managers of property who have bidding authority over the owners of the property as to the amount of compensation to be paid.¹³⁴

Justices Rich and Williams delivered a joint judgment where they interpreted section 51(xiii) narrowly.¹³⁵ As a result, the 1947 Act was invalid as far as not being authorized by section 51(xiii).¹³⁶ It follows that no acquisition can be made under section 51(xxxi) as “property can only be acquired under this power for any purpose

law of the Parliament of the Commonwealth or of any State.

- (6) The powers conferred by this section shall not be construed as being limited in any way by the provisions of section one hundred and five of this Constitution.

This argument does not relate to the tension between the federal and state governments and will not be discussed further in the analysis of this case.

¹²⁷ *The Bank Nationalization Case*, 76 CLR at 3 (Austl.). The provisions are given below:
The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

(xiii) banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money;

(xxxi) the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws;

(xxxix) matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

¹²⁸ *Bank Nationalization Case*, 76 CLR at 193 (Austl.).

¹²⁹ *Id.* at 198.

¹³⁰ *Id.* at 208.

¹³¹ *Id.* at 211.

¹³² *Id.* at 214.

¹³³ *Id.*

¹³⁴ *Id.* at 218.

¹³⁵ *Id.* at 258.

¹³⁶ *Id.* at 259.

in respect of which the Commonwealth Parliament has power to make laws.”¹³⁷ Arguing in the alternative, Justices Rich and Williams also found the Act invalid as the mechanism for acquisition was not “on just terms” because “the power to legislate with respect to banking in its widest meaning could not justify a law placing the nominees of one bank, whether an agent of the Commonwealth or not, permanently in the management and control of the business of another bank”,¹³⁸ and because “to give to the Commonwealth Bank a power compulsorily to acquire shares in another bank is not a purpose in respect of which the Commonwealth Parliament has power to make laws within the meaning of s. 51(xxxi).”¹³⁹

As to Justice Starke, he too observed the large and extensive nature of the acquisition power,¹⁴⁰ however, he also found that “the power is not, in itself, wide enough to include the taking over of liability”,¹⁴¹ although, the incidental power in section 51(xxxix) enlarges the power to warrant legislation providing the manner in which liabilities can be taken over and discharged.¹⁴² Based on his wide interpretation of the acquisition power Justice Starke found that “[t]he authority to acquire shares and to take over businesses of the trading banks by agreement raises no difficulties [under the Constitution].”¹⁴³ Still, in this case, according to Justice Starke, the acquisition was not “on just terms” given that “just terms” “require that a right to interest should be given and not some merely discretionary authority to award interest.”¹⁴⁴

As to Justice Dixon, he found the 1947 Act invalid due to the lack of authorizing power based on precedents in interpreting section 51(xiii).¹⁴⁵ He also found in the alternative that any taking under the Act is not on “just terms”,¹⁴⁶ given that “the assets of the private bank is left to the judgment of the nominees of the Commonwealth Bank ... In substance they are agents of the Commonwealth armed by statute with power to bind the company.”¹⁴⁷

Justice Dixon’s judgment is best known for the individual rights theory that he used to interpret section 92 of the *Australian Constitution*, as a right of private banks to engage in interstate banking. Justice Dixon formulates this approach as follows:

[Section] 92 treats inter-State traffic and intercourse, not as a mere economic phenomenon, but as an activity, and as such sets it free for people to engage in. Juristically it is doubtless true that s. 92 does not confer private rights upon individuals: at all events so I decided in *James v The Commonwealth*.¹⁴⁸ It may perhaps also be true that its purpose is not the protection of the individual trader. But it assumes that without

¹³⁷ *Id.*

¹³⁸ *Id.* at 265.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 299.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 314.

¹⁴⁴ *Id.* at 317.

¹⁴⁵ *Id.* at 330.

¹⁴⁶ *Id.* at 349.

¹⁴⁷ *Id.* at 351.

¹⁴⁸ *James v Commonwealth* (1939) 62 CLR 339, 361-62 (Austl.).

governmental interference trade, commerce and intercourse would be carried on by the people of Australia, across State lines, and its purpose is to disable the governments from preventing or hampering that activity.¹⁴⁹

The last member of the bench, Justice McTiernan provided a brief judgment, where he agreed with the Chief Justice that some provisions of 1947 Act cannot be justified by any power in the *Australian Constitution*.¹⁵⁰ In addition, Justice McTiernan states that in order for the acquisition to be on just terms, “independent approval of the terms of sale would be necessary.”¹⁵¹

In summary, the *Bank Nationalization Case* reflects a set of complexity similar to that seen in tier one cases, barring the layer resulting from the tension between international and domestic law.

3 MOMCILOVIC

The third second-tier outlier is *Momcilovic*.¹⁵² Similar to previous cases, in addition to the vertical jurisdictional tension, *Momcilovic* illustrates the complexity of legal issues when they are examined in the context of protecting human rights,¹⁵³ including the potential of an “invading” international law jurisprudence.¹⁵⁴ The vertical tension in this case had two sources. First, the potential inconsistency between Victorian and Commonwealth legislation,¹⁵⁵ which introduced a first layer of analytical complexity. Second, the added layer of potential inconsistency between the Victorian human rights *Charter*¹⁵⁶ and Chapter III of the *Australian Constitution*. The latter tension also introduces a tension between international and domestic law, as section 32 of the *Charter* authorizes resort to international law instruments relevant to human rights when interpreting statutory provisions.

There are six separate judgments by Chief Justice French and Justices Gummow, Hayne, Heydon and Bell; Crennan and Kiefel writing jointly. The plethora of complex issues raised in *Momcilovic* was given express acknowledgement by Justice Gummow.¹⁵⁷ The issues relate to section 5 of the Victorian Act,¹⁵⁸ which directs juries to find guilt of the defendant unless there is evidence that the defendant did not know that drugs were in their possession. *Momcilovic* was sentenced under the 1981 Act on the offence of trafficking in drugs. She appealed her conviction and sentence arguing that section 5 had to be consistent with section 32 of the *Charter*, which requires that statutes need to be interpreted consistently with human rights. *Momcilovic* also argued that section 71AC of the Victorian Act, under which she was convicted for the offence of trafficking, was invalid because it imposed different penalties to trafficking offences inconsistent with the Commonwealth

¹⁴⁹ *Bank Nationalization Case*, 76 CLR at 388 (Austl.).

¹⁵⁰ *Id.* at 397-98.

¹⁵¹ *Id.* at 395.

¹⁵² *Momcilovic v The Queen* (2011) 245 CLR 1 (Austl.).

¹⁵³ *Id.* at 38-44, 90-92, 162, 204.

¹⁵⁴ *Id.* at 36-38, 244-45 (Austl.).

¹⁵⁵ *See Drugs, Poisons and Controlled Substances Act 1981* (Vic) s 71AC, and the Criminal Code (Cth) s 302.4 (Austl.).

¹⁵⁶ *Charter of Human Rights and Responsibilities 2006* (Vic) s 32 (Austl.).

¹⁵⁷ *Id.* at 75.

¹⁵⁸ *Drugs, Poisons, and Controlled Substances Act 1981* (Vic) (Austl.).

Act.¹⁵⁹ The Crown argued that the *Charter* was invalid because it purports to invest the Supreme Court of Victoria with power inconsistent with the judicial function requirements of Chapter III of the *Australian Constitution*.

By a six-to-one majority, the Court found for Momcilovic. The HCA held that given that the prosecution in this case was brought by Victoria against Momcilovic, who at the time was resident in Queensland, this prosecution was therefore a matter under section 75(iv) of the *Australian Constitution*. Further, it was therefore a matter under which federal judicial power had been engaged and was exercised by Victorian courts. As to the inconsistency with Chapter III of the *Constitution*, the HCA stated that section 32 of the *Charter* did not confer powers inconsistent with Chapter III. The HCA also stated that there was no inconsistency between the Commonwealth and Victorian Acts given that the Commonwealth *Criminal Code* did not intend to cover the field, and did not limit the concurrent operation of the Victorian Act.¹⁶⁰ Moreover, given that the penalty in section 71AC of the Victorian Act is less stringent than the penalty in section 302.4 of the Commonwealth Code, the provisions were not inconsistent for the purposes of section 109 of the *Australian Constitution*.

Of particular interest are the dicta by Chief Justice French and Justice Heydon on the role of international law in interpreting domestic law. Chief Justice French pointed to the fact that the presumption of innocence declared in section 25(1) of the *Charter* (A person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law)¹⁶¹ is “expressed in terms found in Art 14(2) of the International Covenant on Civil and Political Rights (1966) (the ICCPR), Art 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (the ECHR) and Art 8(2) of the American Convention on Human Rights (1969) (the ACHR).”¹⁶² Nevertheless, he also points out to the need for discrimination and care in consulting international and foreign judgments.¹⁶³

In his dissentient opinion, Justice Heydon explains the relevance of international law in the following terms:

although normally recourse to travaux préparatoires is barren and useless, the generality and obscurity of the Charter requires them to be considered, both for the present purpose and for other purposes. For example, the Attorney-General in his Second Reading Speech said:

Australia is the last major common law-based country that does not have a *comprehensive* human rights instrument that *ensures* that *fundamental human rights* are *observed* and that the corresponding obligations and responsibilities are *recognized*.¹⁶⁴

As to Justices Crennan and Kiefel, they note that “[t]he civil and political rights identified in Pt 2 [of the Charter] are derived principally from the International

¹⁵⁹ *Criminal Code* (Cth) s 302.4 (Austl.).

¹⁶⁰ *Drugs, Poisons, and Controlled Substances Act 1981* (Vic) (Austl.).

¹⁶¹ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25(1) (Austl.).

¹⁶² *Momcilovic*, 245 CLR at 37 (Austl.).

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 154 (emphasis in the original).

Covenant on Civil and Political Rights (1966) (the ICCPR).¹⁶⁵ They explain further that:

The ICCPR was opened for signature on 16 December 1966 and entered into force pursuant to Art 49(1) on 23 March 1976. Australia signed the ICCPR on 18 December 1972 and ratified it on 13 August 1980. The ICCPR entered into force for Australia pursuant to Art 49(2) on 13 November 1980. The text of the ICCPR appears in Sch 2 to the Australian Human Rights Commission Act 1986 (Cth) (formerly known as the Human Rights and Equal Opportunity Commission Act 1986 (Cth)).¹⁶⁶

This mention of the ICCPR did not entail any analysis of the relationship between international and domestic law. The position under the dualist system on the implementation of international treaties is that the ICCPR has not been transformed into domestic law.

Justice Bell also makes a similar statement,¹⁶⁷ and goes on to observe that:

The drafting conventions adopted in the two instruments differ. The ICCPR makes provision in the statement of the right for any circumstances in which the right may be limited. The Charter adopts this convention in the statement of some rights, for example, the right to privacy and the right to freedom of expression. A number of the rights which the ICCPR recognizes as being subject to limitation are set out in the Charter without reference to the circumstances of limitation. These include the right to freedom of thought, conscience, religion and belief and the right of peaceful assembly and freedom of association. However, the rights in the Charter are subject to the general limitation provision of s 7, which is the first provision of Pt 2.¹⁶⁸

As with the judgment by Crennan and Kiefel, Justice Bell's judgment does not offer any analysis of the tension between international law and domestic law when it comes to human rights, especially under the ICCPR.

It is useful here to explain that there is a nexus between Chapter III and international law,¹⁶⁹ which will be discussed in more detail in *War Crimes Act Case* as part of third-tier outliers below. Suffice it here to reiterate the reliance on international human rights conventions such as the *European Convention for the Protection of Human Rights* (ECHR) and the *American Convention on Human Rights*, even though Australia is not party to either of these conventions.¹⁷⁰

¹⁶⁵ *Id.* at 202.

¹⁶⁶ *Id.* at 203.

¹⁶⁷ *Id.* at 244.

¹⁶⁸ *Id.* at 245.

¹⁶⁹ See Kristen Walker, *International Law as a Tool of Constitutional Interpretation*, 28 MONASH U. L. REV. 85, 89 (2002).

¹⁷⁰ *Id.* In *War Crimes Act Case*, Justice Deane used these conventions to support his conclusion that 'ex post facto criminal legislation lies outside the proper limits of the legislative function. See *Polyukhovich v Commonwealth* ("*War Crimes Act Case*") (1991) 172 CLR 501, 611 (Austl.).

In summary, the case exhibits the same complexity seen in previous cases, a tension between competing sets of rights, and the position of international vis-à-vis domestic law in protecting these rights.

4. COAL VEND CASE

This is the earliest case in the twelve-outlier list. It relates to convictions against a coal-vend cartel under the AIPA.¹⁷¹ The Act is based on the United States *Sherman Act* of 1890,¹⁷² and was intended to protect Australian industries from predatory conduct by American companies, namely through the formation of trusts that operate against public interest.¹⁷³ Justice Isaacs, sitting alone in the High Court,¹⁷⁴

¹⁷¹ *Australian Industrial Preservation Act 1906* (AIPA) (Cth) (Austl.) (assented to 24th September 1906). The full name of the Act is *An Act for the Preservation of Australian Industries, and for the Repression of Destructive Monopolies*.

¹⁷² Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1980).

¹⁷³ The AIPA differed from the Sherman Act in a key aspect, namely the requirement for proving intent. Section 4(1)(a) of the AIPA proscribes the following conduct:

7(1) Monopolizing or attempting to monopolize or combining or conspiring to monopolize any part of trade or commerce with intent to control, to the detriment of the public, the supply or price of any service, merchandise or commodity;

In contrast, the Sherman Act § 2 states that:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

(July 2, 1890, ch. 647, § 2, 26 Stat. 209; July 7, 1955, ch. 281, 69 Stat. 282; Pub. L. 93-528, § 3, Dec. 21, 1974, 88 Stat. 1708; Pub. L. 101-588, § 4(b), Nov. 16, 1990, 104 Stat. 2880; Pub. L. 108-237, title II, § 215(b), June 22, 2004, 118 Stat. 668.)

Note that s 7(1) was amended in 1910 by the *Australian Industries Preservation Act 1910* (Cth) (Austl.). The amending section reads as follows:

4. Section seven of the Principal Act is amended—

(a) by omitting the words “with intent to control, to the detriment of the public, the supply or price of any service, merchandise, or commodity”;

¹⁷⁴ It is useful to point out that before sitting on the bench at the High Court, Isaacs, J. in his role as the Commonwealth Attorney-General, was responsible for introducing the AIPA. See Martin P. Shanahan & David K. Round, *Serious Cartel Conduct, Criminalization and Evidentiary Standards: Lessons from the Coal Vend Case of 1911 in Australia*, 51 BUS. HIST. 875, 879 (2009). For a background on Justice Isaacs and his role as a maverick on the bench, see Zelman Cowen, *Isaacs, Sir Isaac Alfred (1855-1948)*, 9 AUSTRALIAN DICTIONARY BIOGRAPHY 444 (1983). Michael Kirby, *Isaac Isaacs – A Sesquicentenary Reflection at The Samuel Alexander Lecture*, Wesley College Melbourne (Aug. 4, 2005) (transcript available at https://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_4aug05.pdf).

found against the defendants. However, he did not discuss any constitutional issues, save for the power of the Commonwealth to legislate anti-trust laws.¹⁷⁵

Justice Isaacs refers only shortly to the issue of constitutional validity in relation to section 15(A) of the AIPA. The section was introduced by an amending Act in 1097.¹⁷⁶ His honor stated that he has no doubt as to its constitutional validity.¹⁷⁷ The case is therefore an exception to the other outliers. Those cases have constitutional issues at the heart of each case. The *Coal Vend Case* is instead, as discussed below, a case exhibiting a complexity arising from the interaction between legal and economic analysis.

After an extensive analysis of the evidence, and an erudite discussion of social, economic and legal issues, Justice Isaacs found intent to restraint trade.¹⁷⁸ The next step, arguably the one more relevant to the contemporary significance of this case today,¹⁷⁹ was to ascertain whether this restraint of trade was to the detriment of the public.¹⁸⁰ After examining Vend's minutes, the HCA found no evidence to establish that their coordination was intended to prevent financial ruin.¹⁸¹ Moreover, using a 'cost-plus' approach, Justice Isaacs found the prices charged by the Vend to be unreasonable.¹⁸² However, finding detriment to the public is in essence a social question, and the analysis had to extend to understanding whether the Vend's actions result in an allocative efficiency cost that outweighed the benefits derived from increasing productive efficiency.¹⁸³ Justice

¹⁷⁵ In the appellate court, the coal miners and the shipping companies argued successfully that they did not have the requisite intent to commit a restraint of trade. In subsequent appeals the critical factor was the interpretation of price fixing and bid rigging in relation to intention. The appeal decisions are *Adelaide SS Co Ltd v The King* (1912) 15 CLR 65 (Austl.) and *Attorney-General (Cth) v Adelaide SS Co Ltd* [1913] AC 781 (PC). In 1910, and before the writs were issued, the AIPA was amended to remove the need to proving intent. However, the opportunity to amend the writs was not taken. Walker suggests by way of explanation that the then new Attorney-General had "scant regard" for the AIPA. See GEOFFREY DE Q. WALKER, *AUSTRALIAN MONOPOLY LAW: ISSUES OF LAW, FACT AND POLICY* (1967). See generally Shanahan & Round, *supra* note 174.

¹⁷⁶ *The Australian Industries Preservation Act 1907* (Cth) (Austl.). Section 15(A) reads as follows:

Burden of proof

15A. In any prosecution for an offence against sections four, five, seven, eight, or nine of this Act the averments of the prosecutor contained in the information declaration or claim shall be deemed to be proved in the absence of proof to the contrary, but so that—

- (a) the averment in the information of intent shall not be deemed sufficient to prove such intent, and
- (b) in all proceedings for an indictable offence the guilt of the defendant must be established by evidence.

¹⁷⁷ *Coal Vend Case*, 14 CLR at 404 (Austl.).

¹⁷⁸ *Id.* at 649-50.

¹⁷⁹ Shanahan & Round, *supra* note 174, at n.25.

¹⁸⁰ *Coal Vend Case*, 14 CLR at 469 (Austl.).

¹⁸¹ *Id.* at 518-521.

¹⁸² *Id.* at 547, 549.

¹⁸³ The test was developed in *Horner v. Graves* (1831) 7 Bing 735; 131 Eng. Rep. 284. See Shanahan & Round, *supra* note 174, at 890. For readers not familiar with these efficiency terms, allocative efficiency refers to the production of goods or services in accordance with consumer preferences. Productive efficiency refers to a technology

Isaacs, finding that the cost outweighed the benefit, expressed his reasoning in the following terms:

[I]t is little satisfaction to a consumer to know that he can be the more speedily supplied with coal that he would rather not have, in return for not getting at all the coal he prefers.¹⁸⁴

A key source of complexity in this case is the lack, at the time, of economic theories to explain the behavior of cartels.¹⁸⁵ To his credit, in his analysis, Justice Isaacs “incorporated the ideas and methods, in a less formal way, of course, of modern microeconomic theory.”¹⁸⁶ His approach was described in the following terms:

[H]e created a set of criteria to be examined in search of proof that a cartel was operating ... Many of these [criteria] were not formally incorporated into economic analyses of markets until the 1950s and later ... Isaacs J was clearly several decades ahead of his time in looking at the strategic purposive and targeted behavior and dynamic effects of the actions of the Vend’s members.¹⁸⁷

In summary, the *Coal Vend Case* is the exception to the rule. It does not exhibit a tension between vertical levels of government, or between competing sets of rights, save probably in an economic sense, namely the rights on the supply and demand sides of the coal industry. However, *Coal Vend’s* significance is related to how economic analysis can inform antitrust jurisprudence. Today, the significance of this case is attenuated by the amendment of the AIPA in 1910 to remove the requirement of intent.

5. JIHAD JACK CASE

In *Jihad Jack*,¹⁸⁸ there were two areas of law: constitutional law and evidence. Under constitutional law there were 55 legal issues, and under evidence three. The judgment showcases six opinions, with Justices Gummow and Crennan writing a joint judgment.

The case arose from an interim control order sought against Joseph ‘Jihad Jack’ Terrence Thomas for apprehended terrorist tendencies. These control orders were introduced by a 2005 Commonwealth anti-terrorism Act,¹⁸⁹ and became Division

constraint, where the production of one more good is impossible without sacrificing another good, unless there is an improvement in production technology. See Stephen Palmer & David J. Torgerson, *Economic Notes: Definitions of Efficiency*, 318 B.M.J. 1136 (1999).

¹⁸⁴ *Coal Vend Case*, 14 CLR at 485 (Austl.).

¹⁸⁵ Shanahan & Round, *supra* note 174, at 880.

¹⁸⁶ *Id.* at 893.

¹⁸⁷ *Id.* at 894.

¹⁸⁸ *Thomas v Mowbray* (“*Jihad Jack Case*”) (2007) 233 CLR 307 (Austl.).

¹⁸⁹ *Anti-Terrorism Act* (No 2) 2005 (Cth) (Austl.).

104 of the Commonwealth *Criminal Code*.¹⁹⁰ The orders put restrictions on place of residence, curfews, and tracking devices. The issue in the case was whether such restrictions can be valid without a criminal conviction. Section 104.4 of the *Criminal Code* authorizes making an interim order if, on the balance of probabilities, the order would substantially assist in preventing a terrorist attack, or if the order is against a person who has provided training to, or received training from, a listed terrorist organization. The constitutional issue was whether the *Criminal Code* is invalid because it confers a non-judicial power on a federal court contrary to Chapter III of the *Australian Constitution*. The High Court found that section 104.4 was to be exercised judicially, given the reasonableness of standards imposed therein. The section was constitutionally valid as a protection of the Australian public under the defense power (section 51[vi]).

Thomas challenged the constitutional validity of the interim control orders against him on three grounds. First, violation of the separation of judicial powers by conferring on a federal court a non-judicial power, in contravention of Chapter III of the *Australian Constitution*. Second, in the alternative, if the conferred power for issuing interim control orders were a judicial power, its exercise is nonetheless contrary to Chapter III. Third, that the Commonwealth has no express or implied power to introduce these interim control orders.

A five-to-two majority (Kirby and Hayne dissenting)¹⁹¹ found that section 104.4 of the *Criminal Code* was constitutionally valid.¹⁹² Only Justice Kirby, found

¹⁹⁰ *Criminal Code Act 1995* (Cth) (Austl.). The design of div 104 borrows from the UK control order scheme which came into force in 2005. The Prevention of Terrorism Act 2005, c. 2 (UK) replaced Part IV of the Anti-Terrorism, Crime and Security Act 2001, c. 24, §§ 21(1) and 23 (UK). The 2001 sections allow for the indefinite detention of aliens that are reasonably believed to be a risk to national security. The 2005 amendment came in response to the 2004 House of Lords ruling that Part IV of the 2001 Act was incompatible with the Convention for the Protection of Human Rights and Fundamental Freedoms ('European Convention on Human Rights') arts. 5,14, Nov. 4, 1950, 213 U.N.T.S. 222, and had issued a declaration to this effect under s 4 of the Human Rights Act 1998, c. 2 (UK). One key distinction between div 4 and the UK 2005 Act is that the latter requires the Secretary of State to consider, and a Control Order Review Group to subsequently monitor, whether the subject of an order could be criminally prosecuted instead (s 8). See Andrew Lynch, *Thomas v. Mowbray: Australia's 'War on Terror' Reaches the High Court*, 32 MELB. U. L. REV. 1182, 1184 n.8-10 (2008).

¹⁹¹ Justice Hayne, however, concurred with the majority on the third ground raised by Thomas for challenging the orders.

¹⁹² Section 104.4 states:

- (1) The issuing court may make an order under this section in relation to the person, but only if:
 - (a) the senior [Australian Federal Police] AFP member has requested it in accordance with section 104.3; and
 - (b) the court has received and considered such further information (if any) as the court requires; and
 - (c) the court is satisfied on the balance of probabilities:
 - (i) that making the order would substantially assist in preventing a terrorist act; or
 - (ii) that the person has provided training to, or received training from, a listed terrorist organization; and
 - (d) the court is satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions to be imposed on the person

that the defense power under section 51(vi) of the *Constitution* did not support Division 104.¹⁹³ His conclusion rested on the finding that Division 104 “directly encroaches upon rights and freedoms belonging to all people both by the common law of Australia and under international law.”¹⁹⁴ The other six justices found that the purposive nature of the defense power extends to protecting the Australian public against all forms of political violence, regardless of its form.¹⁹⁵ The difference in Justice Kirby’s approach rests on his interpretation of the power as is enlivened only when the threat is directed to the bodies politic, namely the Commonwealth and the States. Otherwise there is no justification to treating the threat as “beyond that of particular dangers to specific individuals or groups or interests found within the bodies politic.”¹⁹⁶

What is of more direct relevance to this article is that Justices Hayne, Callinan, and Heydon refused to consider the role of international law in the validity of the impugned provisions, especially via considering constitutional validity under the external affairs power (section 51(xxix)).¹⁹⁷ Three of the seven bench Court

by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act.

- (2) In determining whether each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, the court must take into account the impact of the obligation, prohibition or restriction on the person’s circumstances (including the person’s financial and personal circumstances).
- (3) The court need not include in the order an obligation, prohibition or restriction that was sought by the senior AFP member if the court is not satisfied as mentioned in paragraph (1)(d) in respect of that obligation, prohibition or restriction.

¹⁹³ Section 51(vi) of the *Constitution* reads as follows:

Legislative powers of the Parliament

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

(vi) the naval and military defense of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth;

¹⁹⁴ *Jihad Jack Case*, 233 CLR at 380, 440-42 (Austl.).

¹⁹⁵ See in particular the theoretical analysis by Hayne J who invoked the Carl von Clausewitz theory of war. *Id.* at 452. See CARL VON CLAUSEWITZ, ON WAR 1-13 (James John Graham trans., N. Trübner & Co. 1873) (1832). See also Geoffrey Lindell, *The Scope of the Defense and Other Powers in the Light of Thomas v Mowbray*, 10 CONST. L. & POL’Y REV. 42, 46 (2008); David Dyzenhaus & Raynor Thwaites, *Legality and Emergency The Judiciary in a Time of Terror*, in LAW AND LIBERTY IN THE WAR ON TERROR 9, 23 (Andrew Lynch et al. eds., 2007).

¹⁹⁶ *Jihad Jack Case*, 233 CLR at 395 (Austl.). Unlike the majority, Justice Kirby was also critical of the width of the term “terrorist act” in s 104.4 (and in s 104.1 which sets out the purpose of div 104 as the prevention of “terrorist acts”). See *Jihad Jack Case*, 233 CLR at 401-02 (Austl.).

¹⁹⁷ See Lynch, *supra* note 190, at 1196. The section reads as follows:

Legislative powers of the Parliament

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

found sufficient legislative power in the external affairs power. Chief Justice Gleeson agreed with Justices Gummow and Crennan that the external affairs power supplemented any limits to the defense power “by the inclusion of governments of foreign states and expanded notions of ‘the public’” in the definition of “terrorist act.”¹⁹⁸ However, Justices Gummow and Crennan “did not engage at all with legal argument over whether Subdivision B was supported pursuant to treaty obligations upon the Commonwealth.”¹⁹⁹ However, the main concern is the “conspicuous unwillingness on the part of the majority judges to adopt an overt human rights discourse in considering such measures.”²⁰⁰

Justice Kirby, on the other hand stated explicitly the presumption in Australia that “Australian legislation is not ordinarily taken to invade fundamental common law rights or to contravene the international law of human rights, absent a clear indication that this is the relevant legislative purpose.”²⁰¹

Only Justice Kirby looked at international law instruments to guide his analysis as to the validity of the impugned sections. His Honor referred to Security Council Resolutions 1373 and 1566 on the definition of terrorist acts,²⁰² finding that Division 104 failed to have sufficient specificity to come under the external affairs power.²⁰³ In the opinion of at least one commentator: “Kirby, J makes a valid point in suggesting that the effect of domestic laws upon our standing in the international community is a flimsy hook on which to hang the validity of a law such as this. There is no clear consensus across that community as to the way in which terrorism should be rendered unlawful at the national level or even how it should be defined.”²⁰⁴ In finding the impugned section invalid, Justice Kirby, explaining his reasoning as follows:

Resolutions adopted by the Security Council may undoubtedly contain obligations binding on Member States, such as Australia. By virtue of Art 103 of the Charter, they assume a higher status than most other obligations owed under international law. Through its enactment under Ch VII of the Charter, and its use of mandatory language in paras 1, 2, 5, 6 and 9, Resolution 1373 was one such resolution. Clearly, it is binding on Australia as a party to the Charter but subject always, within Australia, to any relevant limitations or restrictions of the Australian Constitution.

For the purposes of s 51(xxix) of the Constitution, under which div 104 may be deemed a valid law of the Federal Parliament if it properly implements an obligation owed by Australia under international law, it is obviously necessary to keep in mind that “it is a constitution we are

(xxix) external affairs;

¹⁹⁸ *Jihad Jack Case*, 233 CLR at 324-6 (Gleeson CJ), 364 (Gummow & Crennan JJ) (Austl.).

¹⁹⁹ Lynch, *supra* note 190, at 1196. See *Jihad Jack Case*, 233 CLR at 364-65 (Gummow & Crennan JJ) (Austl.).

²⁰⁰ Paul Fairall & Wendy Lacey, *Preventive Detention and Control Orders under Federal Law: The Case for a Bill of Rights*, 31 MELB. U. L. REV. 1072, 1087 (2007).

²⁰¹ *Jihad Jack Case*, 233 CLR at 380 (Austl.).

²⁰² S.C. Res. 1373 (Sept. 28, 2001); S.C. Res. 1566 (Oct. 8, 2004).

²⁰³ *Jihad Jack Case*, 233 CLR at 409 (Austl.).

²⁰⁴ Lynch, *supra* note 190, at 1197.

expounding.” Nevertheless, the intended obligation must be characterized as one possessing “sufficient specificity” so as to attract a relevant head of the municipal legislative power.²⁰⁵

Citing precedents, for example the *Industrial Relations Act Case*,²⁰⁶ Justice Kirby found that the words relied upon in Resolution 1373 failed the “specificity” requirement for Division 104 to be a valid exercise of the external affairs power (section 51(xxix)).²⁰⁷

As to the other two grounds for challenging Division 104, namely in relation to Chapter III of the *Constitution* and the strict separation of the judicial power, the question to answer was whether deciding to issue a control order under Division 104 is capable of judicial determination.²⁰⁸ The majority answered in the affirmative, arguing that issuing such orders was reasonably necessary, and that the use of broad standards was a valid approach to applying the law.²⁰⁹ The minority objection was to using these broad standards in conjunction with the uncertainty inherent in the “purpose of protecting the public from a terrorist act” in section 104.4(l)(d).²¹⁰

Some commentators have argued that *Jihad Jack* suggests the need for a bill of rights in Australia.²¹¹ Fairall and Lacey suggest that “[w]hat is important to highlight is that, even aside from the Chapter III issue of complying with the *Boilermakers’ Case*,²¹² international human rights instruments clearly envisage different methods for the protection of human rights.”²¹³ They expound in the following terms:

Specifically, human rights conventions to which Australia is bound do not envisage a uniform role for the courts in their protection. Although the remedies for breaches of human rights are intended to be administered by the courts, different human rights require different roles for national courts in their practical operation (and thereby protection). For example, some human rights merely require the judicial oversight (that is, judicial review) of certain executive decisions. Examples under the ICCPR include arrest and detention and, potentially, the deportation of aliens ... In some circumstances, national courts are the only institutions with

²⁰⁵ *Jihad Jack Case*, 233 CLR at 407 (Austl.).

²⁰⁶ *Industrial Relations Act Case* (1996) 187 CLR 416, 486 (Austl.).

²⁰⁷ *Jihad Jack Case*, 233 CLR at 380 (Austl.).

²⁰⁸ Lynch, *supra* note 190, at 1204-05.

²⁰⁹ *Jihad Jack Case*, 233 CLR at 330-3, 334 (Gleeson CJ), 344-48, 352 (Gummow & Crennan JJ), 507 (Callinan J) (Austl.).

²¹⁰ *Jihad Jack Case*, 233 CLR at 417-25 (Kirby J, arguing that issuing interim control orders was not a normal part of a court’s function), 468-69, 477-78 (Hayne J) (Austl.).

²¹¹ See, e.g., Fairall & Lacey, *supra* note 200 [argued that the HCA treats the constitutional text as the foundation of the rule of law rather than a manifestation resting on broader foundation], Andrew Lynch & Alexander Reilly, *The Constitutional Validity of Terrorism Orders of Control and Preventative Detention* 10 FLINDERS J. L. REFORM 105 (2007) [arguing that ch III of the *Constitution* to be inherently contradictory in that it requires the independence of the judiciary but this independence is used by the executive to legitimize its actions by employing the judiciary to exercise non-judicial power].

²¹² *R v Kirby; Ex parte Boilermakers’ Soc’y of Austl (“Boilermakers’ Case”)* (1956) 94 CLR 254 (Austl.).

²¹³ Fairall & Lacey, *supra* note 200, at 1088.

competence to authorize or carry out certain actions (such as sentencing an offender to the death penalty under art 6 of the ICCPR and declaring the lawfulness or otherwise of an arrest or detention under art 9), whereas in other instances, courts must simply retain a role in reviewing the decisions made by other competent authorities (such as decisions to separate children from their parents against their will [under the CRC]).²¹⁴

They elaborate by explaining that:

What needs to occur if a more substantive approach is to be taken to the rule of law in Australian constitutional jurisprudence, is a more rigorous and transparent examination of the universally accepted human rights that are supposed to be 'fundamental' in common law jurisdictions and most Western liberal democracies. What is currently occurring in the High Court of Australia is a deliberate avoidance of the 'human rights issue' by most judges – a hangover from the conservatism of judges and driven by the politicization of the human rights debate in Australia.²¹⁵

In summary, *Jihad Jack* illustrates the complexity of legal issues when they are examined in the context of protecting (common law) human rights,²¹⁶ especially the potential of invading international law human rights.²¹⁷ The complexity in the case does not involve the tension between federal and state government, but rather the separation of judicial power under the Westminster-type *Australian Constitution*.

V. THIRD TIER OUTLIERS

In the third-tier of outliers, we find the last five cases in our outlier list, namely, the *Pastoral Leases case*, *Pape*, *Mabo [No 2]*, *War Crimes Act Case*, and *School Chaplains Case*. The rest of this section looks at each one of these cases to outline the origins of the complexity of the constitutional issues raised in each case.

I. PASTORAL LEASES CASE

In the *Pastoral Leases Case*,²¹⁸ there was tension between two types of rights: native title or Aboriginal rights to land and rights under pastoral leases. The legal issue was whether these different rights can coexist. The Wik Peoples and the Thayorre Peoples claimed interests in land on the Cape York peninsula, located in Far North Queensland. They argued that their native title was not extinguished by the granting in 1915 and 1919 of pastoral leases over certain areas of Queensland, under Queensland legislative instruments.²¹⁹ In the alternative, if the native title rights have been extinguished, they argued for damages and other relief for

²¹⁴ Fairall & Lacey, *supra* note 200, at 1088-89.

²¹⁵ *Id.*

²¹⁶ *Jihad Jack Case*, 233 CLR at 380 (Kirby J) (Austl.).

²¹⁷ *Id.* at 440.

²¹⁸ *The Wik People v Queensland* ("*Pastoral Leases Case*") (1996) 187 CLR 1 (Austl.).

²¹⁹ *See the Land Act 1910* (Qld) (Austl.), and the *Land Act 1962* (Qld) (Austl.).

breach of a fiduciary duty owed to them by the Crown.²²⁰ The leases contained no reservations for Aboriginal rights, instead it contained reservations to the Crown's mineral and petroleum rights and the rights of entry for third parties. In the Federal Court, Justice Drummond found that the leases granted exclusive possession to the lessees, and that the leases were not subject to any Aboriginal rights reservations. His Honor also found that leases have extinguished any native title. According to Justice Drummond, there was no breach of any fiduciary duty owed to the Wik and Thayorre people in relation to the mining leases. The plaintiffs appealed to the Full Court of the Federal Court but the matter was transferred to the HCA.²²¹

The *Pastoral Leases Case* was the prequel to *Ward*,²²² where the High Court developed a unique approach to “the interpretation of property law in Australia.”²²³ In fact, Ben Ward and others intervened in this case on behalf of the Miriuwung and Gajerrong Peoples,²²⁴ citing Hersch Lauterpacht's monograph on an international bill of rights to argue that “[e]xtinguishment requires the manifestation of a clear and plain intention.”²²⁵ Their intervention also made reference to United States jurisprudence suggesting that “exclusive rights to pasture or graze do not extinguish native title and [that the US jurisprudence] affirms that the fundamental question is whether there is a clear intention to extinguish.”²²⁶ However, in response, P. A. Keane, Q.C., Solicitor-General for the State of Queensland argued that the United States cases “rest on a basis fundamentally different from that in Australia. Courts there have long recognized the existence of a trust or fiduciary relationship between government and Indian tribe, akin to that of guardian and ward, founded on the Nonintercourse Act 1790 (US)”,²²⁷ and that “Despite the guardian/ward

²²⁰ *Pastoral Leases Case*, 187 CLR at 5 (Austl.).

²²¹ See the *Judiciary Act 1903* (Cth) s 40 (Austl.).

²²² The *Pastoral Lease Case* is the third instalment in a native title trilogy that started with *Mabo v Queensland [No 2]* (1992) 175 CLR 1 (Austl.), followed by *Western Australia v Commonwealth* (1995) 183 CLR 373 (Austl.). All four cases, including *Pastoral Leases*, are concerned with the doctrine of native title (also referred to sometime as the doctrine of Aboriginal title) and its extinguishment under common law and under statute. After *Mabo [No 2]* there was confusion as to whether the grant of lease under the *Native Title Act 1993* (Cth) (Austl.) gave exclusive possession that extinguished native title. See on this point Henry Reynolds, *Mabo and Pastoral Leases*, 2 ABORIGINAL L. BULL. 8 (1992); Henry Reynolds, *The Mabo Judgment in the Light of Imperial Land Policy*, 16 U. N.S.W. L. J. 27 (1993); Henry Reynolds & Jamie Dalziel, *Aborigines and Pastoral Leases - Imperial and Colonial Policy 1826-1855*, 19 U. N.S.W. L. J. 315 (1996).

²²³ Maureen Tehan, *The Wik Peoples v Queensland: The Thayorre People v Queensland*, 21 MELB. U. L. REV. 343, 352 (1997).

²²⁴ *Pastoral Leases Case*, 187 CLR at 30 (Austl.).

²²⁵ *Id.* at 31 n.120. See *Gerhardy v Brown* (1985) 159 CLR 70, 128 (Austl.) (quoting HERSCHE LAUTERPACHT, AN INTERNATIONAL BILL OF THE RIGHTS OF MAN 115 (Oxford University Press 2013) (1945)).

²²⁶ *Pastoral Leases Case*, 187 CLR at 32 n 133 (Austl.). See Taylor Grazing Act, 43 U.S.C. § 315 (2012); John S. Harbison, *Hohfeld and Herefords: The Concept of Property and the Law of the Range*, 22 N.M. L. REV. 459, 470, 488-95 (1992); *United States v. Dann*, 706 F.2d 919, 932 (1983); *United States v. Dann*, 470 U.S. 39, 45 (1985). *But see* *United States v. Dann*, 873 F.3d 1189, 1196-1200 (1989), *cert. denied*, 493 U.S. 890 (1989).

²²⁷ *Pastoral Leases Case*, 187 CLR at 39 n 160 (Austl.). See *Joint Tribal Council of Pasmmaquoddy Tribe v. Morton*, 528 F.2d 370, 372 n.2, 374, 375-76, 379 (1975); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 684 (1974); *United States v. University*

relationship, it has been recognized that Indian title can be extinguished under statute.”²²⁸

G. Griffith, Q.C., the Solicitor-General for the Commonwealth, intervening, argued that “In the United States and Canada, the grant of legally inconsistent titles extinguishes aboriginal title where aboriginal rights have not been recognized by treaty”,²²⁹ and that “[i]t is accepted in the United States that power to extinguish indigenous title lay at first exclusively with the States and then with the United States, specifically Congress.”²³⁰ Moreover, and more to the HCA *ratio* in this case, Griffith pointed out that “in the United States, the manner, time and conditions of extinguishment are nonjusticiable in the absence of a statute providing otherwise. Compensation is not required unless by treaty or statute.”²³¹

B. M. Selway, Q.C., Solicitor General for the State of South Australia, intervening, explained that the “initial recognition by Marshall, CJ of native customary law in the United States was specifically based upon the history of relations between the indigenous peoples and the settlers in the United States.”²³²

For the purposes of analyzing the outliers, the case does not involve any constitutional law issues. It looked at native title to land under the heading “Aboriginals” and at the Queensland state government authority to make agreements. Two other issues raised in the case were the effect of mining leases on native title, and whether the Crown owed a fiduciary duty to native title holders. The majority found the mining leases to be valid, and that the Crown held no fiduciary duty to native title holders.²³³ Rather than extinguishment of native title, the *ratio* in this case seems to suggest the “subjugation or suppression” of Aboriginal rights to land for the grant of leases by the Crown on that land,²³⁴ with the actual effect decided on case-by-case basis.

of New Mexico, 731 F.2d 703 (1984), *cert. denied* 469 U.S. 853 (1984); Catawba Indian Tribe of South Carolina v. South Carolina, 718 F.2d 1291, 1298-99 (1983); Hoopa Valley Tribe v. Christie, 805 F.2d 874, 879 (1986); Hoopa Valley Tribe v. Christie, 812 F.2d 1097, 1102 (1987); Golden Hill Paugussett Tribe of Indians v. Weider, 39 F.3d 51, 56 (1994); Tonkawa Tribe of Oklahoma v. Richards, 75 F.3d 1039, 1045 (1996). The argument is that the fiduciary duty is not “free standing.” *See, e.g.*, United States v. Mitchell, 463 U.S. 206, 225-26 (1983). It follows therefore, according to the Solicitor-General, that said duty does not have any applicability in Australia. *But see*, Benjamin Franklen Gussen, *The State Is the Fiduciary of the People*, 3 PUB. L. 440 (2015).

²²⁸ *Pastoral Leases Case*, 187 CLR at 39 n 161 (Austl.). *See, e.g.*, United States v. 7,405.3 Acres of Land in Macon, Clay, and Swain Counties, N. C., 97 F.2d 417, 422 (1938); United States v. Santa Fe Pacific Railroad Co., 314 U.S. 339, 347 (1941); *cert. denied* 314 U.S. 76 (1942).

²²⁹ *Pastoral Leases Case*, 187 CLR at 41 n 171 (Austl.). *See, e.g.*, United States v. Atlantic Richfield Co., 435 F. Supp. 1009, 1020 (D. Alaska 1977); Missouri, Kansas and Texas Railway Co. v. Roberts, 152 U.S. 114, 117-18 (1894); Hamlet of Baker Lane v. Minister of Indian Affairs (1979), [1980] F.C. 518, 566; 107 D.L.R. 3d 513, 549 (Can.); Delgamuukw v. British Columbia (1993), 104 D.L.R. 4th 470, 525 (Can.).

²³⁰ *Pastoral Leases Case*, 187 CLR at 41 n 171 (Austl.). *See* Burtz v. Northern Pacific Railroad, 119 U.S. 55, 66 (1886); Turtle Mountain Band of Chippewa Indians v. United States, 490 F.2d 935, 945 (1974).

²³¹ *Pastoral Leases Case* 187 CLR at 41.

²³² *Id.* at 56 n 248 and 251.

²³³ *Id.* at 3 (Toohey, Gaudron, Gummow & Kirby JJ).

²³⁴ Tehan, *supra* note 223, at 354.

Siding with the plaintiffs with a four-to-three majority, the HCA decided the legal issue narrowly, by looking at the terms of each grant, and by interpreting the specific Queensland statute under which the lease had been made.²³⁵ Native title rights and pastoral rights were found capable of coexistence:

Whether there was extinguishment can only be determined by reference to such particular rights and interests as may be asserted and established. If inconsistency is held to exist between the rights and interests conferred by native title and the rights conferred under the statutory grants, those rights and interests must yield, to that extent, to the rights of the grantees.²³⁶

The case was consequently remitted to the Federal Court for a determination on the native titles claimed.

The *Pastoral Lease Case* decision received public disapproval, with calls to abolish native title and replace it with legislative rights similar to those in Western Australia.²³⁷ The decision that the pastoral leases in this case did not extinguish native title, and that native title could coexist with a pastoral lease led the federal Parliament to pass amendments to the NTA,²³⁸ which allowed disregarding native title when upgrading the activities that can be undertaken on pastoral leases.²³⁹ In particular, the amending Act states:

This Act also confirms that many acts done before the High Court's judgment [in *Wik*], that were either valid, or have been validated under the past act or intermediate period act provisions, will have extinguished native title. If the acts are previous exclusive possession acts (see section 23B), the extinguishment is complete; if the acts are previous non-exclusive possession acts (see section 23F), the extinguishment is to the extent of any inconsistency.²⁴⁰

The subsequent High Court decision in *Ward* clarified that native title can be partially or wholly extinguished when there is inconsistency between native title rights and rights granted under pastoral or mineral leases.²⁴¹

In terms of the sources of complexity in this case, the tension between Aboriginal rights and lessee rights seems to be the only source. While there were comments from Justice Gummow on guidance from international law on the underpinning theories of property law, these were not given any normative weight. Justice Gummow explains the difference between radical title under international

²³⁵ *Pastoral Leases Case*, 187 CLR at 2 (Toohey, Gaudron, Gummow & Kirby JJ) (Austl.). See Tehan, *supra* note 223, at 344.

²³⁶ *Pastoral Leases Case*, 187 CLR at 3 (Toohey, Gaudron, Gummow & Kirby JJ).

²³⁷ *Land (Titles and Traditional Usage) Act 1993* (WA) (Austl.). See generally Tehan, *supra* note 223.

²³⁸ *Native Title Amendment Act 1998* (Cth) (Austl.).

²³⁹ *Ward*, 213 CLR at 68 (Gleeson CJ, Gaudron, Gummow & Hayne JJ) (Austl.). See also BRIAN STEVENSON, *THE WIK DECISION AND AFTER* (1996); Daniel Gal, *An Overview of the Wik Decision* 20 U. N.S.W. L. J. 488 (1997).

²⁴⁰ *Native Title Amendment Act 1998* (Cth) s 4(6) (Austl.).

²⁴¹ *Ward*, 213 CLR at 114 (Gleeson CJ, Gaudron, Gummow & Hayne JJ).

law and under British constitutional law, where the former is acquired upon assumption of sovereignty, while the latter upon settlement. However, as indicated by his honor, this distinction was simply a restatement of dicta in *Mabo [No 2]*,²⁴² a case that I discuss in detail below (as part of tier-three outliers).

What is surprising about *Pastoral Leases Case* is that it flouted the “international moral code that prohibited racial discrimination”, which *Mabo [No 2]* was careful to follow, although eventually defeated by the federal government response as illustrated above.²⁴³ In essence, “the indigenous land rights debate in Australia is an example of, in Turner and Rojeck’s (2001: 127) terms, ‘the frequent tension between national systems of rights and international human rights.’”²⁴⁴ What is at the heart of the case is therefore a marginalization of international law that is intended, it seems, to prevent the following eventuality:

When concerned with an internal colonial situation, the question should not be how can we deal with indigenous ‘claims’ against the state, but rather how can the colonizers legitimately settle and establish their own sovereignty (Tully, 2000: 52). Tully (2000: 53) suggests that for the settler state to gain legitimacy in this regard it is necessary to hold negotiations with indigenous peoples on a ‘nation’ to ‘nation’ basis. Indigenous peoples would be ‘recognized’ as nations equal in status to the settler state and consequently the ensuing treaties would be ‘international treaties’. Under this model, the indigenous nation in question has the right to appeal not only to domestic courts for redress of infringement, but, if this fails, to international law, like any other nation (Tully, 2000). Tully argues that such negotiations have the potential to resolve the problem of internal colonization, and describes the approach as a form of treaty federalism.²⁴⁵

In summary, *Pastoral Leases Case* is an example of a constitutional case that was decided outside any constitutional analysis, given the marginalization of international law in Australia. The case is part of a trilogy of outliers, which includes *Ward* (from the first-tier) and *Mabo [No 2]* (from the third-tier). The case is in essence “a prime example of the tension between national rights regimes and international human rights norms.”²⁴⁶

²⁴² *Mabo [No 2]*, 175 CLR at 86-87 (Austl.).

²⁴³ Damien Short, *The Social Construction of Indigenous ‘Native Title’ Land Rights in Australia*, 55 CURRENT SOC. 857, 873 (2007).

²⁴⁴ *Id.* at 857, 859. See BRYAN S. TURNER & CHRIS ROJEK, SOCIETY AND CULTURE: PRINCIPLES OF SCARCITY AND SOLIDARITY (2001).

²⁴⁵ Short, *supra* note 243 at 872 (citing James Tully, *The Struggles of Indigenous Peoples for and of Freedom*, in POLITICAL THEORY AND THE RIGHTS OF INDIGENOUS PEOPLES 36 (Duncan Iverson et al. eds., 2000)).

²⁴⁶ *Id.* See also Robert French, *Protecting Human Rights Without a Bill of Rights*, 43 J. MARSHALL L. REV. 769 (2010); Darryl Cronin, *Trapped by History: Democracy, Human Rights and Justice for Indigenous People in Australia*, 23 AUSTL. J. HUM. RTS. 220 (2017); Scott A. Reid et al., *Aboriginal Self-Determination in Australia: The Effects of Minority-Majority Frames and Target Universalism on Majority Collective Guilt and Compensation Attitudes*, 31 HUM. COMM. RES. 189 (2005).

2. PAPE

The complexity presented by the case has its origins in the multiple powers raised as giving authority to the Commonwealth to legislate the impugned Act. However, unlike the other outliers, in *Pape* there is no tension between vertical levels of government, nor a tension between competing sets of rights. Although the relevance of a tension between domestic and international law can be seen in the defendants' argument that the Act is supported by the external affairs power (section 51(xxix)), both as a response to the 2008 Global Financial Crisis (GFC), and due to "the effect the law may have internationally."²⁴⁷

In the aftermath of the GFC, the Australian Labor Party's Kevin Rudd Government looked at mitigating economic downturn by, inter alia, passing tax-bonus legislation.²⁴⁸ The Act's explanatory memorandum refers to "the most significant economic crisis since the Second World War" and explained the rationale for the Act as to "provide immediate economic stimulus to boost demand and support jobs."²⁴⁹ Section 5(1) of the Act provided a tax bonus for any taxpayer earning less than AUD \$100,000 for the financial year ending 30 June 2008.

Bryan Reginald Pape was a law lecturer at the University of New England, Armidale, New South Wales, a barrister, and a former officer of the National Party of Australia. He was entitled to receive a putative tax bonus of AUD \$250,²⁵⁰ as part of an AUD \$10.4 billion package.²⁵¹ However, Pape decided to challenge the Act arguing that the payments were not a tax bonus but a gift, and therefore not supported by the taxation power, or any other head of power, in the *Australian Constitution* (section 51(ii)). The Commonwealth argued that the Act is authorized by a combination of powers: section 81 appropriations,²⁵² section 51(ii) taxation power, section 51(i) trade and commerce power,²⁵³ and the nationhood power.²⁵⁴

²⁴⁷ *Pape*, 238 CLR at 14 (Austl.).

²⁴⁸ *Tax Bonus for Working Australians Act (No 2) 2009* (Cth) (Austl.). See Andrew McLeod, *The Executive and Financial Powers of the Commonwealth: Pape v Commissioner of Taxation*, 32 SYDNEY L. REV. 123 (2010); Duncan Kerr, *Pape v Commissioner of Taxation: Fresh Fields for Federalism?*, 9 QUT L. REV. 311 (2009).

²⁴⁹ *Pape*, 238 CLR at 2 (Austl.).

²⁵⁰ *Id.* at 3.

²⁵¹ *Id.* at 30.

²⁵² Section 81 reads as follows:

Consolidated Revenue Fund:

All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution.

²⁵³ Sections 51(i) and 51(ii) read as follows:

Legislative powers of the Parliament:

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

(i) trade and commerce with other countries, and among the States;

(ii) taxation; but so as not to discriminate between States or parts of States;

²⁵⁴ The nationhood power was first discussed in *Victoria v Commonwealth and Hayden* ("AAP Case") (1975) 134 CLR 338 (Austl.). The power was said to be appropriate to the executive government of a nation, and is more general than the constitutional, legislated,

The main legal issue in this case was constitutional, and in particular, powers of the Commonwealth Parliament.

Per curiam the HCA found that sections 81 and 83 are not powers, and therefore could not on their own authorize Commonwealth spending.²⁵⁵ By a majority of four-to-three, the HCA found the Act to be valid enactment, incidental (under section 51(xxxix))²⁵⁶ to the exercise of nationhood power.²⁵⁷ A minority (Hayne and Kiefel) also found the Act valid under the taxation power (section 51(ii)).

In rejecting the external affairs argument, Justice Heydon explained it in the following terms:

The defendants joined South Australia in advancing this submission. They said that the G-20 Declaration was an agreement—not an agreement “made within any formal treaty structure” and not “an enforceable agreement”, but rather a “commitment to act in a particular way for international purposes”. But the defendants did not go so far as to submit that those G-20 countries which had not complied with the commitment were departing from any agreement. The defendants also submitted that s 51(xxix) extended to implementing recommendations of international bodies that are not binding under international law. They relied on certain “recommendations” as steps carried out in the implementation of the G-20 Declaration.

or prerogative powers of the Commonwealth. In *Davis v The Commonwealth* (1988) 166 CLR 79 (Austl.), the HCA found that Commonwealth appropriations celebrating the Australian bicentenary were authorized by the implied nationhood power. The nationhood power formed part of the constitutional analysis in both *Pape* and in *School Chaplains Case*, which is also one of the third-tier outliers.

²⁵⁵ *Pape*, 238 CLR at 3 (Austl.). Section 83 reads as follows:

Money to be appropriated by law:

No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law.

But until the expiration of one month after the first meeting of the Parliament the Governor-General in Council may draw from the Treasury and expend such moneys as may be necessary for the maintenance of any department transferred to the Commonwealth and for the holding of the first elections for the Parliament.

²⁵⁶ Section 51(xxxix) reads as follows:

Legislative powers of the Parliament:

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

(xxxix) matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

²⁵⁷ *Pape*, 238 CLR at 3. Note that *Pape* refers to *Polyukhovich v The Commonwealth* (“*The Wartimes Act Case*”) (1991) 172 CLR 501 (Austl.) in support of the proposition that the s 51(xxxix) second argument, namely the international effect of the Act, is “too broad an expression of the scope of the power” (*Pape*, 238 CLR at 3 (Austl.)). I will discuss *The Wartimes Act Case* in some more detail later in this section.

In explaining his reasoning, Justice Heydon stated that it is “highly improbable that in the ordinary course the deliberations of such a body would generate obligations in international law.”²⁵⁸ He referred to *The Industrial Relations Act Case*²⁵⁹ where it was said that an “external affair” did not exist where all that was stated was a “broad objective with little precise content and permitting widely divergent policies by parties”,²⁶⁰ and suggests that “[y]et that is all the G-20 Declaration does.”²⁶¹

On the other hand, in accepting the argument, Chief Justice French explained that the bodies that tackled the economic implications on the international stage extended to more than the Group of 20 (G20). It also included the International Monetary Fund (IMF), and the Organization for Economic Cooperation and Development (OECD).²⁶² His Honor explained the obligation that members of the IMF and the OECD, which include Australia, have to assume.²⁶³ He then goes on to state that:

A statement from an IMF-OECD-World Bank seminar convened in February 2009 included the following:

In parallel, there continues to be an urgent need for fiscal stimulus. The size and composition of fiscal packages should be consistent with each country’s fiscal space and institutional capacity. The deepening of the downturn suggests the need for an increase in high-impact fiscal expenditures in the first half of 2009, with further support in the following quarters, by countries in a position to prudently undertake such spending. At the same time, embedding stimulus packages in a credible medium-term strategy that safeguards fiscal sustainability will also increase their impact in the short term.²⁶⁴

Chief Justice French then explains how the Updated Economic and Fiscal Outlook (the UEFO), published by the Australian Treasurer and the Minister for Finance on 3 February 2009, refers to the statements by these international institutions about the necessity for domestic fiscal stimulus.²⁶⁵

In their joint judgment, Justices Gummow, Crennan and Bell also referred to the UEFO,²⁶⁶ stating that “Reports and statements provided by international bodies, the Group of Twenty and the International Monetary Fund, emphasize the global nature of the current financial and economic crisis.”²⁶⁷

²⁵⁸ *Pape*, 238 CLR at 159,163 (Austl.).

²⁵⁹ *Victoria v The Commonwealth* (“*Industrial Relations Act Case*”) (1996) 187 CLR 416, 486 (Austl.).

²⁶⁰ *Pape*, 238 CLR at 163 n 607 (citing *Victoria v The Commonwealth* (1996) 187 CLR 416, 486 (Brennan CJ, Toohey, Gaudron, McHugh & Gummow JJ)) (Austl.).

²⁶¹ *Pape*, 238 CLR at 163 (Austl.).

²⁶² *Id.* at 25. The OECD being the Convention on the Organization for Economic Cooperation and Development made in Paris in 1960, to which Australia became a member in 7 June 1971.

²⁶³ *Pape*, 238 CLR at 26 (Austl.).

²⁶⁴ *Id.* at 29.

²⁶⁵ *Id.* at 29.

²⁶⁶ *Id.* at 88.

²⁶⁷ *Id.*

Justices Hayne and Kiefel, however, were of the view that the Commonwealth “was given no express head of power with respect to [creating and fostering national markets]”²⁶⁸ and that “the expression ‘national economy’ is anything but certain”,²⁶⁹ adding that “Australia’s economic wellbeing is not isolated from global economic influences. That may suggest that there is only limited utility in treating (or at least in continuing to treat) the Australian national economy as if it is a separate and distinct unit.”²⁷⁰ They went on to state that “[i]t is sufficient to observe that neither the Declaration by the leaders of the G-20, nor the recommendations of either the IMF or the OECD, imposed any obligation on Australia to take action of the kind now in question”,²⁷¹ that the “recommendations made by the IMF and the OECD are of ... [an] advisory or hortatory character.”²⁷²

In summary, *Pape* illustrates tension between international law and domestic law during a global economic crisis, and how a short-term government intervention, namely the introduction of an economic stimulus package, was challenged for lack of constitutional authority to so legislate.

3. *MABO [No 2]*

In 1879 Queensland annexed islands in the Torres Strait, between the Cape York peninsula, in Queensland’s far north, and the south east coast of Papua New Guinea. In 1982 Eddie Mabo, David Passi and James Rice, members of the Meriam people who occupied the Murray Islands in Torres Strait, sought a declaration that they retained their land rights to these islands, claiming Crown’s sovereignty over the Islands was subject to Meriam people based upon local custom and traditional native title. In 1985, the Queensland government passed legislation²⁷³ to extinguish any Aboriginal land rights in these Islands.

In *Mabo [No 1]*,²⁷⁴ Mabo and the other plaintiffs sought a demurrer to prevent the Queensland government from relying on the 1985 Act in their defense in the main case, which came to be known as *Mabo [No 2]*.²⁷⁵ The proceedings in the first case challenged the validity of the Queensland Act, arguing that it was inconsistent with the protection of the rights to own property and not to be arbitrarily deprived of property under the RDA.²⁷⁶ These rights mirror the civil rights in Article 5(d) of the ICERD.²⁷⁷ The parties agreed that the first case should proceed on the assumption that the Meriam people hold native title rights in the islands, although the question had to be decided in the second case.

²⁶⁸ *Id.* at 125.

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.* at 127.

²⁷² *Id.*

²⁷³ *Queensland Coast Islands Declaratory Act 1985* (Qld) (Austl.).

²⁷⁴ *Mabo v Queensland [No 1]* (1988) 166 CLR 186 (Austl.).

²⁷⁵ *Mabo v Queensland [No 2]* (1992) 175 CLR 1 (Austl.).

²⁷⁶ *Racial Discrimination Act 1975* (Cth) (Austl.).

²⁷⁷ International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 12, 1969, 660 U.N.T.S. 195. See *Mabo [No 1]*, 166 CLR at 198 (Mason CJ), 203 (Wilson J) (Austl.).

A four-to-three majority accepted this inconsistency argument. The plurality stated that:

By extinguishing the traditional legal rights characteristically vested in the Miriam people, the 1985 Act abrogated the immunity of the Miriam people from arbitrary deprivation of their legal rights in and over the Murray Islands. The Act thus impaired their human rights while leaving unimpaired the corresponding human rights of those whose rights in and over the Murray Islands did not take their origin from the laws and customs of the Miriam people. If we accord to the traditional rights of the Miriam people the status of recognized legal rights under Queensland law (as we must in conformity with the assumption earlier made), the 1985 Act has the effect of precluding the Miriam people from enjoying some, if not all, of their legal rights in and over the Murray Islands while leaving all other persons unaffected in the enjoyment of their legal rights in and over the Murray Islands. Accordingly, the Miriam people enjoy their human right of the ownership and inheritance of property to a “more limited” extent than others who enjoy the same human right.²⁷⁸

Justice Deane delivered a separate judgment where accepted the inconsistency argument based on the operation of the 1975 Act,²⁷⁹ stating that “[i]n the context of the nature of the rights which it protects and of the provisions of the International Convention which it exists to implement, the section is to be construed as concerned not merely with matters of form but with matters of substance, that is to say, with the practical operation and effect of an impugned law.”²⁸⁰

The minority (Mason, Wilson and Dawson), however, though that the ICERD was of no assistance to the plaintiffs. For Chief Justice Mason, this is so because “the precise nature and extent of the rights and interests asserted by the plaintiffs” was not clear.²⁸¹ For Justice Wilson, the ICERD was of no assistance given that its operation was directed to special measures not envisaged in the 1975 Act.²⁸² Justice Dawson was of a view similar to that of Justice Wilson.²⁸³

In the second case, *Mabo [No 2]*, now that Queensland could not rely on the 1985 declaratory Act, the HCA needed to decide whether the Miriam people have native title to the Torres Strait Islands. A six-to-one majority (Justice Dawson

²⁷⁸ *Mabo [No 1]*, 166 CLR at 218 (Brennan, Toohey & Gaudron JJ) (Austl.).

²⁷⁹ *Id.* at 232-33.

²⁸⁰ *Id.* at 230.

²⁸¹ *Id.* at 199.

²⁸² *Id.* at 207. Justice Wilson explains the argument as follows:

Let it be supposed that the Queensland legislature passed a law which expressly recognized and entrenched the traditional rights claimed by the plaintiffs ... The recognition, enjoyment or exercise of the right, on an equal footing, would be impaired because the law would secure to the plaintiffs an entrenched and enlarged right to inherit compared with that enjoyed by other racial groups in Queensland. Underlying their special right would be the rights accorded to all Queenslanders by the general inheritance laws. Of course, in the circumstances I have postulated, the law would probably be upheld as a special measure within the meaning of Art. 1(4) of the Convention ...

²⁸³ *Id.* at 242.

dissenting) held that native title to land survived Crown's acquisition of sovereignty and radical title in the islands,²⁸⁴ although Crown's sovereignty exposed native title to extinguishment by "a valid exercise of sovereign power inconsistent with the continued right to enjoy native title."²⁸⁵ The main difference between the majority judgments in *Mabo [No 1]* and *Mabo [No 2]* was stated by Chief Justice Mason and Justice McHugh in *Mabo [No 2]* in the following terms:

The main difference between those members of the Court who constitute the majority is that, subject to the operation of the *Racial Discrimination Act 1975* (Cth), neither of us nor Brennan J agrees with the conclusion to be drawn from the judgments of Deane, Toohey and Gaudron JJ. that, at least in the absence of clear and unambiguous statutory provision to the contrary, extinguishment of native title by the Crown by inconsistent grant is wrongful and gives rise to a claim for compensatory damages.²⁸⁶

Justice Brennan was clear on the interaction between international and common law in Australia. He points out that "Although the manner in which a sovereign state might acquire new territory is a matter for international law, the common law has had to march in step with international law in order to provide the body of law to apply in a territory newly acquired by the Crown."²⁸⁷ His honor then explained the three relevant mechanisms recognized in international law as effective for acquiring sovereignty, namely, "conquest, cession, and occupation of territory that was terra nullius."²⁸⁸ Sovereignty in Australia had to be acquired through an enlarged doctrine of terra nullius to overcome the existence of Aboriginal peoples across the continent.²⁸⁹ His honor then proceeded to explain the then recent decision by the International Court of Justice (ICJ) in its *Advisory Opinion on Western Sahara*,²⁹⁰ where the ICJ states that "territories inhabited by tribes or peoples having a social and political organization were not regarded as terrae nullius",²⁹¹ and that "the concept of terra nullius, employed at all periods, to the brink of the twentieth century, to justify conquest and colonization, stands condemned",²⁹²

²⁸⁴ *Mabo [No 2]*, 175 CLR at 2, 15 (Austl.).

²⁸⁵ *Id.* at 3.

²⁸⁶ *Id.* at 15.

²⁸⁷ *Id.* at 32.

²⁸⁸ *Id.* at 32 n. 65 (citing E. Evatt, *The Acquisition of Territory in Australia and New Zealand*, in GROTIAN SOCIETY PAPERS 16 (C. H. Alexandrowicz ed., 1968), who mentions only cession and occupation as relevant to the Australasian colonies).

²⁸⁹ *Mabo [No 2]*, 175 CLR at 36 (Austl.). For a detailed analysis of the expanded terra nullius, see Gerry Simpson, *Mabo, International Law, Terra Nullius and the Stories of Settlement: An Unresolved Jurisprudence*, 19 MELB. U. L. REV. 195 (1993). See also Gurdial Singh Nijar, *Traditional Knowledge Systems, International Law and National Challenges: Marginalization or Emancipation?*, 24 EUR. J. INT'L. L. 1205 (2013) (argues the importance of the UN Declaration of the Rights of Indigenous Peoples (UNDRIP) and the Convention on Biological Diversity (CBD) for the protection of First Nations); Kristen Walker, *supra* note 167 (argues as controversial Justice Kirby's use of international law to interpret the *Australian Constitution*).

²⁹⁰ *Western Sahara, Advisory Opinion*, 1975 I.C.J. 12 (Oct. 16).

²⁹¹ *Id.* at 39.

²⁹² *Id.* at 86.

made it imperative that “the common law should neither be nor be seen to be frozen in an age of racial discrimination”,²⁹³ and that “[t]he opening up of international remedies to individuals pursuant to Australia’s accession to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imports.”²⁹⁴ Importantly, Justice Brennan stated that:

The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.²⁹⁵

It followed, therefore, that when a common law doctrine such as *terra nullius* loses its legitimacy under international law, it also loses its legitimacy under common law.

On the other hand, Justices Deane and Gaudron delivering one opinion, suggested that the settlement of Australian colonies was an exercise of the Crown’s prerogative power to “extend its sovereignty and jurisdiction to territory over which it had not previously claimed or exercised sovereignty”,²⁹⁶ and hence rejecting the relevance of international law in the case. Similarly, Justice Toohey adopted a distinction between sovereignty and title to land,²⁹⁷ although he also referred with approval to the *Western Sahara* advisory opinion.²⁹⁸

Justice Dawson, dissenting, was less inclined to deal with the relevance of international law generally, and in particular, the tension between international law and domestic (common) law, namely on the doctrine of *terra nullius*.

In summary, the High Court decided that to deny indigenous rights to land would be “unjust and contrary to contemporary international human rights standards, especially the principle of racial equality.”²⁹⁹ The complexity in *Mabo [No 2]* flows from the need for domestic law to stay in step with international law—a source of complexity that we have already seen in other outliers.

4. WAR CRIMES ACT CASE

The significance of this case as part of the twelve outliers lies in the High Court wrestling with the problems of determining the status of customary international law in Australia. The High Court accepted the proposition that a widely accepted norm or custom of international law “will be more readily regarded as part of Australian law. Overall, however, the High Court adopted what international lawyers like to term a ‘dualist’ approach, which regards national and international legal systems as quite separate.”³⁰⁰

²⁹³ *Mabo [No 2]*, 175 CLR at 42 (Austl.).

²⁹⁴ *Id.* at 42.

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 78.

²⁹⁷ *Id.* at 180.

²⁹⁸ *Id.* at 181.

²⁹⁹ Short, *supra* note 241, at 858.

³⁰⁰ Charlesworth, *supra* note 9, at 5.

In the *War Crimes Act Case*, Ivan Timofeyevich Polyukhovich, a Ukrainian-Australian born in today's Belarus, was charged of an indictable offence under a 1945 Commonwealth Act³⁰¹ for war crimes committed in the Ukraine, while under German occupation, between 1942 and 1943. It was alleged that he willfully killed a number of people under German policies persecuting the Jewish people, partisans or communists. The plaintiff was not then an Australian citizen or resident.³⁰² In 1988, the 1945 Act was almost entirely repealed and replaced.³⁰³ The amending Act visits the crimes indictable under the 1945 Act with the application of the 1949 Geneva Conventions defining "war crimes."³⁰⁴ Polyukhovich argued that the 1945 Act was invalid on three grounds. It was beyond the scope of the external affairs (section 51(xxix)) and defense (section 51(vi)) powers, and because it was a usurpation of Chapter III judicial power in that the Act was effectively a bill of attainder.³⁰⁵

A six-to-one majority held that the 1945 Act was a valid exercise of the external affairs power (section 51(xxix)) to the extent that it operated on conduct outside Australia, making that conduct a criminal offence.³⁰⁶ Chief Justice Mason, after canvassing most recent Australian constitutional precedents at the time, based his reasoning on the point that given the Act was "undertaken by way of implementation of an international Convention [Geneva Conventions I-IV]";³⁰⁷ it follows that "it is not necessary that the Court should be satisfied that Australia has an interest or concern in the subject-matter of the legislation in order that its validity be sustained. It is enough that Parliament's judgment is that Australia has an interest or concern."³⁰⁸

Given that his honor found the Act to be valid under the external affairs power, Chief Justice Mason did not entertain the second ground as to invalidity under the defense power.

As to the third ground for the invalidity of the 1945 Act, and after canvassing relevant Australian case law on the definition of "judicial power", his honor stated that "[t]here is nothing in the statements which I have quoted to suggest that an exercise of judicial power necessarily involves the application to the facts of a legal

³⁰¹ *War Crimes Act 1945* (Cth) (Austl.).

³⁰² *War Crimes Act Case*, 172 CLR at 548 (Austl.).

³⁰³ *War Crimes Amendment Act 1988* (Cth) (Austl.).

³⁰⁴ *See* Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention No. I), Aug. 12, 1949, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea (Geneva Convention No. II), Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention No. III), Aug. 12, 1949, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention No. IV), Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Geneva Conventions].

³⁰⁵ Namely, the prohibition deriving from s 71 in ch III of the *Constitution*, which provides that "[t]he judicial power of the Commonwealth shall be vested in ... the High Court of Australia, and in such other federal courts as the Parliament creates, such other courts as it invests with federal jurisdiction." The latter courts are identified in s. 77(ii) as "the courts of the States."

³⁰⁶ *War Crimes Act Case*, 172 CLR at 501 (Austl.).

³⁰⁷ *Id.* at 530.

³⁰⁸ *Id.*

principle or standard formulated in advance of the events to which it is sought to be applied.”³⁰⁹ He then discussed the issue under United States jurisprudence:

Article 1, s. 9, cl. 3 and Art. 1, s. 10, cl. 1 of the United States Constitution prohibit any State as well as Congress from passing a bill of attainder or an ex post facto law. A bill of attainder is a legislative enactment which inflicts punishment without a judicial trial; initially a bill of attainder provided for punishment by death but in the context of the constitutional prohibition such a bill is now regarded as including what was formerly a bill of pains and penalties: *Cummings v. Missouri*.³¹⁰ An ex post facto law, of which a bill of attainder was, or might be, an instance, is a retrospective law which makes past conduct a criminal offence.³¹¹

In distinguishing the 1945 Act, Chief Justice Mason points out that: “The constitutional prohibition against bills of attainder and ex post facto laws was not an expression of the antecedent common law of England.”³¹² He then discussed a number of United States cases which suggest that the prohibition on bills of attainder was part of the doctrine of separation of powers,³¹³ concluding that “a statute which contains no declaration of guilt and does not impose punishment for guilt is not a usurpation of judicial power.”³¹⁴

Justice Deane found the Act to be valid under the external affairs power, given precedents in support of the proposition that “law with respect to matters or things which are territorially outside Australia is a law with respect to ‘External affairs’ for the purposes of s. 51(xxix).”³¹⁵

As to the Chapter III invalidity argument, Justice Deane dissented from the majority. While he stated that the Act will not contravene the doctrine of separation of powers merely because it operates retrospectively,³¹⁶ he then cited *Phillips v. Eyre*,³¹⁷ where the Court of Exchequer Chamber identified: “the central vice of a Bill of Attainder not as lying in its specific naming of an individual but as lying in its ex post facto operation as a legislative decree that an act which was not criminal when done was ‘voided and punished’ as a crime.”³¹⁸ Then Justice Deane referred to the United States doctrine of separation of power, noting “that the United States Constitution contains express prohibitions of any ‘Bill of Attainder or ex post facto Law’ (Art. I, §9, cl. 3 (Federal) and Art. I, §10, d. 1 (State): ‘the Bill of Attainder Clause’) which does not appear in [the Australian] Constitution.”³¹⁹ He goes on to explain that: “a prohibition of ex post facto criminal laws was implicit in the doctrine of separation of judicial power which those United States provisions

³⁰⁹ *Id.* at 533.

³¹⁰ *Cummings v. Missouri*, 71 U.S. 277 (1866).

³¹¹ *War Crimes Act Case*, 172 CLR at 535 (Austl.).

³¹² *Id.* (citing *Calder v. Bull*, 3 U.S. 386, 389 (1798)).

³¹³ *Id.* at 536-37.

³¹⁴ *Id.* at 537.

³¹⁵ *Id.* at 599.

³¹⁶ *Id.* at 608. *Cf.*, e.g., *R v Kirby: Ex parte Boilermakers’ Soc’y of Austl* (“*Boilermakers Case*”) (1956) 94 CLR 258, 281 (Austl.).

³¹⁷ *Phillips v. Eyre* [1870] LR 6 QB 1 (Eng.).

³¹⁸ *War Crimes Act Case*, 172 CLR at 611 (Austl.).

³¹⁹ *Id.* at 616.

embodied supports the conclusion that Ch. III precludes the enactment of such a law.”³²⁰

As to Justice Dawson, he believed that based on recent Australian authority that the reach of the external affairs power extends to “all places, persons, matters or things geographically external to Australia.”³²¹ As to the Chapter III argument, he also found for the proposition that the Commonwealth Parliament may in the exercise of its legislative powers create retrospective laws, “including criminal laws with an ex post facto operation”,³²² and that the *Australian Constitution* contains no provision which corresponds to the bill of attainder clause in the *United States Constitution*, adopts in its entirety the United States theory of the separation of powers.³²³ He then stated that: “The fact that the Act lays down rules of conduct in relation to events which occurred before it came into effect does not invest it with the attributes of a bill of attainder, however widely such an instrument is defined.”³²⁴

Justice Toohey agreed on the validity of the Act, although his reasoning was that the Act “was a law with respect to matter external to Australia which touched and concerned the national interest of Australia”, and because the Act “was an exercise of the universal jurisdiction to prosecute war crimes and crimes against humanity as formulated in international law at the relevant time.”³²⁵ His honor adopted the reasons given by Justice Brennan (see below) for the proposition that the 1945 Act is not supported by the defense power (section 51(vi)). In relation to the third argument, relating to Chapter III of the *Australian Constitution*, he stated that only a law that purports to require a court to act contrary to “accepted notions of judicial power” would contravene Chapter III.³²⁶ However, a law that is operates retrospectively does not necessarily offend Chapter III,³²⁷ which is the case applicable to the impugned 1945 Act.³²⁸

Justice Gaudron found that 1945 Act valid under the external affairs power (section 51(xxix)) by reason that “it operates upon acts, matters or things outside Australia”,³²⁹ while finding no basis on which the Act can be said “to be in the slightest degree relevant to defense.”³³⁰ As to violating Chapter III, her honor stated that the Act would be invalid under this ground, only where such intention is revealed “revealed by unmistakable language.”³³¹

Justice McHugh also adopted a wider interpretation of the external affairs power (section 51(xxix)), finding the Act valid under the power by reason that “the Act penalizes conduct constituting a war crime which occurred outside Australia.”³³² Finding so, he did not entertain validity under section 51(vi).

³²⁰ *Id.* at 618. For his honor’s reasons for finding the 1945 Act ex post facto criminal law, refer to *War Crimes Act Case*, 172 CLR at 630-31 (Austl.).

³²¹ *War Crimes Act Case*, 172 CLR at 636 (Austl.).

³²² *Id.* at 643-44.

³²³ *War Crimes Act Case*, 172 CLR at 648 (Austl.).

³²⁴ *Id.* at 649.

³²⁵ *Id.* at 502.

³²⁶ *Id.* at 689.

³²⁷ *Id.*

³²⁸ *War Crimes Act Case*, 172 CLR at 690 (Austl.).

³²⁹ *Id.* at 696.

³³⁰ *Id.* at 697.

³³¹ *Id.* at 703.

³³² *Id.* at 712.

As to the retrospective operation of the Act and its validity under Chapter III, Justice McHugh stated the following:

In my opinion, the enactment of laws having a retrospective operation does not infringe the constitutional guarantee that the judicial power of the Commonwealth can be exercised only by courts established and judges appointed in accordance with Ch. III of the Constitution, and by such other courts as are invested with federal jurisdiction.³³³

His honor then compares the express prohibition on bills of attainder and ex post facto laws in the *United States Constitution* with the Chapters I to III of the *Australian Constitution*.³³⁴ He comes to the conclusion that “although Chs I, II and III reflect Arts I, II and III of the United States model, our Constitution does not prohibit Bills of Attainder or ex post facto laws. The omission must have been deliberate”,³³⁵ finding that “Retrospectivity is not itself sufficient to offend Ch. III of the Constitution.”³³⁶

In his dissent, Justice Brennan was however of the view that the external power required a connection with Australia and the subject matter of the 1945 Act, which in his view in this case did not exist: “the mere acquisition of Australian citizenship or residence in Australia does not transform earlier extraterritorial conduct that was not a matter of Australia’s external affairs when it was engaged in into a matter of Australia’s external affairs.”³³⁷ As to the argument that the external affairs power is engaged given that the 1945 Act discharges Australia’s international obligations, his honor canvassed relevant United Nations Resolutions,³³⁸ and referred to a 1965 resolution³³⁹ that states these obligations as follows: “in accordance with international law and national laws, the criminals responsible for war crimes and crimes against humanity are traced, apprehended and equitably punished by the competent courts”,³⁴⁰ and to the Geneva Conventions of 1949.³⁴¹ However, he then stated the following:

Although the material demonstrates that there was a widespread aspiration that the war criminals of the Axis powers should be brought to justice after the Second World War and although that aspiration was repeated in a series of resolutions in the UNGA and in the Economic and Social

³³³ *War Crimes Act Case*, 172 CLR at 719 (Austl.).

³³⁴ *Id.* at 719-20.

³³⁵ *Id.* at 720.

³³⁶ *Id.* at 721.

³³⁷ *Id.* at 555.

³³⁸ Especially, United Nations General Assembly resolution on the Extradition and Punishment of War Criminals, G.A. Res. 3 (I) (Feb. 13, 1946), which was reaffirmed by the resolution on the Surrender of War Criminals and Traitors, G.A. Res. 170 (II) (Oct. 31, 1947), and the General Assembly Declaration on the Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity, G.A. Res. 3074 (XXVIII) (Dec. 3, 1973).

³³⁹ Economic and Social Council Res. 1965/39 (July 28, 1965).

³⁴⁰ *War Crimes Act Case*, 172 CLR at 558 (Austl.).

³⁴¹ *Id.*

Council, the practice of States in the community of nations does not reveal a widespread exercise of jurisdiction to try alleged war criminals for extraterritorial war crimes. European States have exercised jurisdiction in respect of war crimes committed in their respective territories, but Israel and Canada are the only States which have asserted jurisdiction to try alleged war criminals in respect of extraterritorial war crimes.³⁴²

Justice Brennan then looked at the sources of international law and found no customary law obligation to try alleged war criminals in respect of extraterritorial war crimes,³⁴³ because there was “no evidence of widespread State practice which suggests that States are under a legal obligation to seek out Axis war criminals and to bring them to trial. There is no *opinio juris* supportive of such a rule.”³⁴⁴ However, of particular interest is his honor’s distinguishing of American cases where he stated that: “The jurisdiction of the courts of the United States to try cases of international crime was founded on the application by municipal courts of international law”,³⁴⁵ and that “the Court spoke in terms which suggested that the courts of the United States applied international law directly as part of the municipal law of the United States.”³⁴⁶

Justice Brennan also accepted the second and third grounds for invalidity. In relation to the defense power (section 51(vi)), Justice Brennan found the 1945 Act to be invalid given that the application of the defense power would not be reasonably proportional in a time of peace.³⁴⁷ As to the retrospectivity argument, Brennan J accepted that international law does not create an international crime retrospectively,³⁴⁸ and condemns retrospective municipal criminal law as offensive to human rights.³⁴⁹

In summary, the *War Crimes Act Case* reflects a complexity sourced in comparative analysis between international human rights law, the *United States Constitution*, and the *Australian Constitution* under two legislative powers, namely the external affairs and defense powers, and under the doctrine of separation of powers, as reflected in Chapter III judicial independence in the *Australian Constitution*.

³⁴² *Id.* at 559.

³⁴³ *Id.*

³⁴⁴ *Id.* at 560.

³⁴⁵ *Id.* at 566-67 (citing *United States v. Smith*, 18 U.S. 153, 161 (1820), where the Supreme Court of the United States held that American common law “recognizes and punishes piracy as an offence, not against its own municipal code, but as an offence against the Law of Nations (which is part of the Common Law), as an offence against the universal law of society; a pirate being deemed an enemy of the human race”).

³⁴⁶ *War Crimes Act Case*, 172 CLR at 567 (Austl.). See *Ex parte Quirin*, 317 U.S. 1, 27-28 (1942) (also cited by Justice Brennan in *War Crimes Act Case*, 172 CLR 501 (Austl.)). Cf. *Application of Yamashita*, 327 U.S. 1, 16 (1946), where the Court spoke in more guarded language, observed that “We do not make the laws of war but we respect them so far as they do not conflict with the commands of Congress or the Constitution.” (Cf. U.S. CONST. art. I, § 8, cl. 10 which confers on the Congress power “To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.”)

³⁴⁷ *War Crimes Act Case*, 172 CLR at 592 (Austl.).

³⁴⁸ *Id.* at 572.

³⁴⁹ *Id.* at 575.

5. SCHOOL CHAPLAINS CASE

While this case³⁵⁰ does not delve into the tension between international and domestic law under the dualist approach, it deals with comparative analysis between the *United States, the Canadian, and Australian Constitutions*. For example, Chief Justice French looked at the 1891 draft of the *Australian Constitution* and how it was “based upon the Constitution of the United States in so far as it assigned enumerated legislative powers to the Federal Parliament”, and how the executive power “followed the Constitution of Canada embodied in the British North America Act 1867 (Imp).”³⁵¹ He points out to the hybrid nature of the *Australian Constitution*, being based on British, United States, and Canadian constitutional designs,³⁵² and explains the incompatibility between a British-style cabinet system of executive government, and a true federation.³⁵³

In the *School Chaplains Case*, Ronald Williams challenged an agreement between the Commonwealth and the Scripture Union of Queensland (SUQ) for the provision of chaplaincy services at schools in Queensland, one which attended by Williams children. Williams argued that given that the agreement was not entered into pursuant to any legislation, the executive has no power to fund the provision of such services.

A six-to-one majority (Justice Heydon dissenting) found the agreement invalid as the Commonwealth had no constitutional or legislative power to enter into the agreement. In particular, section 61 executive power in the *Australian Constitution* did not authorize making payments to the SUQ.³⁵⁴

The source of complexity in this case comes from an inherent contradiction in the design of the *Australian Constitution*, namely the tension between the doctrine of responsible government, a British concept, and the federal compact, and American concept. The contradiction is explained by Quick and Garran in the following terms:

[I]n a Federation, it is a fundamental rule that no new law shall be passed and no old law shall be altered without the consent of (1) a majority of the people speaking by their representatives in one House, and (2) a majority of the States speaking by their representatives in the other house; that the same principle of State approval as well as popular approval should apply to Executive action, as well as to legislative action; that the State should not be forced to support Executive policy and Executive acts merely because ministers enjoyed the confidence of the popular Chamber.³⁵⁵

³⁵⁰ *Williams v Commonwealth [No1]* (“*School Chaplains Case*”) (2012) 248 CLR 156.

³⁵¹ *Id.* at 195.

³⁵² *School Chaplains Case*, 248 CLR at 202-03 (Austl.).

³⁵³ *Id.* (citing JOHN QUICK & ROBERT RANDOLPH GARRAN, *THE ANNOTATED CONSTITUTION OF THE AUSTRALIAN COMMONWEALTH* 706 (1901)).

³⁵⁴ Section 61 reads as follows:

Executive power:

The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen’s representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

³⁵⁵ JOHN QUICK & ROBERT RANDOLPH GARRAN, *THE ANNOTATED CONSTITUTION OF THE*

The invalidity of the agreement with the SUQ led the Commonwealth to enact remedial legislation.³⁵⁶ This time, Williams again successfully challenged the validity of the Act, as not supported by any constitutional powers, in particular, the corporations power section 51(xx) (given that the SUQ was a corporation) and the power to provide benefits to students (section 51(xxiiiA)).³⁵⁷ Unanimously, the HCA found the Act extended beyond the corporations and student benefits powers.³⁵⁸

In summary, unlike the other outliers, the complexity arising in *School Chaplains Case* is found in the hybrid design of the *Australian Constitution* rather than in tension between competing rights or between international and domestic rules. Notwithstanding, the complexity reflects a tension that we have seen previously, namely that between vertical levels of government.

VI. A COMMON DENOMINATOR?

Beyond the observation that nine outliers have common constitutional law issues, can we formulate a more nuanced proposition as to the source of the complexity inherent in the 12 outliers discussed above? The answer is “yes.” The analysis in the previous section provides three possible common denominators for the complexity identified in the twelve outliers. These are listed in Table 2 below.

Table 2: Main sources of outlier complexity.

Source of Complexity and Cases Where it Appears
International law: I(1), I(2), II(1), II(3), II(5), III(1), III(2), III(3)
Federal design: I(1), I(2), II(1), II(2), II(3), III(3), III(5)
Aboriginal rights: I(1), II(1), III(1), III(3)
I(1): <i>Western Australia v Ward</i> (2002) 213 CLR 1 (8 August 2002)
I(2): <i>New South Wales v Commonwealth</i> (“ <i>Work Choices Case</i> ”) (2006) 229 CLR 1 (14 November 2006)
II(1): <i>Commonwealth v Tasmania</i> (“ <i>Tasmanian Dam Case</i> ”) (1983) 158 CLR 1 (1 July 1983)
II(2): <i>Bank of NSW v Commonwealth Cth</i> (“ <i>Bank Nationalization Case</i> ”) (1948) 76 CLR 1 (11 August 1948)
II(3): <i>Momcilovic v the Queen</i> (2011) 245 CLR 1 (8 September 2011)
II(4): <i>R v Associated Northern Collieries</i> (“ <i>Coal Vend Case</i> ”) (1911) 14 CLR 387 (22 December 1911)
II(5): <i>Thomas v Mowbray</i> (“ <i>Jihad Jack Case</i> ”) (2007) 233 CLR 307 (2 August 2007)
III(1): <i>Wik Peoples v Queensland</i> (1996) 187 CLR 1 (23 December 1996)
III(2): <i>Pape v Commissioner of Taxation</i> (2009) 238 CLR 1 (7 July 2009)
III(3): <i>Mabo v Queensland [No 2]</i> (1992) 175 CLR 1 (3 June 1992)
III(4): <i>Polyukhovich v Commonwealth Cth</i> . (“ <i>War Crimes Act Case</i> ”) (1991) 172 CLR 501 (14 August 1991)
III(5): <i>Williams v Commonwealth [No 1]</i> (“ <i>School Chaplains Case</i> ”) (2012) 248 CLR 156 (20 June 2012)

As can be seen in Table 2, there are three common denominators: international law, federal design, and Aboriginal rights. While first-tier cases are concerned with section 109 inconsistency issues between State and Commonwealth legislation, at a deeper

AUSTRALIAN COMMONWEALTH 706 (1901).

³⁵⁶ *Financial Framework Legislation Amendments Act (No 3) 2012* (Cth) (Austl.).

³⁵⁷ *Williams v Commonwealth [No 2]* (2014) 252 CLR 416 (Austl.).

³⁵⁸ *Id.* at 417.

level, the inconsistencies arise from deficiencies in the protection of rights. For example, in *Ward*, there is competition between native title rights and pastoral leases, including the right of Aboriginal Australians not to be discriminated against. Another issue that arises in first-tier of cases is the validity of Commonwealth legislation, the analysis of powers in the *Australian Constitution* relied on by the Commonwealth to pass legislation. A deeper analysis shows that the underlying issues are related to the protection of rights, especially, under international conventions. In second-tier cases we find validity analysis under Chapter III of the *Australian Constitution*. But even here the underlying analysis is largely governed by the protection of human rights. In *Momcilovic*, the tension discussed in terms of one of the few human rights Acts in Australia,³⁵⁹ and the tension between the protection of rights and state legislation. Third-tier cases also reflect complexity arising from Aboriginal rights, international law, and the federal compact. In addition to analysis of the doctrine of separation of powers under Chapter III, and analysis of powers under the *Australian Constitution*, these cases look at the validity of state legislation under section 92 and in relation to extra-territorial operation. There is a connection with the protection of human rights, such as in *School Chaplains Case*, but on the actual analysis by the High Court, the connection to rights is relatively tenuous.

Most of the outliers analyze the tension between the *Australian Constitution* and different types of rights (e.g., Aboriginal rights, workers' rights, fundamental human rights and environmental rights). More specifically, eight of the outliers (I(1), II(1, 2, 3, and 5), III(1, 3, and 4)) illustrate the difficulty of protecting different types of rights, and High Court reluctance to be informed by relevant international law and United States jurisprudence. The high complexity observed in these outliers is a signifier of a deeper, structural issue with rights in Australian constitutional law. This observation could be summarized as relating to the lack of an Australian Bill of Rights, and whether that might be what is underlying the registered complexity in the outliers discussed above.

However, all three common denominators in Table 2 result from comparative analysis with United States jurisprudence, featuring in all 12 outliers. United States jurisprudence overlaps with these other sources, especially federal design and Aboriginal rights. The HCA analysis of United States jurisprudence informs the vertical balance of powers between the States and the Commonwealth, and informs the relationship between Australian Aboriginals and the Crown. The cases also show reliance by litigants on United States jurisprudence in interpreting international conventions, as discussed below.

In *Ward*, the above sources of complexity can be understood in terms of the comparative analysis, initiated by the litigants, and delineated by members of the High Court, with the United States.³⁶⁰ For example, in his dissenting judgment, Justice Callinan looked at interpreting the *International Convention on the Elimination of all Forms of Racial Discrimination* using US jurisprudence, arguing the possibility of pursuing the Convention using limited means.³⁶¹ He makes specific

³⁵⁹ At the state level, we find three human rights Acts in ACT, Victoria, and Queensland. The *Human Rights Act 2004* (ACT) (Austl.), the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (Austl.), and the *Human Rights Bill 2018* (Qld) (Austl.).

³⁶⁰ *Ward*, 213 CLR at 16 (Austl.).

³⁶¹ *Id.* at 283 n.833.

reference to *Rodriguez v. United States*,³⁶² in support of this interpretation. He also refers to *Washington v. Davis*,³⁶³ in holding that “mere discriminatory effect [under the Convention] without discriminatory purpose is not sufficient to found a violation of the equal protection clause of the Fourteenth Amendment of the United States Constitution.”³⁶⁴

In the *Work Choices Case*, similar to *Ward*, the majority referred extensively to United States jurisprudence,³⁶⁵ especially the *Interstate Commerce Act 1887* (US),³⁶⁶ and the *Sherman Act 1890* (US),³⁶⁷ which were supported by the Commerce Clause,³⁶⁸ for the proposition that United States federal courts have the power to intervene by injunction in labour disputes.³⁶⁹

Chief Justice Gleeson and Justices Gummow, Hayne, Heydon and Crennan make specific reference to *In re Debs*,³⁷⁰ which “supported the intervention of the federal government in the Pullman Strike to break the strike by force.”³⁷¹ Their honors also cite *McCulloch v. Maryland*,³⁷² to make analogies with the Commonwealth power to creating the Commonwealth Bank, and that of Congress in creating the Bank of the United States.³⁷³

United States jurisprudence is again prominent in the High Court reasoning in the *Tasmanian Dam Case*. The case illustrates an extensive comparative analysis, especially with the Fifth Amendment of the *United States Constitution*.³⁷⁴ Justice Mason, for example, looks at Justice Stephen’s distinction between “taking” property and “regulation” of property in *Tooth*,³⁷⁵ but comes to the conclusion that

³⁶² *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987).

³⁶³ *Washington v. Davis*, 426 U.S. 229 (1976).

³⁶⁴ *Ward*, 213 CLR at 284 n 838 (Austl.).

³⁶⁵ *Work Choices Case*, 229 CLR at 134 (Austl.).

³⁶⁶ *Interstate Commerce Act*, 24 Stat. 379 (1887) (codified as amended at 49 U.S.C. §§ 1701-17047 (1994)).

³⁶⁷ *Sherman Antitrust Act*, 26 Stat. 209 (1890) (codified at 15 U.S.C. §§ 1-7).

³⁶⁸ U.S. CONST., art I, § 8, cl 3.

³⁶⁹ See Felix Frankfurter & Nathan Greene, *The Use of the Injunction in American Labor Controversies*, 44 L. Q. REV. 164, 168-71 (1928).

³⁷⁰ *In re Debs*, 158 U.S. 564, 582 (1895).

³⁷¹ *Work Choices Case*, 229 CLR at 126 (Austl.). See also their general statement that “the United States federal courts had intervened by injunction in labour disputes” (*Work Choices Case*, 229 CLR at 134 (citing Felix Frankfurter & Nathan Greene, *The Use of the Injunction in American Labor Controversies*, 44 L. Q. REV. 164, 168-71 (1928))).

³⁷² *McCulloch v. Maryland*, 17 U.S. 316 (1819). In this case, the Supreme Court upheld the incorporation in 1816 by the Congress of the Bank of the United States. As stated in *Work Choices Case*, 229 CLR at 126 n 355, “[...]By the time of the adoption of the Australian Constitution, the Supreme Court had upheld laws for the creation of corporations to construct railroads and bridges for the purpose of promoting interstate commerce: *Luxton v North River Bridge Co* (1894) 153 U.S. 525 at 529-530”.

³⁷³ *Work Choices Case*, 229 CLR at 124 (Austl.). See also their quote from Joseph Story at *Work Choices Case*, 229 CLR at 126 (Austl.), confirming that the power to erect corporations may also be implied. The test being “whether it be such an instrument or means, and have a natural relation to any of the acknowledged objects of government.” JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 447 § 622 (1833).

³⁷⁴ *Tasmanian Dam Case*, 158 CLR at 5, 247, 284 (Austl.).

³⁷⁵ *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397, 413-15 (Austl.). See *Tasmanian Dam Case*, 158 CLR at 144.

“[t]he decisions of the United States Supreme Court have no direct relevance to s. 51 (xxx) of the Constitution.”³⁷⁶ This is so given that:

Many of [the decisions] turn on the Fifth Amendment which is made applicable to the states by the Fourteenth Amendment: see, e.g., *Penn Central Transportation Co. v. New York City*,³⁷⁷ in which Pennsylvania Coal was explained on the footing that a State statute that substantially furthers important public policies may so frustrate distinct investment backed expectations as to amount to a “taking.” The relevant provision in the Fifth Amendment is “... nor shall private property be taken for public use, without just compensation.” It seems that the Supreme Court has proceeded according to the view that the object of the clause is to prevent government from forcing some people alone to bear public burdens which should be undertaken by the entire public: *Armstrong v. United States* (24); *National Board of Young Mens Christian Assns. v. United States* (25); *Penn Central*.

The emphasis in s. 51 (xxx) is not on a “taking” of private property but on the acquisition of property for purposes of the Commonwealth. To bring the constitutional provision into play it is not enough that legislation adversely affects or terminates a preexisting right that an owner enjoys in relation to his property; there must be an acquisition whereby the Commonwealth or another acquires an interest in property, however slight or insubstantial it may be.³⁷⁸

Justice Murphy finds support for the presumption in favor of the validity of a legislative Act in United States jurisprudence, indicating that the presumption “was ‘thoroughly established’ by 1811”,³⁷⁹ and that United States Supreme Court referred to “the rule that every reasonable intendment must be indulged in favor of the constitutionality of a legislative power exercised.”³⁸⁰ As a corollary, of the presumption of validity, must also be presumed “all the facts and circumstances essential to the validity [of the Act].”³⁸¹ He then cited the United States Supreme Court “[i]f no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the State.

³⁷⁶ *Tasmanian Dam Case*, 158 CLR at 144 (Austl.).

³⁷⁷ *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

³⁷⁸ *Tasmanian Dam Case*, 158 CLR at 144-45 (Austl.).

³⁷⁹ *Id.* at 163 (citing James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 150 (1893); the classic statement of the doctrine of “reasonable doubt” by Justice Washington in *Ogden v. Saunders*, 25 U.S. 213, 270 (1827); *Fletcher v. Peck*, 10 U.S. 87, 128 (1810) (Marshall, C.J.); *Pure Oil Co. v. Minnesota*, 248 U.S. 158, 162-63 (1918); *Bd. of Trade of City of Chicago v. Olsen*, 262 U.S. 1, 37-38 (1923); *Gitlow v. New York*, 268 U.S. 652, 668 (1925).; *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 153 (1944); *United States v. Five Gambling Devices*, 346 U.S. 441, 449 (1953); *Hodel v. Virginia Surface Mining and Reclamation Ass’n, Inc.*, 452 U.S. 264, 276 (1981).

³⁸⁰ *First Nat’l Bank of Bay City v. Fellows ex rel. Union Tr. Co.*, 244 U.S. 416, 422 (1917). *See Tasmanian Dam Case*, 158 CLR at 164.

³⁸¹ *Tasmanian Dam Case*, 158 CLR at 167 (Austl.).

But if it could, we must presume it did”,³⁸² and “when the classification made by the legislature is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts.”³⁸³ And that those challenging the legislative judgment “must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.”³⁸⁴

Justice Brennan also looks at the Fifth Amendment, arguing that private property should not be “taken” without just compensation. He cites the Supreme Court as construing the provision as one “designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”³⁸⁵ However, he also cites the difficulty identified by the Supreme Court in finding “a touchstone for applying the limitation to some regulatory laws and not to others.”³⁸⁶

Justice Deane also looks at United States jurisprudence in considering the scope of the external affairs power, in particular, his honor refers to the *Burgess’ Case*, and the test in relation to the United States treaty-making power, that there has to be “sufficient international significance to make it a legitimate subject for international cooperation and agreement.”³⁸⁷ His honor also refers to *Tooth*.³⁸⁸ Justice Stephen referred to the distinction which has been recognized in the United States between the regulation of proprietary rights and the taking of property, for example, in *Penn Central Transportation Co. v. New York City*.³⁸⁹

Similar to the other outliers, also both plaintiffs and defendants in the *Bank Nationalization Case* referred to United States jurisprudence, this time on the definition of banking.³⁹⁰ Chief Justice Latham refers to cases from the United States on the precise definition of banking, finding that “in none of these cases was it necessary to formulated a precise definition of banking in order to apply any constitutional provisions upon the subject.”³⁹¹ Citing *McCulloch v. Maryland*,³⁹² his honor points out that “there is no constitutional provision dealing with the subject of banking and

³⁸² *Munn v. Illinois*, 94 U.S. 113, 132 (1876).

³⁸³ *Borden’s Farm Prod. Co. v. Baldwin*, 293 U.S. 194, 209 (1934).

³⁸⁴ *Vance v. Bradley*, 440 U.S. 93, 111 (1979) (citing *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1911); *Schilb v. Kuebel*, 404 U.S. 357, 364 (1871); *United States v. Maryland Savings-Share Ins. Corp.*, 400 U.S. 4, 6 (1970); *McGinnis v. Royster*, 410 U.S. 263, 274 (1973); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487 (1955)). *See also* *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911); *Ohio, ex rel. v. Deckebach*, 274 U.S. 392, 397 (1927); *Lawrence v. State Tax Comm’n of Mississippi*, 286 U.S. 276, 283 (1932); *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938); *McGowan v. Maryland*, 366 U.S. 420, 426 (1961); *United States v. Maryland Savings-Share Ins. Corp.*, 400 U.S. 4, 6 (1970); *Schilb v. Kuebel*, 404 U.S. 357, 364 (1971); *McGinnis v. Royster*, 410 U.S. 263, 274 (1973); *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 175 (1980).

³⁸⁵ *Tasmanian Dam Case*, 158 CLR at 247 (Austl.) (citing *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

³⁸⁶ *Tasmanian Dam Case*, 158 CLR at 248 (Austl.) (citing *Penn Central Transportation Co. v. City of New York City*, 438 U.S. 104, 124 (1978)).

³⁸⁷ *Tasmanian Dam Case*, 158 CLR at 257 (Austl.). *See* WESTEL WOODBURY WILLOUGHBY, CONSTITUTIONAL LAW OF THE UNITED STATES 519 (2nd ed., 1929).

³⁸⁸ *Trade Practices Commission v Tooth & Co* (1979) 142 CLR 397, 414-15 (Austl.).

³⁸⁹ *Penn Central Transp. Co. v. City of New York City*, 438 U.S. 104, 123-28, 139-46 (1978).

³⁹⁰ *See, e.g., The Bank Nationalization Case*, 76 CLR at 192, 278 (Austl.).

³⁹¹ *Id.* at 192.

³⁹² *McCulloch v. Maryland*, 17 U.S. 316 (1819).

the American authorities cited are of little assistance”,³⁹³ and that the incidental power is the source of the power of the Congress “to make laws with respect to banking.”³⁹⁴ His honor also referred to United States jurisprudence to find that “The cases in the United States in which reference is made to banking do not include any considered decision of the question whether banking is trade or commerce.”³⁹⁵

Chief Justice Latham also makes reference to *United States v. Darby*,³⁹⁶ and the proposition that in the United States “the power of Congress to ‘regulate commerce with foreign nations and among the several States’ has on very many occasions been held to extend ‘not only to those regulations which aid, foster and protect the commerce, but [it] embraces those which prohibit it.’”³⁹⁷ He also explains that “in the United States of America the Supreme Court has jurisdiction in all ‘controversies to which the United States shall be a party’—Constitution of the United States, Art. III., s. 2. But this jurisdiction can be exercised only if the United States consents.”³⁹⁸ Then his honor distinguishes section 75(iii) of the *Australian Constitution* (“In all matters in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is party, the High Court shall have original jurisdiction”) in the following terms:

In the Commonwealth Constitution the words used are not “a party to a controversy,” but “being sued on behalf of the Commonwealth.” In the case of the United States Constitution there is much to be said for the proposition that the court should look at the controversy, whatever it may be, and ascertain who are the real parties to it, whoever or whatever may be the agents through whom they act. But in the case of the Commonwealth Constitution the reference to the record is much more direct. It is necessary only to find out who is actually being sued and then to ask whether that person is being sued on behalf of the Commonwealth.³⁹⁹

In their joint opinion, Justices Rich and Williams also look at *United States v. Thayer-West Point Hotel Co.*,⁴⁰⁰ for the proposition that

[F]or the acquisition of income-producing property must, in order to provide just terms, empower the tribunal which is to assess the compensation to award interest from the date the acquirer enters into possession, so that, if the law provides for the assessment of “compensation,” this word, read in the light of constitutional requirement, should be construed as including such a power in its content.⁴⁰¹

³⁹³ *Bank Nationalization Case*, 76 CLR at 192 (Aust.).

³⁹⁴ *Id.*

³⁹⁵ *Id.* at 233.

³⁹⁶ *United States v. Darby*, 312 U.S. 100 (1941).

³⁹⁷ *Bank Nationalization Case*, 76 CLR at 197-98 (Austl.) (citing *United State v. Darby*, 312 U.S. 100, 113 (1941)).

³⁹⁸ *Id.* at 225 (citing WESTEL W. WILLOUGHBY, CONSTITUTIONAL LAW OF THE UNITED STATES 1381, 1422 (2nd ed., 1929)).

³⁹⁹ *Id.* at 225-26.

⁴⁰⁰ *United States v. Thayer-West Point Hotel Co.*, 329 U.S. 585 (1947).

⁴⁰¹ *Bank Nationalization Case*, 76 CLR at 277 (Austl.).

They also refer to *Freeman v. Hewitt*,⁴⁰² to support the view that banking was part of commerce, and refer to *Atlantic Cleaners & Dyers Inc. v. United States*,⁴⁰³ to ascertain the meaning of trade.⁴⁰⁴

Justice Starke refers to *McCulloch v. Maryland*,⁴⁰⁵ making the same point made by Chief Justice Latham on the power of Congress to incorporate banks, stating that the power was “deduced by inference or implication from the Constitution.”⁴⁰⁶ His honor also looks at section 92 of the *Australian Constitution* (stipulating for trade within the Commonwealth to be free) and compares it to “the power in the American Constitution to regulate commerce with foreign nations and among the several States and with the Indian tribes.”⁴⁰⁷ Justice Starke then cites with approval Chief Justice Marshall in *Gibbons v. Ogden*,⁴⁰⁸ on the “intercourse” description of commerce.⁴⁰⁹ However, on a contextual analysis of the *Australian Constitution*, he nevertheless distinguishes the United States doctrine giving Congress the exclusive power regulate commerce, where there is a requirement of uniformity of regulations, while allowing the States jurisdiction over matters admitting diversity of treatment, until Congress decides otherwise.⁴¹⁰ Justice Starke also follows Chief Justice Latham’s approach on distinguishing the interpretation of section 75(iii) of the *Australian Constitution* from the Supreme Court interpretation of the Case or Controversy Clause.⁴¹¹

Similarly, Justice Dixon looked at *New York v. United States*,⁴¹² in rejecting the point in relation to discriminating against the states in curtailing their freedom in using the general banking system.⁴¹³ He then goes to distinguish the “just compensation” requirement under the Fifth Amendment of the *United States Constitution* from that under section 51(xxxi) of the *Australian Constitution*,⁴¹⁴ citing the statement from *Thayer-West Point Hotel Co.*,⁴¹⁵

The fact that ‘just compensation’ includes interest in the eminent domain setting does not necessarily mean that the term must be given the same scope in other situations . . . in the absence of constitutional connotations, ‘just compensation’ is not a term of art so far as interest is concerned.⁴¹⁶

Justice Dixon goes on and provides a comparative analysis with the *United States Constitution* on interpreting section 92 “trade and commerce”, similar to that given

⁴⁰² *Id.* at 284.

⁴⁰³ *Atl. Cleaners & Dyers v. United States*, 286 U.S. 427, 436 (1932).

⁴⁰⁴ *Bank Nationalization Case*, 76 CLR at 285 (Austl.).

⁴⁰⁵ *McCulloch v. Maryland*, 17 U.S. 316 (1819).

⁴⁰⁶ *Bank Nationalization Case*, 76 CLR at 306 (Austl.).

⁴⁰⁷ *Id.*

⁴⁰⁸ *Gibbons v. Ogden*, 22 U.S. 1, 189-90 (1824).

⁴⁰⁹ *Bank Nationalization Case*, 76 CLR at 306 (Austl.).

⁴¹⁰ *Id.*

⁴¹¹ *Id.* at 322 (U.S. CONST. art. III, § 2, cl. 1).

⁴¹² *New York v. United States*, 326 U.S. 572 (1946).

⁴¹³ *Bank Nationalization Case*, 76 CLR at 338 (Austl.).

⁴¹⁴ *Id.* at 341-42.

⁴¹⁵ *United States v. Thayer-West Point Hotel Co.*, 329 U.S. 585, 588 (1947).

⁴¹⁶ *Bank Nationalization Case*, 76 CLR at 341-43 (Austl.).

by the other members of the bench.⁴¹⁷

Similarly, in *Momcilovic*, as to its comparative analysis with the *United States Constitution*, Chief Justice French looks at the 19th century Supreme Court proposition that the presumption of innocence and the prosecutor's burden of proof are "logically separate and distinct", and how "sharp scholarly criticism" resulted in discarding the distinction.⁴¹⁸

Justice Gummow looks at decisions of the Supreme Court of the United States,⁴¹⁹ for the proposition that "the diversity jurisdiction established by Art III §2 of the *United States Constitution* did not extend to criminal proceedings",⁴²⁰ and for comparing covering cl 5 of the *Australian Constitution* with the Supremacy Clause of the *United States Constitution*,⁴²¹ only to emphasize that "the position of the States in the Australian federal structure does not correspond to that of the States in the American federal structure."⁴²² Justice Hayne also makes reference to Joseph Story in his commentary on the *United States Constitution*,⁴²³ in comparing Article VI of the *United States Constitution*, and section 109 of the *Australian Constitution*, and in support of the proposition that "despite the differences between the two systems, these particular observations apply with equal force to the Commonwealth Constitution and serve to explain why laws of the Commonwealth, validly made, are and must be paramount."⁴²⁴

Justices Crennan and Kiefel also make use of United States cases, citing *Mistretta v. United States*, for the proposition that "the reputation of the judicial branch may not be borrowed by the legislative and executive branches 'to cloak their work in the neutral colors of judicial action.'"⁴²⁵

In the *Coal Vend Case*, in discussing the validity of the 1906 Act, Justice Isaacs refers to similar enactments in the United State,⁴²⁶ and uses *United States v. American Tobacco Co.*,⁴²⁷ to ascertain the meaning of "restraint of trade."⁴²⁸ He also refers to Justice Holmes in *Swift v. United States*,⁴²⁹ to discuss the validity of the agreement in the *Coal Vend Case*.⁴³⁰ The case shares an extensive comparative

⁴¹⁷ *Bank Nationalization Case*, 76 CLR at 366-82 (Austl.)

⁴¹⁸ *Momcilovic v The Queen* (2011) 245 CLR 1, 51-52 n 255 (Austl.) (citing *Coffin v. United States* 156 U.S. 432 (1985); *Taylor v. Kentucky*, 436 U.S. 478, 483 (1978)). See also John William Strong et al., MCCORMICK ON EVIDENCE, 519-20 (5th ed., 1999); William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329 (2005); Larry Laudan, *The Presumption of Innocence: Material or Probatory?*, 11 LEGAL THEORY 333 (2005); David Hamer, *A Dynamic Reconstruction of the Presumption of Innocence*, 31 OXFORD J. LEGAL STUD. 417 (2011).

⁴¹⁹ *Chisholm v. Georgia*, 2 U.S. 419, 431-32 (1793); *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 289-90, 298 (1888).

⁴²⁰ *Momcilovic*, 245 CLR at 81 (Austl.).

⁴²¹ *Id.* at 101-03 (U.S. CONST. art. VI, cl. 2).

⁴²² *Id.* at 81 n.376 (citing *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 (Austl.)).

⁴²³ *Momcilovic*, 245 CLR at 131 (Austl.) (citing JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 693 § 1831 (1833)).

⁴²⁴ *Id.* at 132.

⁴²⁵ *Id.* at 228 (citing *Mistretta v. United States*, 488 U.S. 361, 407 (1989)).

⁴²⁶ *Coal Vend Case*, 14 CLR at 404 (Austl.).

⁴²⁷ *United States v. American Tobacco Co.*, 221 U.S. 106, 178; (1911).

⁴²⁸ *Coal Vend Case*, 14 CLR at 457 (Austl.).

⁴²⁹ *Swift & Co. v. United States*, 196 U.S. 375, 396 (1905).

⁴³⁰ *Coal Vend Case*, 14 CLR at 476 (Austl.).

analysis with United States jurisprudence, especially in relation to anti-trust laws.⁴³¹

Jihad Jack also shares a comparative analysis with United States jurisprudence, but on the protection of civil rights. For example, Justice Kirby, citing his opinion in *Fardon*,⁴³² reaffirms that “[a]lthough the constitutional setting in the United States is different from that operating in Australia, our legal tradition shares a common vigilance to the dangers of civil commitment that deprives persons of their liberty.”⁴³³ Similarly, Justices Gummow and Crennan discuss *McCulloch v. Maryland*,⁴³⁴ in analyzing the meaning of the term “necessary” in para (d) of section 104.4(1) of the *Criminal Code*, and refer to *The Federalist* in analyzing the scope of the defense power (section 51(vi)).⁴³⁵

Similarly, the common denominator in third-tier outliers remains the extensive reliance on United States jurisprudence. In *Pastoral Leases Case*, the comparison is on the native title in the United States. For example, Chief Justice Brennan explains the need for a “a treaty or a convention entered to pursuant to the Constitution.”⁴³⁶ Also, Justice Toohey compares United States and Australian property law,⁴³⁷ especially the powers to extinguish native title.⁴³⁸ Justice Gummow adds the following:

Quite apart from the treatment in the United States of native title, the American Revolution was followed in several of the States by legislative repudiation of the tenurial system as the ultimate root of real property title. For example, in New York the legislature abolished all feudal tenures of every description, with all their incidents, and declared that all lands within that State were allodial.⁴³⁹

Justice Kirby also looks comparatively at the United States. For example, he describes the effects of radical title in Australia, and the extinguishment of native title as follows:

⁴³¹ *Id.* at 463.

⁴³² *Fardon v A-G for Queensland* (2004) 223 CLR 575, 641 (Austl.).

⁴³³ *Jihad Jack Case*, 233 CLR at 430 (Austl.).

⁴³⁴ *McCulloch v. Maryland*, 17 U.S. 316 (1819).

⁴³⁵ *Jihad Jack Case*, 233 CLR at 359 (Austl.). See ALEXANDER HAMILTON ET AL., *THE FEDERALIST* 200 (Benjamin Wright ed., 1961).

⁴³⁶ *Pastoral Leases Case*, 187 CLR at 96 (Austl.) (citing 25 U.S.C § 177).

⁴³⁷ *Pastoral Leases Case*, 187 CLR at 111 (Austl.) (referring to Brendan Edgeworth, *Tenure, Allodialism and Indigenous Rights at Common Law: English, United States and Australian Land Law Compared after Mabo v Queensland*, 23 *ANGLO-AM. L. REV.* 397 (1994)).

⁴³⁸ *Pastoral Leases Case*, 187 CLR at 123 (Austl.) (citing *Johnson v. McIntosh*, 21 U.S. 543, 587 (1823); *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339 (1941); *St. Catherine's Milling & Lumber Co. v. R.* (1888) 14 App. Cas. 46 (UK); *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1955)).

⁴³⁹ *Pastoral Leases Case*, 187 CLR at 178 (Austl.) (citing *Kavanaugh v. Cohoes Power & Light Corp.*, (1921) 187 N.Y.S. 216, 236-37 (N.Y. Sup. Ct.); JOHN CHIPMAN GRAY, *THE RULE AGAINST PERPETUITIES* §23 (4th ed., 1942)).

This apparently unjust and uncompensated deprivation of preexisting rights distinguished the treatment by the Crown of the indigenous peoples in Australia when compared to other settlements established under the Crown in the American colonies.⁴⁴⁰

Pape continued the comparative analysis with United States jurisprudence, for example on the standing issue, with Chief Justice French citing the Supreme Court to describe the relation between the federal government and tax payers as “shared with millions of others” and “comparatively minute and indeterminable.”⁴⁴¹ Chief Justice French also cites authorities rejecting the equating of the *United States Constitution* and sections 81 and 83 of the *Australian Constitution*.⁴⁴² Similarly, Justices Gummow, Crennan and Bell look at the *United States Constitution* in interpreting section 83 of the *Australian Constitution*.⁴⁴³ There is similar analysis in the judgment of Justices Hayne and Kiefel.⁴⁴⁴

Mabo [No 2] exhibits the same comparative analysis with United States jurisprudence on native title.⁴⁴⁵ For example, Justice Brennan looks at United States cases when discussing the extinguishment of native title.⁴⁴⁶ Justices Deane and Gaudron also look at United States cases on the ability of the Crown to revoke or terminate native title.⁴⁴⁷ Justice Dawson also entertains the effect of United States jurisprudence on native title, in particular, the proposition that “traditional native title is not dependent upon a grant to or recognition of rights in the native inhabitants because such title is not dependent upon a treaty, statute or other formal government action.”⁴⁴⁸ He cites with approval the proposition that “Indian title in the United States (in the absence of recognition by Congress through treaty or legislation so that it becomes property within the meaning of the Fifth Amendment) is a right of occupancy which can be terminated by Congress at will”,⁴⁴⁹ adding,

⁴⁴⁰ *Pastoral Leases Case*, 187 CLR at 206 (Austl.) (citing *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832); *Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968); *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1975); *cf. Mabo [No 2]* (1992) 175 CLR 1, 135-36 (Austl.)).

⁴⁴¹ *Massachusetts v. Mellon*, 262 U.S. 447, 487 (1923). *See Pape*, 238 CLR at 34 (Austl.).

⁴⁴² *Pape*, 238 CLR at 43-48 (Austl.) (citing U.S. CONST. art. I, § 8, cl. 1).

⁴⁴³ *Id.* at 81 (citing U.S. CONST. art. I, § 9, cl. 7).

⁴⁴⁴ *Id.* at 112 (citing U.S. CONST. art. I, § 8, cl. 1).

⁴⁴⁵ *E.g., Mabo [No 2]*, 175 CLR at 90 (Austl.).

⁴⁴⁶ *Mabo [No 2]*, 175 CLR at 63 (Austl.) (citing *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 347 (1941); *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 281-85 (1955)).

⁴⁴⁷ *Mabo [No 2]*, 175 CLR at 90 (Austl.) (citing *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1955); *but cf. Johnson v. McIntosh*, 21 U.S. 543, 587 (1823) and *Cherokee Nation v. Georgia*, 30 U.S. 1, 12 (1831)).

⁴⁴⁸ *Mabo [No 2]*, 175 CLR at 129 (Austl.) (citing *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 347 (1941); *Narragansett Tribe v. S. Rhode Island Land Dev. Corp.*, 418 F. Supp. 798, 807 (D.R.I. 1976); *Hamlet of Baker Lake v. Minister of Indian Affairs*, [1980] 1 F.C. 518 (Can.)). *See also Mabo [No 2]*, 175 CLR at 135 (Austl.) (Dawson J).

⁴⁴⁹ *Mabo [No 2]*, 175 CLR at 136 (Austl.) (citing *Oneida Indian Nation of N. Y. State v. Oneida, Cty.*, 414 U.S. 661, 667 (1974); *Lipan Apache Tribe v. United States*, 180 Ct. Cl. 487, 492 (1967); *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 347 (1941); *Johnson v. McIntosh*, 21 U.S. 543, 587-88 (1823); *United States v. Tillamooks*, 329 U.S. 40, 46 (1946); *United States v. Atl. Richfield Co.*, 435 F. Supp. 1009, 1031 (D. Alaska

“[h]owever, Indian title will only be extinguished where Congress’ intention to effect such extinguishment is ‘clear and plain.’”⁴⁵⁰

What is clear from Justice Dawson’s judgment is that he continues the same approach of distinguishing United States jurisprudence, especially when it comes to Aboriginal rights. Hence, he states that the “fiduciary relationship [that] exists between the United States government and the various Indian tribes”, is not applicable in Australia, given that “the doctrine is dependent upon a history of protection of the Indian tribes, as separate domestic dependent nations with their own limited form of sovereignty and territorial and governmental integrity.”⁴⁵¹ A similar discussion of United States jurisprudence and native title can be found in the judgment by Justice Toohey.⁴⁵²

The *War Crimes Act Case* also illustrates dependence on United States jurisprudence, and the what now can be described as a ‘portmanteau’ rejection of analogies with the *United States Constitution*. Chief Justice Mason analyzes the issue of retrospective law by looking at Supreme Court decisions,⁴⁵³ arguing that the prohibition in the United States “rests upon the existence of a specific prohibition in the United States Constitution which has no counterpart in [the Australian] Constitution.”⁴⁵⁴ His honor makes the same argument in relation to bills of attainder.⁴⁵⁵

Justice Brennan, inter alia, looks at the “jurisdiction of the courts of the United States to try cases of international crime” arguing that this jurisdiction was “founded on the application by municipal courts of international law.”⁴⁵⁶ He also refers to United States cases trying war criminals after Civil War.⁴⁵⁷

Justice Deane also looks to the Supreme Court to support the proposition that “[t]he ordinary object of the exercise of judicial power is the ascertainment of rights and liabilities or of guilt or innocence under the law.”⁴⁵⁸ His honor looked at United States precedents when analyzing the effect of the doctrine of separation of powers, explaining that “[t]he doctrine of the separation of powers which is incorporated in the Constitution differs from that embodied in the United States Constitution in so far as the relationship between the legislative and executive arms of government is concerned.”⁴⁵⁹ According to his honor, even the separation of judicial power under Chapter III of the *Australian Constitution* is different from that of the prohibitions

1977); *Narragansett Tribe v. S. Rhode Island Land Dev. Corp.*, 418 F. Supp. 798, 807 (D.R.I. 1976); *Gila River Pima-Maricopa Indian Cmty. v. United States*, 494 F.2d 1386, 1389 (Ct. Cl. 1974)).

⁴⁵⁰ *Mabo [No 2]*, 175 CLR at 136 (Austl.) (citing *Lipan Apache Tribe v. United States*, 180 Ct. Cl. 487, 492 (1967)).

⁴⁵¹ *Mabo [No 2]*, 175 CLR at 164 (Austl.).

⁴⁵² *Id.* at 183-200 (citing U.S. CONST. art. I, §9, cl. 3 and art. I, § 10, cl. 1).

⁴⁵³ *War Crimes Act*, 172 CLR at 534 (Austl.).

⁴⁵⁴ *Id.*

⁴⁵⁵ *Id.* at 535.

⁴⁵⁶ *Id.* at 566-67.

⁴⁵⁷ *Id.* at 570 (citing *Coleman v. Tennessee*, 97 U.S. 509 (1878) and *Dow v. Johnson*, 100 U.S. 158 (1879)).

⁴⁵⁸ *War Crimes Act*, 172 CLR at 607 (citing *Prentis v. Atl. Coast Line Co.*, 211 U.S. 210, 226 (1908)).

⁴⁵⁹ *War Crimes Act*, 172 CLR at 616 (Austl.).

in any “Bill of Attainder or ex post facto Law.”⁴⁶⁰ Justices Dawson and Toohy also makes similar comparative analysis with United States jurisprudence.⁴⁶¹

One can also find other comparative analysis in *Williams [No 1]*. Justices Gummow and Bell distinguished the “religious test clause” in the *United States Constitution* when analyzing section 116 of the *Australian Constitution*,⁴⁶² as well as the doctrine in *United States v. Butler*,⁴⁶³ under which Congress has unlimited taxing and spending powers.⁴⁶⁴ While, in rejecting a wide view of the Commonwealth power to spend, Justice Hayne also looks at the *United States Constitution* when analyzing sections 81 and 83 of the *Australian Constitution*.⁴⁶⁵ As to Justice Heydon, he also looked at Article VI of the *United States Constitution* prohibition on the religious test.⁴⁶⁶ However, the rest of the judgments in *School Chaplains*, by Crennan and Kiefel, do not go into comparative analysis.

In summary, only the comparative analysis with the United States features in all twelve outliers, making it a common denominator that explains the high complexity seen in these cases. Moreover, the comparative analysis also informed other common themes in these outliers, including Aboriginal rights, the vertical power balance between State and Commonwealth governments, and on the way international law can inform domestic jurisprudence.

In the following section, the article explains the genesis of the rejection of SCOTUS interpretation of the *United States Constitution* as the most helpful aid for interpreting the *Australian Constitution*.

VII. REMOVING THE INEFFICIENCY IN INTERPRETING THE AUSTRALIAN CONSTITUTION

As discussed below, the high complexity of HCA judgments over the last 100 years suggests inefficiencies in interpreting the *Australian Constitution*. This is, however, not only a historical problem, as can be seen in Figure 2 below. Out of the twelve outliers, half were decided in the 21st century. If the HCA chooses to continue applying the *Engineers Case*, there can only be more paralysis in the actual operation of the *Australian Constitution*.

⁴⁶⁰ *Id.* at 616 (citing U.S. CONST. art. I, §9, cl. 3 (Federal) and art. I, §10, d. 1 (State): “the Bill of Attainder Clause”)

⁴⁶¹ *Id.* at 645-48, 660-89.

⁴⁶² *School Chaplains Case*, 248 CLR at 223 (Austl.) (citing U.S. CONST. art. VI, cl. 3). Section 116 reads as follows:

Commonwealth not to legislate in respect of religion:

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

⁴⁶³ *United States v. Butler*, 297 U.S. 1 (1936).

⁴⁶⁴ *School Chaplains Case*, 248 CLR at 231 (Austl.).

⁴⁶⁵ *Id.* at 245 (citing U.S. CONST. art. I, §8, cl. 1). Justice Hayne also refers to the proposition in *Pape* that “the power to spend appropriated moneys must be found either in provisions of the Constitution other than s 81 or s 83, or in statutes made under the Constitution” (*School Chaplains Case*, 248 CLR at 248 (Austl.) (citing *Pape*, 134 CLR at 412-413 (Austl.))).

⁴⁶⁶ *School Chaplains Case*, 248 CLR at 335 (Austl.).

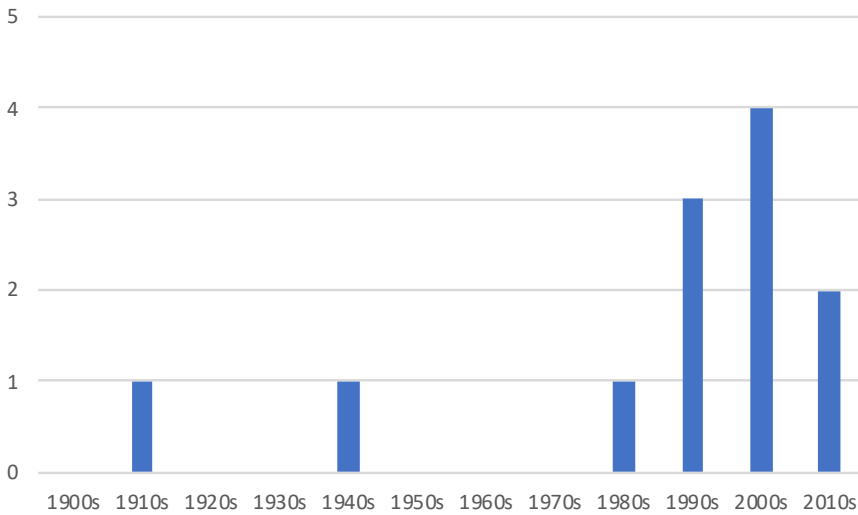


Figure 2: The frequency of outliers over the last twelve decades.

Since the passing of the *Australia Acts*,⁴⁶⁷ all appeals to the Judicial Committee of the Privy Council from state supreme courts have been eliminated, making section 74 of the *Australian Constitution* obsolete.⁴⁶⁸ However, the HCA has been reluctant to grant certificates of appeal to the Privy Council since its inception, exercising its discretion to grant appeal only once in 1912.⁴⁶⁹ The HCA explains this reluctance in the following terms:

There are various considerations which must govern the decision of this Court in exercising its power in a case which comes within s. 74. But no doubt the principle which lies at the root of s. 74 is one which must

⁴⁶⁷ See *Australia Act 1986 (Cth)* (Austl.), and *Australia Act 1986, c. 2 (UK)*.

⁴⁶⁸ Section 74 reads as follows:

Appeal to Queen in Council:

No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits inter se of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits inter se of the Constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council.

The High Court may so certify if satisfied that for any special reason the certificate should be granted, and thereupon an appeal shall lie to Her Majesty in Council on the question without further leave.

Except as provided in this section, this Constitution shall not impair any right which the Queen may be pleased to exercise by virtue of Her Royal prerogative to grant special leave of appeal from the High Court to Her Majesty in Council. The Parliament may make laws limiting the matters in which such leave may be asked, but proposed laws containing any such limitation shall be reserved by the Governor-General for Her Majesty's pleasure.

⁴⁶⁹ In *Colonial Sugar Ref Co Ltd v Attorney-General (Cth)* (1912) 15 CLR 182 (Austl.).

be kept in mind as possibly paramount. It has been expressed by this Court in judgments before, but it may be very shortly summarized by the statement that experience shows—and that experience was anticipated when s. 74 was enacted that it is only those who dwell under a Federal Constitution who can become adequately qualified to interpret and apply its provisions.⁴⁷⁰

Notwithstanding this consciousness of the autochthonous prerequisite for interpreting the *Australian Constitution*, the origins of the high complexity seen in the twelve HCA decisions can be traced back to the marginalization of the framers' intention in cleaving closely to SCOTUS jurisprudence on the *United States Constitution*. The starting point to understanding the emerging constitutional crisis is to revisit the HCA decision in what came to be known as the *Engineers Case*.⁴⁷¹

7.1. THE LINGERING EFFECT OF THE ENGINEERS CASE

In the *Engineers Case*, a national trade union served a list of claims on employers throughout Australia, including businesses owned by Western Australia, and began proceedings in the Commonwealth Arbitration Court. The Court had jurisdiction to settle industrial disputes,⁴⁷² even if involving state or public authorities. The issue in the High Court was whether the Commonwealth had “power to make laws binding on the States with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of one State.”⁴⁷³ The HCA found the 1904 Act valid under the conciliation and arbitration power (section 51(xxxv)) of the *Australian Constitution*.

The case marked a move to a new interpretation of the *Australian Constitution*, one based on textualism rather than originalism—in essence opting for British precedents on statutory construction.⁴⁷⁴ The earlier approach was to interpret the *Australian Constitution* based on the intention of the framers of the *Constitution*, of whom three were original judges of the HCA (Griffith, Barton and O'Connor) and two were appointed in 1906 (Isaacs and Higgins). The textual approach replaced the framers' intention with the intention of the British Parliament, who passed the *Australian Constitution*.⁴⁷⁵ Samuel Griffith, the first Chief Justice of the HCA, explains originalism in these terms:

We cannot disregard the fact that the Constitution of the Commonwealth was framed by a Convention of Representatives from the several colonies. We think that, sitting here, we are entitled to assume—what, after all, is a fact of public notoriety—that some, if not all, of the framers of that Constitution were familiar, not only with the Constitution of the United States, but with that of the Canadian Dominion and those of the British

⁴⁷⁰ *Whitehouse v Queensland* (1961) 104 CLR 635, 637-38 (Austl.).

⁴⁷¹ *Engineers Case*, 28 CLR 129 (Austl.).

⁴⁷² *See Conciliation and Arbitration Act 1904* (Cth) (Austl.).

⁴⁷³ *Id.* at 129, 132.

⁴⁷⁴ *Engineers Case*, 28 CLR at 149 (Austl.) (citing *Ontario (Attorney-General) v. Canada (Attorney-General)*, [1912] A.C. 571, 583 (Can.)).

⁴⁷⁵ Commonwealth of Australia Act, 1900 (Imp), 63 & 64 Victoria, c. 12 § 9 (U.K.).

colonies. When, therefore, under these circumstances, we find embodied in the Constitution provisions undistinguishable in substance, though varied in form, from provisions of the Constitution of the United States which had long since been judicially interpreted by the Supreme Court of that Republic, it is not an unreasonable inference that its framers intended that like provisions should receive like interpretation.⁴⁷⁶

This earlier approach was criticized by the majority (Knox, Isaacs, Rich, and Starke) in the following terms:

The more the decisions are examined, and compared with each other and with the Constitution itself, the more evident it becomes that no clear principle can account for them. They are sometimes at variance with the natural meaning of the text of the Constitution; some are irreconcilable with others, and some are individually rested on reasons not founded on the words of the Constitution or on any recognized principle of the common law underlying the expressed terms of the Constitution, but on implication drawn from what is called the principle of "necessity," that being itself referable to no more definite standard than the personal opinion of the Judge who declares it.⁴⁷⁷

However, the earlier approach was first criticized not by the HCA but by the Privy Council, who in 1906 stated that:

It is, indeed, an expansion of the canon of interpretation in question to consider the knowledge of those who framed the Constitution and their supposed preferences for this or that model which might have been in their minds. Their Lordships are not able to acquiesce in any such principle of interpretation. The legislature must have had in their minds the Constitution of the several States with respect to which the Act of Parliament which their Lordship are called upon to interpret was passed.⁴⁷⁸

The ensuing marginalization of SCOTUS jurisprudence paralyzed the interpretive coherence of the *Australian Constitution*, especially given the latter's brevity on issues such as (Aboriginal) rights, the federal compact, and the effect international law.

7.2. THE PROPOSED APPROACH

The distribution of the twelve outliers suggests an ongoing 'constitutional crisis', where more efficiencies in interpreting the *Constitution* are likely to arise in the following decades. The origins of this crisis are summarized in the *Bank Nationalization Case*, when Justice Starke makes it clear that "[t]he decisions of the United States Courts are not authoritative upon the interpretation of the Australian

⁴⁷⁶ *D'Emden v Pedder* (1904) 1 CLR 91, 113 (Austl.).

⁴⁷⁷ *Engineers Case*, 28 CLR at 141-42 (Austl.).

⁴⁷⁸ *Webb v Outtrim* (1906) 4 CLR 356, 360-61 (on appeal from Victoria) (Austl.).

Constitution.”⁴⁷⁹ Similarly, Justice Callinan’s dissenting judgment in *Ward*, where he states the following:

I do not propose to refer to United States authorities upon which some of the claimants rely to maintain a claim to ownership of minerals.⁴⁸⁰ Those authorities are distinguishable by reason of the special treaty arrangements made with the Indian peoples whose lands were affected thereby and considered in those cases.⁴⁸¹

In addition, in support of the dualist approach to international law, Justice Callinan states “the long settled principle that provisions of an international treaty do not form part of Australian law unless validly incorporated by statute.”⁴⁸² The rationale for this approach being that “the separation of the legislative and executive arms of government necessitates that treaties be implemented domestically under statute.”⁴⁸³ His honor then compares the *Australian Constitution* to the *United States Constitution*:

A contrast may be drawn with the position under the Constitution of the United States of America. Article VI of the United States Constitution relevantly provides: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.” As a result, self-executing treaties can create rights and impose liabilities without being implemented by legislation passed in Congress.

The distinction is tenuous. A similar clause to Article VI of the *United States Constitution* was introduced into the 1891 draft of the *Australian Constitution*. However, the clause was eventually removed from the final version. The lack of references to international law in the *Australian Constitution* was, therefore, intentional. An early draft of the *Australian Constitution* included the following clause (adapted from the *United States Constitution*):

Operation of the Constitution and laws of the Commonwealth:

Clause 7. The Constitution established by this Act, and all laws made by the Parliament of the Commonwealth in pursuance of the powers conferred by the Constitution, *and all Treaties made by the Commonwealth, shall, according to their tenor, be binding on the Courts, Judges, and people, of every State, and of every part of the Commonwealth*, anything in the laws of any State to the contrary notwithstanding: and the Laws and Treaties of the Commonwealth shall

⁴⁷⁹ *Bank Nationalization Case*, 76 CLR at 306 (Austl.).

⁴⁸⁰ *United States v. Shoshone Tribe of Indians of Wind River Reservation in Wyoming*, 304 U.S. 111 (1938); *United States v. Klamath & Moadoc Tribes*, 304 U.S. 119 (1938).

⁴⁸¹ *Ward*, 213 CLR at 273 (Austl.).

⁴⁸² *Id.* at 391.

⁴⁸³ *Id.* See also *id.* at 391-92, n1090.

be in force on board of all British ships whose last port of clearance or whose port of destination is in the Commonwealth.⁴⁸⁴

This provision was later removed from the final version of the *Australian Constitution*, because “it was thought to have the unacceptable implication that Australia had the power to enter into international agreements independently of Great Britain.”⁴⁸⁵ The amendment was introduced in the following terms:

I think it is expected by the Legislative Council of New South Wales that I should explain what the meaning of this amendment [to omit reference to treaties in clause 7] is. In the first place, the desire of that body is that, inasmuch as the treaty-making power will be in the Imperial Government, we should omit any reference to the making of treaties by the commonwealth; in other words, while they concede that we should make certain trade arrangements, which would have force enough if ratified by the Imperial Government, *the sole treaty-making power is in the Crown of the United Kingdom.*⁴⁸⁶

Query, however, whether this rationale still applies today, and therefore, whether cl. 7 does in fact have relevance in interpreting the *Australian Constitution*, as a virtually identical version of Article VI, that can be implied into the *Constitution* by the HCA using SCOTUS jurisprudence.

Similarly, in *Polyukhovich*, Justice McHugh provided a comparison in the following terms:⁴⁸⁷

The framers of our Constitution were much influenced by the model of the U.S. Constitution. They “felt the full fascination of its plan”.⁴⁸⁸ Yet, although Chs I, II and III reflect Arts I, II and III of the United States model, our Constitution does not prohibit Bills of Attainder or ex post facto laws. *The omission must have been deliberate.* It is a powerful indication that the Parliament was intended to have the power to enact ex post facto laws. Furthermore, I have not seen anything in the historical materials which would indicate that the framers of the Commonwealth Constitution believed or assumed that giving a criminal statute a retrospective operation was an exercise of, or an interference with the exercise of, judicial power. Inglis Clark later wrote that “any exposition of the purport of the language of an existing law, or any *declaration* of the existence of any rights or liabilities as the result of its

⁴⁸⁴ GEORGE BURNETT BARTON, THE DRAFT BILL TO CONSTITUTE THE COMMONWEALTH OF AUSTRALIA (2000), <http://setis.library.usyd.edu.au/ozlit/pdf/fed0007.pdf> (emphasis added).

⁴⁸⁵ Charlesworth, *supra* note 9, at 4.

⁴⁸⁶ See *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 9 September 1897, 239 (Edmund Barton), https://www.apf.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Records_of_the_Australasian_Federal_Conventions_of_the_1890s. (Emphasis added).

⁴⁸⁷ *War Crimes Act Case*, 172 CLR at 720-21 (Austl.).

⁴⁸⁸ OWEN DIXON, JESTING PILATE: AND OTHER PAPERS AND ADDRESSES 113 (1965).

enactment, is not an exercise of legislative power ... it is an attempted encroachment on the province of the judiciary and is therefore invalid" ([McHugh J's] emphasis)".⁴⁸⁹ But he accepted that "[t]he Constitution does not prohibit the Parliament of the Commonwealth from making retroactive laws."⁴⁹⁰

Even when consulting historical material, Justice McHugh suggests that difference in form between the *Australian and United States Constitutions*, should be interpreted as deliberate, regardless of the rationale for such differences. Query, however, whether when reasons can be found in, for example, the records of the *Australian Constitutional Convention Debates*,⁴⁹¹ there should be a more nuanced approach.

In a more radical approach, the drafting history of the *Australian Constitution* was held by some justices to be irrelevant. In *Work Choices*, Justice Callinan makes extensive reference to United States jurisprudence, *inter alia*, in relation to the relevance of the *United States Constitution* to the Convention Debates (1891-1898), which culminated in the drafting of the *Australian Constitution*.⁴⁹² He cites the Member for North Melbourne, Henry Bournes Higgins, and the delegates prejudice "in favor of certain theories which they had derived from the antiquated Constitution of the United States",⁴⁹³ in particular that residual powers should remain with the States, and therefore "that each State should be left to deal with its own labour conditions as it thought best."⁴⁹⁴ Justice Callinan was also clear on his textualist approach to the *Australian Constitution*, emphasizing "that the primary duty of a Justice of the High Court is to apply the language of the Constitution rather than other judicial decisions about it",⁴⁹⁵ although citing the fourth Storrs Lecture by Judge Benjamin N. Cardozo,⁴⁹⁶ where Cardozo states that "adherence to precedent should be the rule and not the exception."⁴⁹⁷ He also uses the Tenth Amendment to explain the meaning of section 107 (saving of power of state parliaments) of the *Australian Constitution*.⁴⁹⁸

Similarly, *Pape* evinces arguments contra the framers' intention. Justice Heydon cites the following passages from two cases that suggests his approval of the way the *Australian Constitution* should be interpreted:

⁴⁸⁹ ANDREW INGLIS CLARK, *STUDIES IN AUSTRALIAN CONSTITUTIONAL LAW* 39 (1901).

⁴⁹⁰ *Id.* at 39-40 (emphasis added).

⁴⁹¹ *Official Records of the Debates of the Australasian Federal Conventions of the 1890s*, PARLIAMENT OF AUSTRALIA, https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Records_of_the_Australasian_Federal_Conventions_of_the_1890s.

⁴⁹² *Work Choices Case*, 229 CLR at 275 (Austl.).

⁴⁹³ *Id.* at 279 (citing Commonwealth, *Parliamentary Debates*, House of Representatives, 12 August 1903, 3467 (Henry Bournes Higgins) (Austl.)).

⁴⁹⁴ *Work Choices Case* (2006) 229 CLR 1, 281 (Austl.) (citing Henry Bournes Higgins, *A New Province for Law and Order: Industrial Peace through Minimum Wage and Arbitration*, 29 HARV. L. REV., 13, 13-14 (1915)).

⁴⁹⁵ *Work Choices Case*, 229 CLR at 311 (Austl.).

⁴⁹⁶ BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 149-50 (1921).

⁴⁹⁷ *Id.*

⁴⁹⁸ *Work Choices Case*, 229 CLR at 343 (Austl.).

[I]n 1819 Marshall CJ said in *McCulloch v Maryland* that “we must never forget that it is a *constitution* we are expounding”.⁴⁹⁹ In the same case he said that constitutions are “intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs”.⁵⁰⁰ In 1884, Gray J, in delivering the opinion of the Supreme Court of the United States, said:⁵⁰¹ “A constitution, establishing a frame of government, declaring fundamental principles, and creating a national sovereignty, and intended to endure for ages and to be adapted to the various crises of human affairs, is not to be interpreted with the strictness of a private contract”.⁵⁰²

Justice Heydon goes on to explain that

These passages do not suggest that their authors believed that the meaning of either the United States or the Australian Constitution changed over time. They rather suggest that their authors believed that, while the meaning did not change, the meaning was broad. As Scalia J wrote:⁵⁰³ “Marshall was saying that the *Constitution* had to be interpreted generously because the powers conferred upon Congress under it had to be broad enough to serve not only the needs of the federal government originally discerned but also the needs that might arise in the future. If constitutional interpretation could be adjusted as changing circumstances required, a broad initial interpretation would have been unnecessary.”⁵⁰⁴

However, his honor then suggests that “[r]eference to history is not permitted for the purpose of substituting for the meaning of the words used in the Constitution the scope and effect which the framers subjectively intended the Constitution to have”,⁵⁰⁵ and that “The unusual course of drawing originalist inferences from negatives to support conclusions about the mental state of the framers is impermissible.”⁵⁰⁶

This reluctance to patriate the *Australian Constitution* to its originalist inferences is at the crux of the complexity observed in the HCA interpretation of the *Constitution*. As expressed in *Work Choices* by Justice Callinan:

Part, indeed an essential, if not the most illuminating, aspect of the history of the Constitution is the language of the founders in the Convention Debates with respect to the provisions which they debated at great length, at much greater length it may be said, than the authors of the United States Constitution, but with the advantage of a sound knowledge of that

⁴⁹⁹ *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819) (italics in original).

⁵⁰⁰ *Id.* at 415 (italics in original).

⁵⁰¹ *The Legal Tender Cases*, 110 U.S. 421, 439 (1884).

⁵⁰² *Pape*, 238 CLR at 144 (Austl.).

⁵⁰³ Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 853 (1989). See also Jeffrey Goldsworthy, *Originalism in Constitutional Interpretation*, 25 FED. L. REV. 1, 28 (1997).

⁵⁰⁴ *Pape*, 238 CLR at 144 (Austl.).

⁵⁰⁵ *Id.* at 148.

⁵⁰⁶ *Pape*, 238 CLR at 149 (Austl.).

Constitution and how it had operated and been construed for more than 100 years.⁵⁰⁷

Contrast the above statements with the following balanced approach, also from the *Bank Nationalization Case*, where Justice Dixon then goes on to compare Article III to section 75(iii) and states the following:

[I]t is apparent that when the framers of the Commonwealth Constitution took up the study of the Constitution of the United States with a view to modelling upon it the new Australian instrument of Government, and reached the clause in question, the first difficulty they must have encountered was to say how stood suits against officers and agents of the United States. We may be permitted to know as a matter of history that what is now s. 75(iii) appeared in its present form in the draft Constitution presented at the Convention of 1891 and that before it so emerged it had gone through the hands of Sir Samuel Griffith who had before him the report of the Judicial Committee over which Inglis Clark J presided.

Anyone who takes Article III of the American Constitution and acquaints himself with the difficulties that arose under it and the manner in which they were dealt with by the Supreme Court and Congress and then compares it with Chapter III of [the Australian] Constitution will at once see that the text of the latter is the outcome of much knowledge of the judicial exegesis by which judicial power of the United States has been defined. The addition of the words “or a person suing or being sued on behalf of the Commonwealth” appear appropriate to ensure that the jurisdiction over matters in which the Commonwealth is a party should not be limited to cases in which the Commonwealth is a party on the record and to ensure that on the contrary it covered officers and agencies of the Government sued or suing in their official or governmental capacity such as those whose position had been the cause of so much trouble in the United States.⁵⁰⁸

In his analysis, Justice Dixon employs two principles: a principle of implication of the *United States Constitution* into the *Australian Constitution*, and a principle of equivalence between the *United States and Australian Constitutions*. The first principle is based on the framers’ “view to modelling” upon the former “the new Australian instrument of Government.”⁵⁰⁹ The second is based on the framers’ “study of the Constitution of the United States” and their acquaintance with “difficulties that arose under” the *United States Constitution*.⁵¹⁰ In his analysis his honor then uses SCOTUS jurisprudence to ascertain the intention behind using additional or different words used in the *Australian Constitution*. In some situations, as we saw

⁵⁰⁷ *Work Choices Case*, 229 CLR at 275 (Austl.).

⁵⁰⁸ *Bank Nationalization Case*, 76 CLR at 366-67 (Austl.) (citing *United States v. Thayer-West Point Hotel Co.*, 329 U.S. 585, 589 (1947)).

⁵⁰⁹ *Bank Nationalization Case*, 76 CLR at 366-67 (Austl.).

⁵¹⁰ *Id.*

earlier in Chief Justice Mason's judgment, in the *Tasmanian Dam Case*,⁵¹¹ variance in form is not authority to an intention to produce a result not available under the *United States Constitution*. For such authority, there has to be SCOTUS cases or Convention debates that explain the rationale for the changes made.

This analytical framework, based on the implication and equivalence principles, encapsulates the proposed optimal interpretive approach.

In summary, an efficient interpretation of the *Australian Constitution* must first patriate the *Constitution*, by ensuring that its interpretation rests on the intention of its Australian framers, rather than the intentions of the British Parliament who passed the Act within which the instrument is found.⁵¹² That intention can be ascertained from the records of the Australasian federal Conventions of the 1890s, including the 1891 draft and other writings of the framers. The records suggest two guiding interpretive principles. The first is the implication principle, where the *Australian Constitution* is held to be modelled on the *United States Constitution*, and therefore implying its constitutional principles into the *Australian Constitution*, including, for example, its Bill of Rights (based on the first ten Amendments and the Fourteenth Amendment). The implication does not obtain from what is in the *Constitution*, but from the intention of the framers. Hence, even though there was never a bill of rights in any of the *Constitution's* drafts, the fact that the framers intended to have such protections, and the reasoning given for declaring such protections redundant, necessitates implying the bill into the *Constitution* when said redundancy has not materialized. This particular implication is discussed in more detail below.

The second principle is that of equivalence, where Australian provisions are presumed to cleave particularly closely to their US counterparts. As suggested by Chief Justice Griffith,⁵¹³ differences in form, should not trump equivalence in substance. SCOTUS jurisprudence and the Convention debates are then used to ascertain any difficulties with the US form that could have been the reason for any difference in form. The equivalence principle is based on the deep understanding that the framers had for SCOTUS jurisprudence. For example, Justice Kirby explains:

[Andrew Inglis] Clark's legislation bore the mark of his progressivist and humanitarian values. The laws he sponsored included legalization of trade unions; the prevention of cruelty to animals; providing allowances to members of Parliament; and reforming the laws on lunacy and the custody of children. In one dispute over a railway line, which the government had lost before the colonial Supreme Court, he advised an appeal to the Privy Council in London. He travelled to England in 1890 to conduct the case. His experience in seeing most of the Law Lords asleep during the appeal reinforced his view that appeals to the Privy Council should be terminated. Pursuing both his political and spiritual interests (he was a Unitarian), Clark made the first of three visits to the United

⁵¹¹ See Chief Justice Mason's emphasis on the distinction between "taking" and "acquisition" in *Tasmanian Dam Case*, 158 CLR at 144-45 (Austl.).

⁵¹² Namely, Commonwealth of Australia Constitution Act, 1900 (Imp), 63 & 64 Victoria, c. 12, § 9 (UK).

⁵¹³ *D'Emden*, 1 CLR at 113 (Austl.), discussed further in the next section.

States where he became increasingly familiar with the Constitution—a subject on which he wrote frequently to Oliver Wendell Holmes Jr, also a Unitarian. Clark returned to Hobart convinced of the relevance and utility of the United States Constitution for Australian’s future federal governance.⁵¹⁴

The equivalence principle rests on solid grounds, in the scholarship of the framers of the *Australian Constitution*, and their resolve to create a federal compact that emulated that in the United States.

The next section fleshes out the proposed interpretive approach through application to one of the more recent HCA judgments on freedom of speech and expression.

7.3. AN APPLICATION OF THE PROPOSED APPROACH

It is useful to provide an example of how the proposed approach can be applied by the HCA, by reference to a recent case. In August 2019, the HCA delivered a judgment in the case of Michaela Banerji, a former employee of the Department of Immigration and Border Protection.⁵¹⁵ Banerji had been fired by the Department after an internal investigation found that her criticism of the Department’s policies through a Twitter handle breached the Australian Public Servants’ (APS) Code of Conduct⁵¹⁶ — notwithstanding that the account was under a pseudo name. In the Federal Circuit Court, Banerji failed to obtain an injunction to stop the termination of her employment, as there was no free speech right in Australia.⁵¹⁷ After termination, her application for workers’ compensation was rejected on the ground that the termination was reasonable.⁵¹⁸ On appeal to the Administrative Appeals Tribunal (AAT), the AAT found that the termination was unreasonable given the nature of the comments made by Banerji on the Twitter account and her role as a public servant.⁵¹⁹ The AAT decision was appealed to the Federal Court, and the Commonwealth Attorney-General removed the dispute to the HCA. The HCA upheld the appeal unanimously. In the majority joint judgment, the court reiterated that in Australia there is no ‘personal right’ protecting freedom of speech.⁵²⁰

The *Banerji* decision reignited the debate around the necessity of an Australian bill of rights. It has been suggested that this is a matter of ‘national urgency’, given

⁵¹⁴ Michael Kirby, *Reviving the Memory of Andrew Inglis Clark: An Unfinished Federal Project*, 34 U. Tas. L. Rev. 92, 95 (2015).

⁵¹⁵ *Comcare v Banerji* (2019) 93 ALJR 900. (Austl.). The Department name was later changed to the Department of Immigration and Citizenship (DIAC).

⁵¹⁶ Under the *Public Service Act 1999* (Cth) (Austl.), Banerji was required to ‘at all times behave in a way that upholds the APS Values’ (s 13(1)). Among the APS Values was a declaration that ‘the APS is apolitical, performing its functions in an impartial and professional manner’ (s 10(1)). These sections—collectively the APS Code of Conduct—have subsequently been amended, but the changes are not material.

⁵¹⁷ *Banerji v Bowles* [2013] FCCA 1052, ¶ 101 (Austl.).

⁵¹⁸ *See Safety, Rehabilitation and Compensation Act 1988* (Cth) (Austl.).

⁵¹⁹ *Re Banerji and Comcare (Compensation)* [2018] AATA 892, ¶ 116 (Austl.).

⁵²⁰ *Comcare v Banerji* (2017) 93 ALJR 900, 909 (Austl.).

that Australia is 'the only Western democracy without some form of charter of rights legislated by Parliament or entrenched in the constitution'.⁵²¹

As to the protection of rights, one point of particular relevance to the proposed approach comes from Justice Heydon, who looks to the Supreme Court to ascertain the meaning of "judicial power",⁵²² citing Chief Justice Marshall in *Osborn v. Bank of the United States*,⁵²³ and in *Wayman v. Southard*.⁵²⁴ Justice Heydon distinguishes the operation of the *Australian and United States Constitutions* in the following terms: "The Constitution does not contain express guarantees to establish individual rights of the kind set out in the Fourteenth Amendment to the United States Constitution, which guarantees would have restricted state legislatures. *That was left to the rule of law.*"⁵²⁵ His honor's point in relation to the Fourteenth Amendment extends to all rights Amendments in the *United States Constitution*, including First Amendment protection of freedom of speech from government restrictions.

The lack of an Australian bill of rights reflects the views expressed by those who framed the *Australian Constitution* in the 1890s.⁵²⁶ The question of rights protections was championed by Andrew Inglis Clark, the then Tasmanian Attorney-General, who did not propose a US-style bill of rights but included several rights protections in the *Draft Constitution*. Some delegates shared Clark's concerns as to the protection of rights. For example, Richard O'Connor was concerned that laws passed by majorities were not always just:

I rise for the purpose of pointing out the position in which we stand, and to express the hope that, having discussed this matter so fully, we may soon come to a division. The honorable and learned member [Bernhard Ringrose Wise] has proposed an amendment which, if carried, will involve the declaration that the citizens of each state are citizens of the Commonwealth. I have already dealt with the general aspect of this provision, but I should like to ask the committee what is meant by the term 'citizen'? What rights shall we give to a man as a citizen? If we do not give any definite rights, what is the use of placing in the Constitution a provision which will be a fruitful source of litigation?⁵²⁷

⁵²¹ Gillian Triggs, *Why an Australian Charter of Rights is a Matter of National Urgency*, THE CONVERSATION (Aug. 13, 2019, 5:12 AM), <https://theconversation.com/why-an-australian-charter-of-rights-is-a-matter-of-national-urgency-121411>; Binoy Kampmark, *Freedom of Speech: The Powerful Chill of the Banerji High Court Decision*, INDEPENDENT AUSTRALIA (Aug. 13, 2019, 8:00 AM), <https://independentaustralia.net/politics/politics-display/freedom-of-speech-the-powerful-chill-of-the-banerji-high-court-decision,12996>. See also Kieran Pender, 'A Powerful Chill?' *Comcare v Banerji [2019] HCA 23 and the political expression of public servants*, AUSTRALIA PUBLIC LAW (Aug. 28, 2019), <https://auspublaw.org/2019/08/a-powerful-chill-comcare-v-banerji-2019-hca-23/>.

⁵²² *Momcilovic*, 245 CLR at 155 (Austl.).

⁵²³ *Osborn v. Bank of U.S.*, 22 U.S. 738, 866 (1824).

⁵²⁴ *Wayman v. Southard*, 23 U.S. 1, 46 (1825).

⁵²⁵ *Momcilovic*, 245 CLR at 216 (emphasis added).

⁵²⁶ Paul Kildea, *The Bill of Rights Debate in Australian Political Culture*, 9 AUSTRALIAN J. HUM. RTS. 65 (2003). See also George Williams, *The Victorian Charter of Human Rights and Responsibilities: Origins and Scope*, 30 MELB. U. L. REV. 880, 883–85 (2006).

⁵²⁷ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 8 February 1898, 682 (Richard O'Connor), https://www.aph.gov.au/About_Parliament/

However, few delegates agreed. Most of the convention delegates believed that individual rights were adequately protected by the common law and the rule of law—the same argument raised by Justice Heydon in *Momcilovic* (see above). The idea of rights protections was also said to be contrary to the notion of parliamentary sovereignty—yet another British concept. For example, Victorian delegate William Trenwith said:

The honorable member who has just sat down [O'Connor] has assumed a possible difficulty that I cannot conceive is likely to occur. He assumes that unless we define clearly what we mean by citizenship, the Federal Parliament may take such action as will infringe some liberties which we now possess, and which we ought to possess. When we remember that we have provided in the Constitution that both Houses of Parliament shall be elected on the broadest possible franchise, *it seems to me to be utterly impossible to conceive that such a Parliament will proceed to infringe any of the liberties of the citizens.*⁵²⁸

The result was the establishment of a constitutional system that, consistent with utilitarian philosophy, secured the expression of the majority's will. The *Australian Constitution*, which came into force on 1 January 1901,⁵²⁹ contained only three provisions that related directly to human rights:⁵³⁰ trial by jury for indictable offences (section 80), freedom of religion (section 116) and a limitation on discrimination based on state residence (section 117). The constitutional design was utilitarian, befitting the political culture of the day.⁵³¹

Query, however, a situation like in *Banerji*, where the Commonwealth Parliament infringes on the liberties of citizens. To understand this point, it is useful to unpack the AAT decision.⁵³² At the tribunal, *Banerji* argued that her termination was unreasonable, in breach of the implied freedom of political communication as identified by the High Court in *Lange*.⁵³³ The legal issue was whether the termination of Banerji's employment falls outside the relevant Commonwealth compensation Act,⁵³⁴ having regard to the implied freedom of political communication.⁵³⁵ The AAT looked at the circumstances surrounding Banerji's tweets, finding that she tweeted

Senate/Powers_practice_n_procedures/Records_of_the_Australasian_Federal_Conventions_of_the_1890s.

⁵²⁸ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 2 March 1898, 1761 (Hackett Trenwith), https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Records_of_the_Australasian_Federal_Conventions_of_the_1890s (emphasis added).

⁵²⁹ Commonwealth of Australia Constitution Act 1900 (Imp), 63 & 64 Victoria, c 12, s 9 (Austl.).

⁵³⁰ See Rosalind Dixon, *An Australian (Partial) Bill of Rights*, 14 INT'L J. CONST. L. 80 (2016) (argues that the *Australian Constitution* contains an extremely narrow bill of rights).

⁵³¹ See generally, Kildea, *supra* note 526.

⁵³² *Banerji*, [2018] AATA 892 (Austl.).

⁵³³ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (Austl.).

⁵³⁴ *Safety Rehabilitation and Compensation Act 1988* (Cth) (Austl.).

⁵³⁵ *Banerji*, AATA 892 at ¶ 38 (Austl.).

in the course of her employment.⁵³⁶ The Tribunal then looked at the Department guidelines, finding online unofficial comments to be permitted within certain requirements.⁵³⁷ After a comparative analysis with Canadian jurisprudence,⁵³⁸ the Tribunal found:

Patently, the stated purpose of the APS and Department Guidelines are not well served when the guidelines are applied to anonymous comment by public servants ... a law purporting to prevent anonymous expressions of opinion, whatever the situation of the person using that medium, surely requires powerful and persuasive justification for its existence if it is to displace the implied freedom of political communication. Almost all of the public policy considerations underpinning restrictions on the statements of public officials, including senior public servants and military officers, cease to apply where the identity of the interlocutor is unknown. On the contrary, restrictions in such circumstances bear a discomfiting resemblance to George Orwell's thoughtcrime.⁵³⁹

In the Federal Circuit Court, Judge Neville also looks at United States jurisprudence, stating that:

103. Likewise, in the same case [*Attorney-General for South Australia v Corporation of the City of Adelaide (Corneloup's Case)*],⁵⁴⁰ at [151] and [152], Heydon J confirmed the obvious point that the Australian Constitution does not contain provisions similar to the First and Fourteenth Amendments of the United States' Constitution...

104. As already observed, the unfettered right asserted by the Applicant does not exist. In the circumstances outlined in the current matter, and certainly only in the context of an interlocutory Application, I do not see that Ms Banerji's political comments, 'tweeted' while she remains (a) employed by the Department, (b) under a contract of employment, (c) formally constrained by the APS Code of Conduct, and (d) subject to departmental social media guidelines, are constitutionally protected. Further, it makes no difference, and actually strengthens the case against granting the relief she seeks, that her "tweets" occurred (in part or in full) while she was also professionally retained or engaged in employment outside her duties with the Department, and in relation to which she has/had no formal permission from the Department to be so employed.⁵⁴¹

In the HCA, the Court refused to entertain the "anonymous" communications argument raised by Banerji, given "the argument differed fundamentally from the

⁵³⁶ *Id.* at ¶ 30.

⁵³⁷ *Id.* at ¶ 37.

⁵³⁸ *Id.* at ¶ 79.

⁵³⁹ *Id.* at ¶ 116.

⁵⁴⁰ *Attorney-General (SA) v Corp of the City of Adelaide* (2013) 249 CLR 1 (Austl.).

⁵⁴¹ *Banerji v Bowles* [2013] FCCA 1052 (9 August 2013) (Austl.).

way in which the respondent put her case before the Tribunal.”⁵⁴² Instead, Chief Justice Kiefel and Justices Bell, Keane and Nettle rejected the implied freedom argument, stating that:

In the result, the respondent’s implied freedom argument amounts in effect to saying that, despite the fact that her conduct in broadcasting the “anonymous” tweets was conduct which failed to uphold the APS Values and the integrity and good reputation of the APS, Parliament was precluded from proscribing the conduct because its proscription imposed an unjustified burden on the implied freedom of political communication. To say the least, that is a remarkable proposition.⁵⁴³

They went on to reiterate that the implied freedom of political communication was not “a personal right like ... the freedom of speech guaranteed by the First Amendment to the Constitution of the United States.”⁵⁴⁴ The Majority explained the nature of the implied freedom in the following terms:

It is a restriction on legislative power which arises as a necessary implication from ss 7, 24, 64 and 128 and related sections of the Constitution and, as such, extends only so far as is necessary to preserve and protect the system of representative and responsible government mandated by the Constitution. Accordingly, although the effect of a law on an individual’s or a group’s ability to participate in political communication is relevant to the assessment of the law’s effect on the implied freedom, the question of whether the law imposes an unjustified burden on the implied freedom of political communication is a question of the law’s effect on political communication as a whole. More specifically, even if a law significantly restricts the ability of an individual or a group of persons to engage in political communication, the law will not infringe the implied freedom of political communication unless it has a material unjustified effect on political communication as a whole.⁵⁴⁵

The HCA reasoning rests on an “implied freedom of political communication”, which does not amount to the protections afforded by the First Amendment. If, however, we were to apply the proposed interpretive framework, the starting point is to look at SCOTUS jurisprudence on public employee speech. For example, in *Pickering v. Board of Education*,⁵⁴⁶ Marvin L. Pickering, a public-school teacher, wrote a letter to the *New York Times* criticizing the allocation of financial resources at his school. The school Board argued that: “the teacher by virtue of his public employment has a duty of loyalty to support his superiors in attaining the generally accepted goals of education and that, if he must speak out publicly, he should do so factually and

⁵⁴² *Comcare v Banerji* (2017) 93 ALJR 900, 910 (Austl.).

⁵⁴³ *Id.* at 911-12.

⁵⁴⁴ *Id.* at 909.

⁵⁴⁵ *Id.* at 910.

⁵⁴⁶ *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

accurately, commensurate with his education and experience.”⁵⁴⁷ In dispensing with this argument, Marshall J’s majority opinion rejected categorically the propositions that “teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work.”⁵⁴⁸ Justice Marshall found that the government interests did not outweigh Pickering’s freedom of speech.⁵⁴⁹ Absent any malicious libel of the school Board, actionable under the New York Times standard, Pickering could not be dismissed.⁵⁵⁰

The *Pickering* Principle was applied in *Connick v. Myers*,⁵⁵¹ where a five-to-four majority found that striking the right balance between free speech and public employment did not extend to internal office matters. In this case, the employee was Sheila Myers, an assistant district attorney in New Orleans. She objected to the office transfer policy, and distributed a questionnaire to 15 assistant district attorneys soliciting their views on the policy. In finding that the termination of her employment did not violate the Free Speech Clause, Justice White explained that the holding was narrow, “[w]e hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personal decision taken by a public agency allegedly in reaction to the employee’s behavior.”⁵⁵² More to the point of comparison with the implied freedom in Australia, his honor cites the following statement: “[T]he First Amendment does not protect speech and assembly only to the extent it can be characterized as political. ‘Great secular causes, with smaller ones, are guarded.’”⁵⁵³

In *Lane v. Franks*,⁵⁵⁴ SCOTUS updated and clarified the *Pickering* principle. In *Lane*, the president of the Central Alabama Community (CACC) terminated the employment of the Director of a program for underprivileged youth directed by CACC. The Director, Lane, sued the President, Franks, in his individual and official capacities,⁵⁵⁵ alleging retaliation for testifying against Schmitz, a state representative on the payroll of the youth program. Justice Sotomayor re-stated the principle as follows:

Almost 50 years ago, this Court declared that citizens do not surrender their First Amendment rights by accepting public employment. Rather, the First Amendment protection of a public employee’s speech depends on a careful balance “between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it

⁵⁴⁷ *Id.* at 568-69.

⁵⁴⁸ *Id.* at 568.

⁵⁴⁹ *Id.* at 571-72.

⁵⁵⁰ KATHLEEN M. SULLIVAN & NOAH FELDMAN, CONSTITUTIONAL LAW 1305-06 (19th ed., 2004).

⁵⁵¹ *Connick v. Myers*, 461 U.S. 138 (1983).

⁵⁵² *Id.* at 147.

⁵⁵³ *Id.* (citing *United Mine Workers of Am. v. Illinois Bar Ass’n*, 389 U.S. 217, 223 (1967)).

⁵⁵⁴ *Lane v. Franks* 573 U.S. 228 (2014).

⁵⁵⁵ *See* 42 U.S.C. § 1983.

performs through its employees.” *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563, 568 (1968).⁵⁵⁶

Under the proposed interpretive framework, the Frist Amendment is implied into the *Australian Constitution*. The equivalence principle is not enlivened given that the *Australian Constitution* does not have any provisions based on the First Amendment. The analysis would then proceed to apply the *Pickering* principle as updated in *Lane*. Under the *Pickering* principle, “if an employee speaks as a citizen on a matter of public concern”,⁵⁵⁷ the next step is to ask

whether the government had “an adequate justification for treating the employee differently from any other member of the public” based on the government’s needs as an employer.⁵⁵⁸

The involved balancing exercise requires

“[balancing] the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.” 391 U.S., at 568, 88 S.Ct. 1731.⁵⁵⁹

Even setting aside the “anonymous” nature of Banerji’s tweets, it is difficult to see the interests of the government in promoting the efficiency of the public services in preventing tweets by Banerji in her capacity as a citizen. For example, in its examination of the *Public Service Act 1999* (Cth) (“PSA”), which sets out, *inter alia*, the Australian Public Servants (APS) values and the Code, the Administrative Appeals Tribunal (AAT) also looked at the guidelines promulgated by the Department of Immigration and Citizenship (DIAC) on the use of social media, where it is stated that

DIAC employees may generally make comment in their private capacity; however, it must be clear they are expressing their own view having regard to the general principles set out below.

These principles declare as inappropriate making comments that compromise or perceived to compromise the ability of the DIAC to perform its duties, or the public confidence in DIAC or APS. It also declared not appropriate “harsh or extreme criticism of the government, a member of parliament or political party...”; or “strong criticism of DIAC administration that could disrupt the workplace.”⁵⁶⁰

However, section 13(11) of the PSA provides that “An APS employee must at all times behave in a way that upholds the APS Values and the integrity and good reputation of the APS...”

⁵⁵⁶ *Id.* at 231.

⁵⁵⁷ *Id.* at 242.

⁵⁵⁸ *Garcetti*, 547 U.S., at 418, 126 S.Ct. 1951.

⁵⁵⁹ *Id.* at 236.

⁵⁶⁰ *Banerji and Comcare (Compensation)* [2018] AATA 892, ¶ 36 (Austl.).

The AAT found that:

The phrase *at all times* must reasonably be construed as requiring this behavior both when an employee is working and when she is not ... The requirements to uphold the values (which are defined with specificity in s 10) and the good reputation of the APS must necessarily preclude an employee who does not share those values, or who wishes to cast aspersions on the reputation of the APS or a department within it, from expressing those views, including where to do so amounts to communication on the subjects of politics and government ... Both parties contended that the Code does in fact burden the freedom of political communication, with Comcare noting that *the burden falls on a narrow class of persons and is narrow in its restriction on political communication*.⁵⁶¹

Given the blanket ban on public comments, and given that under the First Amendment, the balancing exercise is with a constitutional protected right of freedom of speech, the outcome would be different. The HCA decision would have found the PSA invalid under the *Australian Constitution*. The AAT outcome was similar to the proposed approach because of their reliance on Canadian jurisprudence under a similar constitutional protection, namely, *The Canadian Charter of Rights and Freedoms*.⁵⁶²

VIII. THE WAY FORWARD

A constitutional crisis is emerging in Australia, as captured by the complexity of HCA judgments involving constitutional issues, which is leading to inefficiencies in interpreting the *Australian Constitution*. The proposition is illustrated through an analysis of all HCA judgments from 1903-2020 (see Figure 1 and Figure 2). Cases exhibiting high complexity share a common denominator, namely a comparative analysis with United States constitutional jurisprudence, where under the principle in the *Engineers Case*, there is preference for British constitutional concepts (such as representative government and the rule of law), over the federal design found in the *United States Constitution*. This approach marginalized the original intent of the framers of the *Australian Constitution*, who saw in the United States model an ideal to be followed in the design of the Australian instrument.

This article calls for patriating the *Australian Constitution*—an Act of the British Parliament, not as opted for in Canada, but a judicial patriation that see the *Constitution* interpreted not following the intention of the British Parliament, but following the framers' intention, as evidenced, inter alia, in the Constitutional debates (1890-1898) leading to its adoption by the Australian people. The drafting history of the *Australian Constitution* should be accepted by the HCA as "indicative of an intention on the part of the framers to cleave particularly closely to" SCOTUS jurisprudence, especially on the interpretation of the *United States Constitution*.⁵⁶³

⁵⁶¹ *Id.* at ¶ 69 (emphasis in the original).

⁵⁶² *Id.* at ¶¶ 79-89.

⁵⁶³ The quote comes from the HCA judgment in *Re Canavan* where it was held that the drafting history was of little use to interpreting s 44(i) (disqualification of parliamentarians for holding dual citizenship), *Re Canavan* (2017) 263 CLR 284, 304 (Austl.).

This patriation can be actioned using a number of different approaches that revive the critical role of US constitutional jurisprudence in enlivening the framers' intention. For example, in *Work Choices*, Justice Kirby provided a useful synopsis of the possible approaches for interpreting the *Australian Constitution*, in stating that

The United States Supreme Court has lately found innovative ways to uphold the role of the States within the federal system and to enforce limits on the powers of Congress without doing undue damage to the national demands of efficiency, prosperity and security.⁵⁶⁴ Efforts like these balance the competing values that frame the American constitutional system. This Court should be no less attentive to the federal character of the *Australian Constitution*.⁵⁶⁵

The approach in this article is based on an implication-equivalence framework. The framework informs the ongoing debated on the need for an Australian Bill of Rights. The recommendation is to redefine the debate on an Australian bill of rights as one in relation to a (constitutional) recognition of human rights through the interpretation of the *Australian Constitution* based on the framers' intention in affording citizens under the Commonwealth the same protections they studied under the *United States Constitution*.

The framework is provided for illustrative purposes rather than as a complete interpretive theory. The purpose is to open new research possibilities on the role of the HCA in embracing SCOTUS jurisprudence when interpreting the *Australian Constitution*. The framework itself requires more analysis on implication and equivalence, in particular through deeper analysis of the available historical record of Convention debates and the scholarship of the framers, including on the HCA bench.

⁵⁶⁴ His honor refers to the following authorities: *National League of Cities v. Usery*, 426 U.S. 833 (1976); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980); *White v. Massachusetts Council of Const. Employers, Inc.*, 460 U.S. 204 (1983); *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000); Anthony B. Sanders, *The 'New Judicial Federalism' Before Its Time: A Comprehensive Review of Economic Substantive Due Process Under State Constitutional Law Since 1940 and the Reasons for Its Recent Decline*, 55 AM. U. L. REV. 457 (2005).

⁵⁶⁵ *Work Choices Case*, 229 CLR at 245 n 856 (Austl.).

APPORTIONMENT, ALLEGIANCE, AND BIRTHRIGHT CITIZENSHIP

John Vlahoplus*

ABSTRACT

Trump v. New York appears to present the Supreme Court with a simple question of statutory construction: do federal statutes allow the President to exclude unlawfully resident aliens from the apportionment of seats in the House of Representatives? The President claims that they do. A three-judge District Court ruled that they do not.

However, many arguments for the President go further and assert that the Constitution supports or even compels the exclusion. Some are historical, like the argument that no federal law restricted immigration before 1875, or that apportionment historically included aliens only because they were on a path to citizenship. Others assert that unlawfully present aliens should not be counted because they are outside the allegiance, jurisdiction, and polity of the United States. Some even utilize discredited theories that reject birthright citizenship for U.S.-born children of aliens. This Article rebuts those arguments and shows constitutional history supporting inclusion in the decennial apportionment. It demonstrates that the arguments ignore early federal, state, and colonial restrictions on immigration and naturalization and are inconsistent with fundamental constitutional principles governing apportionment, liability for treason, and birthright citizenship.

Because these arguments reach far beyond the apportionment issue and threaten to surreptitiously alter longstanding constitutional law, the Court should disregard them and decide the case on statutory rather than constitutional grounds. If instead the Court addresses these arguments, it should reject them and reaffirm longstanding principles governing apportionment, liability for treason, and birthright citizenship.

KEYWORDS

Constitutional Law, Immigration, Treason, Census, Apportionment, Citizenship

CONTENTS

INTRODUCTION	109
I. HISTORICAL ARGUMENTS	110
<i>A. Naturalization</i>	110
<i>B. Immigration Restrictions</i>	110
1. Federal Provisions	110

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2. State and Colonial Provisions	112
II. ALLEGIANCE, JURISDICTION, AND THE POLITY	114
<i>C. Jurisdiction</i>	114
<i>D. Allegiance</i>	114
<i>E. The Polity</i>	117
CONCLUSION.....	118

INTRODUCTION

*Trump v. New York*¹ appears to present a simple question of statutory construction: do federal statutes allow the President to exclude unlawfully resident aliens from the apportionment of seats in the House of Representatives? The President claims that they do.² A three-judge District Court ruled that they do not.³

However, many arguments for the President go further and assert that the Constitution supports or even compels the exclusion.⁴ These arguments ignore early federal, state, and colonial immigration and naturalization laws, are inconsistent with fundamental constitutional principles, and threaten longstanding precedents governing birthright citizenship and liability for treason. Some claim that a fundamental principle of consent defines the polity,⁵ which has been asserted and discredited in attempts to restrict or eliminate birthright citizenship for U.S.-born children of aliens.⁶ The President even cites Vattel, the patron saint of birthers,⁷ in an argument related to citizenship.⁸ These arguments reach far beyond the

¹ No. 20-366 (Oct. 16, 2020).

² See, e.g., Memorandum of Law in Support of Defendants’ Motion to Dismiss and in Opposition to Plaintiffs’ Motion for Partial Summary Judgment or Preliminary Injunction at 32, *New York v. Trump*, No. 20 Civ. 5770 (JMF) (S.D.N.Y. 2020) [hereinafter “President’s Memorandum”] (2 U.S.C. § 2a(a) leaves the President significant policy discretion), https://www.brennancenter.org/sites/default/files/2020-08/MTD_2020-08-19.pdf.

³ *New York v. Trump*, 20-CV-5770 (RCW) (PWH) (JMF) (S.D.N.Y. Sept. 10, 2020) at 85 (excluding them would violate “Congress’s delegation of its constitutional responsibility to count the whole number of persons in each State and to apportion members of the House of Representatives among the States according to their respective numbers under 2 U.S.C. § 2a and 13 U.S.C. § 141.”), https://www.brennancenter.org/sites/default/files/2020-09/OpinionandOrder_2020-09-10_0.pdf.

⁴ See President’s Memorandum, *supra* note 2, at 27, 29 (Fourteenth Amendment incorporates a narrow standard of “inhabitants” for inclusion in the enumeration that is not in the text of the apportionment clause); Brief Amicus Curiae of Citizens United, Citizens United Foundation, and The Presidential Coalition, LLC in Support of Appellants at 5, *Trump v. New York*, No. 20-366 (Oct. 2, 2020) (Constitution compels “that the House be apportioned based on a count of ‘the People.’”).

⁵ See Brief of *Amici Curiae* U.S. Reps. Morris Jackson “Mo” Brooks, Jr., Bradley Byrne, and Robert Aderholt in Support of Appellants at 29, *Trump v. New York*, No. 20-366 (Oct. 2020), https://www.supremecourt.gov/DocketPDF/20/20-366/159267/20201030144754270_20-366%20TSAC%20Rep%20Brooks%20et%20al.pdf.

⁶ See, e.g., John C. Eastman, *Born in the U.S.A.? Rethinking Birthright Citizenship in the Wake of 9/11*, 42 U. RICH. L. REV. 955, 955, 966 (2008) (asserting that *United States v. Wong Kim Ark* was wrongly decided and that not even U.S.-born children of lawfully permanent resident aliens are natural born citizens). Eastman’s claims have been broadly discredited. See, e.g., Alex Nowrasteh, *John Eastman on Birthright Citizenship, Kamala Harris, the Mexican Repatriation, and Citizenship for the Children of Braceros*, CATO INSTITUTE (Aug. 14, 2020), <https://www.cato.org/blog/john-eastman-birthright-citizenship-kamala-harris-mexican-repatriation-citizenship-children>. It is unsurprising that Eastman is counsel for Brooks, Byrne, and Aderholt in their amicus brief before the Court. See *supra* note 5.

⁷ See *infra* note 57 and accompanying text.

⁸ See *infra* note 50 and accompanying text.

apportionment issue and threaten to surreptitiously alter longstanding constitutional law. Consequently, the Supreme Court should disregard them and decide the case on statutory rather than constitutional grounds. If the Court chooses to address the constitutional arguments, however, it should reject them and reliance on Vattel for anything involving or related to U.S. citizenship.

This Article details and rebuts the constitutional arguments of the President and amici. It utilizes only materials and events up to the 1868 ratification of the Fourteenth Amendment because that amendment applies to apportionment and because some Justices may apply an original public meaning approach to interpreting the relevant text.

I. HISTORICAL ARGUMENTS

A. NATURALIZATION

The President claims that apportionment historically included aliens only “because the law provided them with a direct pathway to citizenship—mainly, an oath of loyalty and five years of residence in the United States,” citing the naturalization Act of Apr. 14, 1802 and statements of members of Congress in 1866.⁹ However, that statute and other early federal naturalization acts only authorized naturalization of white immigrants.¹⁰ The President provides no evidence that apportionment historically excluded non-white resident aliens, even though they had no greater pathway to citizenship than unlawfully resident aliens do today.

B. IMMIGRATION RESTRICTIONS

The President also dismisses “historical evidence about the treatment of aliens” for apportionment purposes, arguing that it “does not and cannot resolve the distinct question whether *illegal* aliens must be included—for the simple reason that there were no federal laws restricting immigration (and hence no illegal aliens) until 1875.”¹¹ In fact there were federal, state and colonial laws restricting immigration long before the Constitution and the Fourteenth Amendment prescribed apportionment. Some were racially restrictive. Others attacked immigrants as nativists do today, from fear that immigrants might retain their own language, become too successful and replace natives, or alternatively become public charges. Any assertion that the Constitution and Fourteenth Amendment were ratified without any awareness of illegal immigration is untenable.

1. Federal Provisions

The Constitution forbade Congress to prohibit “[t]he Migration or Importation of such Persons as any of the States now existing shall think proper to admit” prior

⁹ President’s Memorandum, *supra* note 2, at 37.

¹⁰ *See, e.g.*, An Act to establish a uniform Rule of Naturalization, § 1, March 26, 1790, ch. 3, 2 Stat. 103 (repealed 1795).

¹¹ President’s Memorandum, *supra* note 2, at 36.

to 1808.¹² Congress exercised its power at the earliest opportunity, prohibiting the entry of Black indentured servants beginning January 1, 1808.¹³ Treasury Secretary Cobb explained in 1858 that the statute’s language “leaves no doubt” that Congress “intended to provide in the most unequivocal manner against the increase of that class of population by immigration from Africa.”¹⁴ Cobb’s views were widely published.¹⁵

Congress had previously sidestepped the 1808 limitation by federalizing state laws prohibiting the entry of free Blacks. Many states prohibited their entry, and in 1803 some—apparently those that allowed slavery—pushed Congress to incorporate their statutes in federal law.¹⁶

A congressional bill proposed in February of 1803 would have forbidden anyone to bring, or cause to be brought, any Black person into any state whose law prohibited their entry.¹⁷ Many in Congress supported the bill to protect the country from outlaws, exiles, and “brigands from the West India Islands.”¹⁸ West Indian Brigands were largely freed slaves allied with France who fought the British for independence.¹⁹

Others members of Congress opposed the bill as unconstitutionally overbroad in “destroying and abridging the rights of free negroes and persons of color, who were citizens of one State,” by preventing their entry into “certain [other] States.”²⁰ The final act included an exception protecting them and confirming President Jefferson’s and Congress’s understanding that free Blacks could be citizens. It excepted from its prohibition any Black person who was “a native, a citizen, or registered seaman of the United States.”²¹

¹² U.S. CONST. art. I, § 9, cl. 1.

¹³ See An Act to prohibit the importation of slaves into any port or place within the jurisdiction of the United States, from and after the first day of January, in the year of our Lord one thousand eight hundred and eight, § 1 (March 2, 1807), <https://hdl.handle.net/2027/nyp.33433090743166?urlappend=%3Bseq=102>.

¹⁴ See 2 ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1911 at 436 (1913) (letter to the Charleston collector of the customs, May 22, 1858) [hereinafter “AMERICAN HISTORICAL ASSOCIATION”], <https://hdl.handle.net/2027/mdp.39015062260826?urlappend=%3Bseq=444>.

¹⁵ See, e.g., *African Emigration: Letter from Secretary Cobb*, DAILY PENNSYLVANIAN 1, col. 3 (June 9, 1858).

¹⁶ See AMERICAN HISTORICAL ASSOCIATION, *supra* note 14, at 436–37; GALES AND SEATON, ANNALS OF THE CONGRESS OF THE UNITED STATES: SEVENTH CONGRESS—SECOND SESSION 472 (1851) (the bill’s penalties were described as “rigorous,” but “only such as the imminent danger of the Southern States called for.”), [https://hdl.handle.net/2027/uc1.\\$c227010?urlappend=%3Bseq=244](https://hdl.handle.net/2027/uc1.$c227010?urlappend=%3Bseq=244).

¹⁷ See GALES AND SEATON, *supra* note 16, at 467.

¹⁸ See *id.* at 471–72.

¹⁹ See, e.g., James L. Sweeney, *Caribs, Maroons, Jacobins, Brigands, and Sugar Barons: The Last Stand of the Black Caribs on St. Vincent*, 10 AFRICAN DIASPORA ARCHAEOLOGY NEWSLETTER 1, 26 (March 2007), <https://scholarworks.umass.edu/cgi/viewcontent.cgi?article=1228&context=adan>.

²⁰ See GALES AND SEATON, *supra* note 16, at 472.

²¹ See An Act to prevent the importation of certain persons into certain States, where, by the laws thereof, their admission is prohibited, § 1 (February 28, 1803), <https://hdl.handle.net/2027/nyp.33433090743125?urlappend=%3Bseq=537>.

Because of these restrictions and the prohibition on slave trading, Treasury Secretary Cobb advised the Charleston collector of the customs in 1858 to refuse a vessel permission to depart for Africa for the purpose of boarding Blacks there and bringing them to the United States.²² The statutes were critical for the nationwide policy of racial exclusion²³ that they advanced. Not even the later *Dred Scott* decision could deny natural born citizenship to U.S.-born children of indentured or free Black immigrants.²⁴

Congress also considered other restrictions on immigration, including a proposal in 1856 to prevent immigration by foreign criminals and paupers.²⁵ Although some argue that Congress has no power to prohibit voluntary immigration,²⁶ it has long been clear that Congress has that power. Any claim that the Fourteenth Amendment was ratified with no awareness of illegal immigration is untenable.

2. State and Colonial Provisions

Not all early American immigration restrictions targeted race. A 1782 Virginia statute forbade British subjects to enter the state, declared those who did to be prisoners of war, and required them to be jailed and either exchanged or sent to a British post.²⁷ A 1783 Virginia statute forbade entry to any American who had

²² See AMERICAN HISTORICAL ASSOCIATION, *supra* note 14, at 434–35, 435 n.2, and 438–39.

²³ See, e.g., *id.* at 438 (“I may be permitted to refer, in this connection, to the various repeated and earnest efforts which have been made in every section of the Union, to provide for the removal from our midst of this most unfortunate class. However variant the motives which have induced these efforts with different persons in different sections of the country, they all exhibit an earnest desire to diminish rather than increase the free negro population.”) (statement of Treasury Secretary Cobb).

²⁴ See *Scott v. Sandford*, 60 U.S. 393, 403 (1857) (Taney, C.J.) (“[T]he plea applies to that class of persons only whose ancestors were negroes of the African race, and imported into this country and sold and held as slaves. . . . [T]he court must be understood as speaking in this opinion of that class only”). See also *Op. Att’y Gen. Bates* 26 (1863) (explaining that limited holding).

²⁵ See, e.g., H.R. 124, 34th Cong., 1st Sess. (1856), <https://memory.loc.gov/cgi-bin/ampage?collId=llhb&fileName=034/llhb034.db&recNum=419>. A congressional report cited efforts as early as 1838 to exclude such immigrants. See *Foreign Criminals and Paupers: Report to Accompany Bill H. R. 124, August 16, 1856, at 19*, <https://hdl.handle.net/2027/uiuo.ark:/13960/t4kk98c53?urlappend=%3Bseq=21>.

²⁶ See, e.g., Ilya Somin, *Why the Migration or Importation Clause of the Constitution Does Not Imply Any General Federal Power to Restrict Immigration*, WASH. POST (April 19, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/04/19/why-the-migration-or-importation-clause-of-the-constitution-does-not-imply-any-general-federal-power-to-limit-immigration/>. Somin cites, among others, James Madison. However, Madison acknowledged that “the term migration allow[ed] those who were scrupulous of acknowledging expressly a property in human beings, to view imported persons as a species of emigrants, whilst others might apply the term to foreign malefactors sent or coming into the country. It is possible tho’ not recollected, that some might have had an eye to the case of freed blacks, as well as malefactors.” 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 436–37 (Max Farrand, ed. 1937), <https://hdl.handle.net/2027/uiug.30112038035702?urlappend=%3Bseq=444>.

²⁷ See An act to prohibit intercourse with, and the admission of British subjects into this state, §§ III and V, ch. XVII (ch. CXII in the original), in 11 WILLIAM WALLER HENING, THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM

fought for the British or had been on or had acted under the direction or authority of the Board of Refugee Commissioners at New York.²⁸

In 1786 a group of citizens met in Petersburg, Virginia because “sundry persons” had been residing in the town “above twelve months” contrary to the latter statute, “giv[ing] much uneasiness to a majority of this meeting.”²⁹ The meeting resolved that “their residence here is illegal” and “that an application ought to be made to the Legislature at the next session praying a revision” of the statute to enforce it.³⁰ Americans recognized even before the adoption of the Constitution that people can reside here illegally for extended periods contrary to immigration proscriptions. Their usual residence is here, contrary to the President’s denials.³¹

Colonial provisions also limited admission of Catholics, Germans, and persons considered to be “indigent or immoral and vicious,” among others.³² Some feared that the “Peace and Security” might “be endangered by such Numbers of Strangers daily poured in, who being ignorant of our Language & Laws, & settling in a Body together, make, as it were, a distinct People from his Majesties Subjects.”³³ Others feared that large numbers of immigrants with their “superior Industry and Frugality may in Time, out the *British* People from the Colony.”³⁴ Contemporary American xenophobia—with its Muslim bans, fears of Spanish-speaking immigrants, and “replacement” conspiracy theories—sadly parallels colonial history.

THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619 (1823), <https://hdl.handle.net/2027/mdp.39015039504942?urlappend=%3Bseq=142>.

²⁸ See An act prohibiting the migration of certain persons to this commonwealth, and for other persons, § § I and II, <https://hdl.handle.net/2027/mdp.39015039504942?urlappend=%3Bseq=330>.

²⁹ 4 CALENDAR OF VIRGINIA STATE PAPERS AND OTHER MANUSCRIPTS 171 (William P. Palmer, ed. 1884), <https://hdl.handle.net/2027/wu.89069546364?urlappend=%3Bseq=185>.

³⁰ *Id.* at 171–72. The statute purported not to provide “full and ample protection” to those violating its prohibition. See An act prohibiting the migration of certain persons to this commonwealth, and for other persons, § IV, *id.* However, Attorney General Edmund Randolph advised that the statute did not prescribe a “specific stile of prosecution,” and therefore the correct remedy was indictment in accordance with the common law. See *id.* at 179.

³¹ See, e.g., President’s Memorandum, *supra* note 2, at 40.

³² See EMBERSON EDWARD PROPER, COLONIAL IMMIGRATION LAWS: A STUDY OF THE REGULATION OF IMMIGRATION BY THE ENGLISH COLONIES IN AMERICA 18, 31, 36 (1900), <https://hdl.handle.net/2027/uc2.ark:/13960/t6rx9d544>.

³³ 3 PENNSYLVANIA, MINUTES OF THE PROVINCIAL COUNCIL OF PENNSYLVANIA, FROM THE ORGANIZATION TO THE TERMINATION OF THE PROPRIETARY GOVERNMENT 299 (1840) (from a Council held Sept. 14, 1727), <https://hdl.handle.net/2027/uva.x001608428?urlappend=%3Bseq=309>.

³⁴ 2 WILLIAM DOUGLASS, A SUMMARY, HISTORICAL AND POLITICAL, OF THE FIRST PLANTING, PROGRESSIVE IMPROVEMENTS, AND PRESENT STATE OF THE BRITISH SETTLEMENTS IN NORTH-AMERICA 326 (1751), <https://hdl.handle.net/2027/osu.32435030859581?urlappend=%3Bseq=336>.

II. ALLEGIANCE, JURISDICTION, AND THE POLITY

The President and his amici argue that unlawfully resident aliens are outside the jurisdiction of the United States,³⁵ lack allegiance to United States,³⁶ and must not be allowed “to redistribute ‘political power’ within” the United States through apportionment because that would be “fundamentally antithetical” to principles governing “the sovereign’s rights to define the polity (‘the people’).”³⁷

These arguments are inconsistent with the legal history of apportionment.³⁸ They are also inconsistent with the liability of aliens for treason, which requires a violation of allegiance.³⁹ Finally, they threaten birthright citizenship because a lack of parental allegiance arguably could negate citizenship for children born here.⁴⁰

C. JURISDICTION

Unlawfully resident aliens are within the jurisdiction of the United States. As Chief Justice Marshall explained in 1812,

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.⁴¹

The claim that the United States lacks jurisdiction over unlawfully resident aliens, or that its jurisdiction over them is only partial,⁴² is groundless.

D. ALLEGIANCE

Unlawfully resident aliens also owe allegiance to the United States. Under the common law, both alien friends and alien enemies who are within the realm benefit from the protection of the sovereign and therefore owe allegiance and

³⁵ Brief *Amicus Curiae* of Immigration Law Reform Institute in Support of Appellants, *Trump v. New York*, No. 20-336 at 5 (Oct. 6, 2020).

³⁶ *See id.* *See also* President’s Memorandum, *supra* note 2, at 26–28 (denying that unlawfully resident aliens have minimum ties such as allegiance to the states in which they reside).

³⁷ President’s Memorandum, *supra* note 2, at 35–37.

³⁸ *See infra* note 63 and accompanying text.

³⁹ *See, e.g.*, Act of April 30, 1790 (liability for treason “if any person or persons, owing allegiance to the United States of America, shall levy war against them, or shall adhere to their enemies, giving them aid and comfort”).

⁴⁰ *See, e.g.*, *Inglis v. The Trustees of the Sailor’s Snug Harbour*, 28 U.S. 99, 156 (1830) (Story, J., dissenting on other grounds) (“children of enemies, born in a place within the dominions of another sovereign, then occupied by them by conquest, are still aliens”).

⁴¹ *The Schooner Exchange v. McFaddon*, 11 U.S. 116, 136 (1812) (Marshall, C.J.).

⁴² *See, e.g.*, John C. Eastman, *Some Questions for Kamala Harris About Eligibility*, NEWSWEEK (Aug. 12, 2020), <https://www.newsweek.com/some-questions-kamala-harris-about-eligibility-opinion-1524483>.

can be liable for treason,⁴³ contrary to both the President’s views in the current litigation and to the claim of counsel for the President’s amici in his attempt to deny birthright citizenship for U.S.-born children of aliens.⁴⁴ So too an alien enemy who arrives after hostilities begin in order “to inhabit either as a merchant, dweller, or sojourner . . . because he comes not hither as an enemy, or by way of hostility, but partakes of the king’s protection.”⁴⁵ Unlawfully resident aliens are violating the immigration laws, of course. But even those who break the law continue to owe allegiance.⁴⁶

Under the same principle, even prisoners of war owe allegiance and can be liable for treason:

[A] prisoner at war is not adhering to the King’s enemies, for he is here under protection from the King. If he conspires against the life of the King, it is high treason; if he is killed, it is murder; he does not therefore stand in the same situation as when in a state of actual hostility.⁴⁷

Alien enemies who are in the country owe allegiance even though the nation may choose whether to deport them or allow them to remain. Representative Sewall noted in discussing the controversial alien bill in 1798, for example, that not “all alien enemies shall be sent out of the country; but that persons of that description who are not suspected of being inimical to the interests of this country, shall be protected.”⁴⁸

An alien’s allegiance is not limited to the duration of their presence. Aliens—including alien enemies—continue to owe allegiance and be liable for treason after

⁴³ See 2 SIR MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 92 (George Wilson, ed., 1778), <https://hdl.handle.net/2027/njp.32101013843204?urlappend=%3Bseq=138>.

⁴⁴ In critiquing Justice Gray’s opinion in *United States v. Wong Kim Ark*, John C. Eastman asserts that Gray made “some astoundingly incorrect assertions” including that an alien present in the realm owes obedience “and may be punished for treason.” See Eastman, *supra* note 6, at 965 (quoting Gray and adding emphasis). But Gray was correct, and Eastman is wrong—as he is about birthright citizenship generally.

⁴⁵ HALE, *supra* note 44, at 92–93.

⁴⁶ See, e.g., Thomas Jefferson, *Notes on British and American Alienage* [1783] (“Abjuratur still owes allegiance because he may be restored. 9.b. So an outlaw. ib. 14.a.”), FOUNDERS ONLINE, <http://founders.archives.gov/documents/Jefferson/01-06-02-0346>. Jefferson cites *Calvin v. Smith*, 7 Co. Rep. 1a (1608), the landmark English case governing allegiance.

⁴⁷ See *Sparenburgh v. Bannatyne*, 1797, 1 Bos. & Pull. 163, 171 (Heath, J.). See also *id.* (Rooke, J.: “A prisoner at war is, to certain purposes, under the King’s protection. . . .”). See also H. BYERLEY THOMSON, *THE LAWS OF WAR AFFECTING COMMERCE AND SHIPPING* 22 (1854) (paraphrasing Heath, J., in *Sparenburgh*), <https://hdl.handle.net/2027/hvd.hb9rn9?urlappend=%3Bseq=38>. Cf. 3 RICHARD BURN, *THE JUSTICE OF THE PEACE AND PARISH OFFICER* 60 (12th ed. 1772) (prisoner of war who offends against “the fundamental laws of all society . . . is liable to answer in the ordinary course of justice, as other persons offending in like manner are.”), <https://hdl.handle.net/2027/nyp.33433008577771?urlappend=%3Bseq=68>.

⁴⁸ JOSEPH GALES, *THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES, WITH AN APPENDIX, FIFTH CONGRESS 1811* (1851) (statement of Rep. Sewall) (June 16, 1798), <https://hdl.handle.net/2027/nyp.33433081775185?urlappend=%3Bseq=390>.

departing the country if they leave family or property behind and thereby continue to benefit from the sovereign's protection.⁴⁹

The President and amici argue further that the Constitution only permits the counting of "inhabitants," which they define thickly to mean lawfully and permanently resident by reference among other sources to the continental theorist Vattel's understanding of "inhabitants" and "citizens."⁵⁰ But period American usage was broader and acknowledged both temporary and permanent inhabitants.⁵¹ Soldiers were described as inhabitants of the locations in which they were posted.⁵² Period statutes described persons who inhabit for as much as seven years or as little as forty days.⁵³ Many of those who came to the United States in the great wave beginning 1830–50 intended to ultimately return home,⁵⁴ and large numbers did—

⁴⁹ See, e.g., SIR MICHAEL FOSTER, A REPORT OF SOME PROCEEDINGS ON THE COMMISSION FOR THE TRIAL OF THE REBELS IN THE YEAR 1746, IN THE COUNTY OF SURRY: AND OF OTHER CROWN CASES: TO WHICH ARE ADDED DISCOURSES UPON A FEW BRANCHES OF THE CROWN LAW 185, § 4 (1792) ("This rule was laid down by all the judges assembled at the Queen's command *Jan.* 12th 1707."), <https://hdl.handle.net/2027/nyp.33433009490438?urlappend=%3Bseq=225>. See also SIR MICHAEL FOSTER, DISCOURSE ON HIGH TREASON (1762) (same, excerpted § 4 available at https://press-pubs.uchicago.edu/founders/documents/a3_3_1-2s7.html, the original of which is unavailable to the author).

⁵⁰ See, e.g., President's Memorandum, *supra* note 2, at 27–28 (limitation to "inhabitants") and 32 (quoting Vattel's "proposition that 'inhabitants, as distinguished from citizens, are strangers who are *permitted* to settle and stay in the country.'" (emphasis from the President's Memorandum); Brief for the Appellants at 37, *Trump v. New York*, No. 20-366 (Oct. 2020) ("This Court's understanding that such aliens are not 'dwelling,' 'resid[ing] permanently,' or otherwise 'in' the United States supports deeming them not to be 'inhabitants' of this country."), https://www.supremecourt.gov/DocketPDF/20/20-366/159324/20201030213207220_20-366tsUnitedStates.pdf; Brief of *Amici Curiae*, *supra* note 5, at 19 (lawfully and permanently resident).

⁵¹ See, e.g., A Further Supplement to the Act to Raise the Supplies for the Year Seventeen Hundred and Eighty-One, LAWS OF MARYLAND ch. XXV, § XX (1781) (taxation of French subjects "who hath or may come into this state . . . to be a temporary inhabitant only"), <https://hdl.handle.net/2027/mdp.35112203945748?urlappend=%3Bseq=288>; *Bingham v. Cabot*, 3 U.S. 382, 383 (1798) (argument of counsel that state citizenship follows from the place where one is a permanent inhabitant).

⁵² See *Extracts from the Gazette, 1735*, THE PENNSYLVANIA GAZETTE (Aug. 28, 1735) ("They say . . . that there are but few People settled on that River, only here and there a Fort for Security of Trade; and that there are more Soldiers than other Inhabitants."), <https://founders.archives.gov/documents/Franklin/01-02-02-0018>.

⁵³ See, e.g., An Act for Naturalizing such Foreign Protestants, and Others Therein Mentioned, as are Settled, or Shall Settle, in Any of His Majesty's Colonies in America, 13 Geo. II c. 7 (1740) (naturalizing those who "inhabit or reside, for the Space of seven Years or more" in the colonies); A Law to Prevent Strangers from Becoming Chargeable to the City of Albany § § 1 and 2, in CITY OF ALBANY, THE CHARTER OF THE CITY OF ALBANY AND THE LAWS AND ORDINANCES, ORDAINED AND ESTABLISHED BY THE MAYOR, ALDERMEN AND COMMONALTY OF THE SAID CITY, IN COMMON COUNCIL CONVENED 47 (1800) (subjecting to legal process those who "come into any of the wards of the said city, and shall there reside and inhabit for the space of forty days"), <https://hdl.handle.net/2027/nyp.33433082046610?urlappend=%3Bseq=51>.

⁵⁴ See, e.g., Alex Shashkevich, *New Stanford research explores immigrants' decision to return to Europe during historical Age of Mass Migration*, STANFORD NEWS (Sept. 12, 2017), <https://news.stanford.edu/2017/09/12/returning-home-age-mass-migration/>.

including more than “half of all southern Italians, . . . 64 percent of Hungarians, 59 percent of Slovaks and 40 percent of Germans.”⁵⁵

The Court recently refused to accept thick definitions of words like “elector,” “ballot,” and “vote” in litigation over the electoral college.⁵⁶ It should refuse to accept the proffered thick definitions of “inhabitant.” In particular, Vattel is the patron saint of birthers, who assert that his description of the continental rule of *jus sanguinis* defines natural born citizenship.⁵⁷ But the Constitution inherited the English law of *jus soli*,⁵⁸ and even temporary local allegiance is sufficient to make a U.S.-born child a natural born citizen under that law.⁵⁹ The Supreme Court should reject reliance on Vattel for anything involving or related to citizenship, including his cited discussion of inhabitants and citizens.

E. THE POLITY

The President asserts that unlawfully resident aliens should not be allowed “to redistribute ‘political power’ within” the United States through apportionment because that would be “fundamentally antithetical” to principles governing “the sovereign’s rights to define the polity (‘the people’).”⁶⁰ Amici argue that the apportionment must exclude all aliens for the same reason.⁶¹ These are just policy arguments, which a nineteenth-century author set out in strikingly similar terms to try to exclude all aliens from the count that determines apportionment:

[T]he government, being republican, must necessarily be in the hands of the people exclusively; and any participation of unnaturalized aliens in the rights of representation and suffrage would be inconsistent with the nature of the government. It is inconceivable that the American people should have intended to authorize unnaturalized foreigners, in any way, to augment or influence the representative power of any portion of the people; and it is equally inconceivable that they should have intended, in

⁵⁵ See Joshua Zeitz, *The Real History of American Immigration*, POLITICO MAGAZINE (Aug. 6, 2017), <https://www.politico.com/magazine/story/2017/08/06/trump-history-of-american-immigration-215464>.

⁵⁶ See *Chiafalo v. Washington*, 591 U.S. ___, slip op. at 11–12 (2020).

⁵⁷ See, e.g., Mario Apuzzo, *Emer de Vattel, Adolf Hitler, America’s Youth, and the Natural Born Citizen Clause*, CDR KERCHNER (RET)’S BLOG (Dec. 11, 2011), <https://cdrkerchner.wordpress.com/2011/12/11/emer-de-vattel-adolf-hitler-americas-youth-and-the-natural-born-citizen-clause-by-atty-mario-apuzzo/>.

⁵⁸ See, e.g., *Inglis v. The Trustees of the Sailor’s Snug Harbour*, 28 U.S. 99, 155–56 (1830) (Story, J., dissenting on other grounds). See also *Op. Att’y Gen. Bates 12* (1863) (citing Kent, Blackstone, *Calvin’s Case*, *Shanks v. Dupont*, and other authorities), <http://hdl.handle.net/2027/miun.aew6575.0001.001>

⁵⁹ See, e.g., *Calvin v. Smith*, 7 Co. Rep. 1a, 6a (1608) (“local obedience being but momentary and uncertain, is yet strong enough to make a natural subject”).

⁶⁰ See President’s Memorandum, *supra* note 2, at 36–37.

⁶¹ See Brief of *Amici Curiae*, *supra* note 5, at 29 (“the ‘one-person, one-vote’ principle articulated by this Court must necessarily be tied to ‘the people’ who form the body politic, not to some undifferentiated total population that includes those who are not part of the body politic. Citizens are ‘the people’ who give the government legitimacy by their consent.”).

this way, to naturalize all such, and confer on them the rights of citizens, seeing they have expressly provided another mode for the purpose. It is therefore probably true that aliens cannot be counted, either as “free persons” or “other persons,” in apportioning Representatives to “the people of the several States.”⁶²

But the Federalist 54 sets out the rationale for counting enslaved people for purposes of apportionment. It applies as well to resident aliens, whether lawfully present or not:

In being protected . . . in his life and in his limbs, against the violence of all others, even the master of his labor and his liberty; and in being punishable himself for all violence committed against others, the slave is no less evidently regarded by the law as a member of the society, not as a part of the irrational creation; as a moral person, not as a mere article of property.⁶³

The President attempts to separate the “personhood” of unlawfully resident aliens from their potential status as “inhabitants.”⁶⁴ But their legal status makes no difference for apportionment. Their subjection to and advantage from the country’s general laws makes each of them “a member of the society” who counts for purposes of apportionment as the Federalist 54 explains. They are indistinguishable from other residents for this purpose.

CONCLUSION

The constitutional arguments of the President and his amici fail. Apportionment did not historically include aliens because of any path to citizenship. Federal, state, and colonial laws restricted immigration long before 1868. Americans were aware of illegal residence even before the adoption of the Constitution.

Unlawfully resident aliens are within the jurisdiction of and owe allegiance to the United States. They need not be part of the polity to be counted. It is enough that they are members of the society. The Court should decide *Trump v. New York* on statutory grounds. But if it reaches these constitutional arguments it should reject them and any application of Vattel’s continental legal theories to anything involving or related to American citizenship.

⁶² TIMOTHY FARRAR, *MANUAL OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 56–57 (1867), <https://hdl.handle.net/2027/nyp.33433081767257?urlappend=%3Bseq=90>.

⁶³ The Federalist 54 (Alexander Hamilton or James Madison).

⁶⁴ See President’s Memorandum, *supra* note 2, at 24.

A STRUCTURALIST CONCEPT OF THE RULE OF LAW

Alani Golanski*

ABSTRACT

The prevalent approach to the concept of the rule of law among legal theorists puts attributes first, assigning certain features of laws and sometimes legal systems as rule-of-law virtues. Inquiring at a more basic level, this paper advances a novel, structuralist view of the rule of law. While honoring theoretical constraints that guard against diluting the rule-of-law concept too thinly as a remedy for myriad societal ills, this approach shows that the concept implicates inequalities sustained by a society's social, economic, and political structures. This is accomplished by demonstrating that the rule-of-law project holds a structural position in the collective normative discourse as a vehicle by which people morally evaluate the interplay between the actual capabilities of individuals and groups to participate in law, and the legal system's treatment of those individuals and groups.

Law's procedural outputs may formally provide the public with access to the legal system, but the rule-of-law project goes to the actual capabilities of the people to access the system in reality, to have a fair opportunity to participate in the inputs into the system, and to have that participation impartially adjudicated. Conditions impacting a diversity of stakeholders – and particularly the most disadvantaged within the population – perturb the virtues typically associated with the rule-of-law ideal when those conditions, and the power exercised to maintain them, impair capabilities for fair, dignified, and equal access to legal processes.

Understanding the rule of law in structuralist terms, as an informal moral operator, (1) makes sense of the schism we normally accept between the concepts of law and the rule of law, (2) reorients the source of rule-of-law thinking from theorists bent on fixing a conceptual definition to communities engaged in first-order interactions with the legal system, (3) helps explain why citizens come not only to expect law to constrain official coercive powers but also to demand that law promote their actual capabilities to participate in the legal system on an egalitarian and dignitarian footing, and hence (4) implicates a critique of conditions of political and material inequalities that cannot but impair the healthy functioning of the rule-of-law project.

KEYWORDS

The Rule of Law; Jurisprudence; Legal Theory; Waldron; Dworkin; Plato; Aristotle; Dicey; Raz; Rousseau; Amartya Sen

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CONTENTS

INTRODUCTION	121
I. REALIGNING CONCEPTS OF LAW AND THE RULE OF LAW.....	126
II. THE RULE OF LAW AS A MORAL OPERATOR.....	137
III. THE RULE OF LAW IMPLICATES CONDITIONS THAT IMPACT ACCESS TO LAW	146
CONCLUSION.....	152

INTRODUCTION

As urgently as ever, the rule of law is a paradigm worth revisiting. As one leading theorist has said, “[r]ecent developments in Poland, Hungary, and elsewhere have raised disturbing questions about the conditions and nature of the rule of law and of threats to it.”¹ *Elsewhere’s* domain is now widely deemed to include the American experience, its iconic claim of governance by the rule of law having lost its seeming immunity from grave challenge.

What do theorists reference, however, when they speak of the rule of law? It hasn’t always been clear whether they have trained their sights on formulating a robust concept or, with some distinction, on grappling with what it means to have rule by law and then importing those characteristics into an idea of the rule of law.² The somewhat diaphanous border between the two notions has been well-rehearsed, the rule of law often being described in terms of rule-by-law’s formal features and arguably thin constituent elements, and sometimes alternatively in terms of thicker procedural and substantive rule-of-law conceptions.³

The prevalent approach puts attributes first, assigning certain largely non-negotiable features of laws, lawmaking, official accountability, and sometimes legal systems as rule-of-law virtues, and then contemplating whether to go further, and if so how much further without diluting the distinctive value of the rule of law.⁴ Seen that way, it’s useful to reflect upon the extent of the overlap between qualities of the rule of law and those requisite to considering an arrangement of governance to be a legal system.

This article advances a novel view of the rule of law.⁵ I think that the rule of law is an evaluative lens by virtue of which participants in the legal system and

¹ Martin Krygier, *What’s the Point of the Rule of Law?*, 67 BUFFALO L. REV. 743, 745 (2019).

² See generally BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 96 (2004) (opining that “it is correct to conclude that formal legality has more in common with the idea of rule by law than with the historical rule of law tradition”).

³ See Robert Barros, *Dictatorship and the Rule of Law: Rules and Military Power in Pinochet’s Chile*, in DEMOCRACY AND THE RULE OF LAW 188, 189-90 (José María Maravall & Adam Przeworski eds. 2003) (distinguishing the “narrow,” “formal” conception of “rule by law” from a “more demanding” notion of the rule of law); David Dyzenhaus, Schmitt v. Dicey: *Are States of Emergency Inside or Outside the Legal Order*, 27 CARDOZO L. REV. 2005, 2031 (2006) (writing that someone endorsing a fairly thick conception of the rule of law will likely conclude “that there is a point on a continuum of legality where rule by law ceases to be in accordance with the rule of law”); Stephen Holmes, *Lineages of the Rule of Law*, in DEMOCRACY AND THE RULE OF LAW 19, 49 (José María Maravall & Adam Przeworski eds. 2003) (noting Rousseau’s idea that, “in existing societies, rule of law and rule by law occupy a single continuum and do not present mutually exclusive options”); cf. JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 222 (2d ed., Oxford U. Press, 2009) (saying “[c]onformity to the rule of law is a matter of degree”).

⁴ See John Tasioulas, Penultimate version: *The Rule of Law*, in THE CAMBRIDGE COMPANION TO THE PHILOSOPHY OF LAW, at *4 (John Tasioulas ed., 2020) (John Tasioulas ed., forthcoming), at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3216796 (visited Jan. 14, 2020).

⁵ The context in which I use the phrase *the rule of law* should make clear that the reference is not to a particular rule or type of legal institutional pronouncement, but rather to the larger term as commonly used in ordinary discourse.

individuals in the larger community assess the legal system's functioning. A rule of law appraisal is a certain type of evaluation that, for the most part, is appropriately delimited by imperative legal procedural concerns. A disciplined focus on broadly conceived procedural concerns (1) retains the distinctive values connoted by a rule-of-law evaluation, (2) appears to align empirically with the way most people think of the rule of law, (3) implicates the material conditions that impact people's actual capabilities to participate in governance, and thereby (4) accommodates a wide ethos that tasks the rule of law with fairly heavy lifting. As such, the concept holds a structural position in the collective normative discourse, functioning as a vehicle for morally evaluating the interplay between the actual capabilities of individuals and groups to participate in law, and the legal system's treatment of those individuals and groups.

Being vigorously procedural, the rule of law focuses not solely on static features such as the clarity and generality of legal norms, but on questions of access to justice and the legal system's openness to the ordinary citizen or other participants in the legal process.⁶ Ordinary individuals seeking redress are entitled to the opportunity to advance their claims and to have their arguments treated with dignity and considered fully, without regard to their social or economic status.⁷ Yet the very social and economic conditions that determine that status impact the integrity of the rule-of-law project. If the individual is not afforded open and dignified access to the legal system, then the rule of law is diminished—which means that the rule-of-law evaluation of the legal system comes out poorly.

Hence the rule-of-law project concerns not solely the quality of the legal system's outputs, but also the capabilities of the people, acting responsibly on their own behalf, to participate free of avoidable external obstacles. Those outputs include law's formal rules and procedures that condition the nature and ease of entering into law's argumentative or legislative structures. In other words, although the general rules governing equality of access to justice, and the standards that apply to everyone and that structure participation in the legal system, guide the nature and form of inputs, these rules are themselves law's outputs. This may be enough to realize a procedural version of the rule of law affording "a mode of governance that allows people a voice, a way of intervening on their own behalf in confrontations with power."⁸ Yet the well-being of the rule-of-law project demands more to the extent that asymmetries of political power and economic well-being trammel people's capabilities to take advantage of the pathways that may formally be open to them.⁹

⁶ Citizenship is not requisite to seeking legal redress in the American legal system. See *Graham v. Richardson*, 403 U.S. 365, 371 (1971) (reaffirming that the Constitution "entitles both citizens and aliens to the equal protection of the laws of the State in which they reside"). But, for economy's sake, I will often just use "citizen" to refer to anyone having legal rights in the society.

⁷ See JEREMY WALDRON, *DIGNITY, RANK & RIGHTS* 33 (2012) (hypothesizing that "the modern notion of human dignity involves an upwards equalization of rank, so that we now try to accord every human being something of the dignity, rank, and expectation of respect that was formerly accorded to nobility").

⁸ Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 8 (2008).

⁹ See JEAN-JACQUES ROUSSEAU, *A DISCOURSE ON INEQUALITY* 133 (Maurice Cranston trans., 1984) (1755) (discussing "all the different masks behind which inequality has hidden itself up to the present time").

Law's procedural outputs may formally provide the public with access to the legal system, but the rule-of-law project goes to the actual capabilities of the people to access the system in reality and on an equal basis with others, to have a fair opportunity to participate in the inputs into the system, and to have that participation impartially adjudicated. The issue of people's real world capabilities to obtain access is tightly-enough circumscribed to remain as a legitimate rule-of-law concern, while at the same time implicating social, political, and economic conditions. We can readily understand that the substantive requires the procedural, for how can one obtain substantive *legal* relief without having passed through procedural doors,¹⁰ but it is also the case that the capability to pass through such doors rests on at least some important substantive guarantees or the absence of certain substantive deprivations.

It is nevertheless important to recognize that the rule of law is not a doctrine that constrains the legal system or its functioning from within. Jurists seldom use the expression, and even when they do this is to provide some level of heightened justification for a free-standing legal practice or doctrine, such as *stare decisis*.¹¹ Courts are free to enlist extra-legal considerations when shoring up the legitimacy of a legal doctrine,¹² and use of *the rule of law* to do so – again, on very rare occasion – does not render the ideal a *legal* precept. Indeed, the judiciary's occasional reference to the rule of law is typically *dicta*, and little different from use of the term by any theorist or commentator who may be gazing critically at the legal system's options and aspirations.¹³

So the rule of law is a concept that operates outside of the legal system, although participants in the legal community may summon it from time to time. Even then, however, the rule of law functions as a filter through which the participant gazes from the external point of view at the system's institutional actions. The filter is an evaluative one, and therefore may *seem* on rare occasion to be capable of helping legal officials decide things from the internal point of view. But on the very rare occasion when they reference the rule of law, those officials invoke the concept

¹⁰ See FREDERICK SCHAUER, *PLAYING BY THE RULES* 170 n.7 (1991).

¹¹ *E.g.*, *Kisor v. Wilkie*, 139 S. Ct. 2400, 2422 (2019) (calling adherence to precedent “a foundation stone of the rule of law,” such that “any departure from the doctrine demands ‘special justification’ – something more than an argument that the precedent was wrongly decided”) (omitting citations and markings).

¹² See JOSEPH RAZ, *THE CONCEPT OF A LEGAL SYSTEM: AN INTRODUCTION TO THE THEORY OF LEGAL SYSTEM* 214-15 (2d ed. 1980) (1970).

¹³ See, *e.g.*, Ardi Imseis, “Moderate” *Torture on Trial: Critical Reflections on the Israeli Supreme Court Judgment Concerning the Legality of General Security Service Interrogation Methods*, 19 *BERKELEY J. INT’L L.* 328, 348 (2001) (saying, “for all its *dicta* attesting to the importance of the ‘rule of law,’ and the maintenance of a legal system that is ‘reasonable’ and ‘fair,’ the H CJ’s [High Court of Justice] ruling in the GSS [General Security Service] Torture Case suggests that the integrity of the Israeli judicial process may have been forsaken for the cause of state ‘security’”); Zachary S. Price, *Symmetric Constitutionalism: an Essay on Masterpiece Cakeshop and the Post-Kennedy Supreme Court*, 70 *HASTINGS L.J.* 1273, 1297 (2019) (opining that, “as Chief Justice Marshall, in another polarized period, made the pro-Jeffersonian outcome in *Marbury v. Madison* effectively symmetric by including extended *dicta* on judicial review and the rule of law, so too might express reference to situations not before the Court today help render politically fraught decisions more palatable”).

from the observer's point of view to better justify their handling of a standing, internal legal doctrine.¹⁴

As a moral lens situated outside of legal doctrine and law's practical affairs, the rule of law ideal empowers the public to evaluate legal institutional action and well-being, and legal officials on occasion to assay their own decision-making. Although legal discourse is rife with moral terminology incorporated into law's data,¹⁵ courts are typically hostile to explicitly moral argument.¹⁶ The difference is that moral factors once subsumed into legal doctrines can be assessed in a nonmoral and backwards-looking manner to determine whether the new situation "falls under" the prior rule or precedential treatment of the similar matter.¹⁷ Moral argument, on the other hand, "would effectively unsettle the very matters that the law is meant to settle."¹⁸

Courts nevertheless sometimes, albeit rarely, do invite use of moral considerations as a counterpoint to the engrained approach to legal argument based on precedent.¹⁹ As unusual as express resort to moral argument is in the courtroom, however, reliance on the rule of law as a *sui generis* consideration is all the more dissonant with legal practice. Nor for the most part do jurists, either by virtue of their legal education or professional experience, have any special epistemic expertise at reckoning how the rule of law ideal ought to impact the outcome of particular cases.

What follows? My positive thesis is that the rule of law concept serves as an informal normative operator by which the people morally evaluate a legal system in progress. The evaluation is largely conditioned by people's expectations arising from constitutional constraints and guarantees, and from beliefs about how the system ought to treat individuals who submit their claims or defenses, *or who would do so, in an unfettered manner, if sufficiently capable*. In the latter sense, the rule-of-law evaluation implicitly takes account of the social, political, and economic conditions that impact citizens' access to procedural justice.²⁰ When

¹⁴ *E.g.*, *Koschkee v. Taylor*, 929 N.W.2d 600, 614 (Wis. 2019) (remarking that "[r]eallocating the making of rules . . . from the legislature to administrative agencies housed within the executive branch, aggrandizes the power of the latter, at the risk of replacing the rule of law with the rule of men") (Rebecca G. Bradley, J., concurring).

¹⁵ See SCOTT SHAPIRO, *LEGALITY* 245 (2011) (explaining that, from the start, law students "are taught about floodgates, slippery slopes, unclean hands, frustrated expectations, cheapest cost avoiders," and so forth).

¹⁶ *E.g.*, *Steele v. Isikoff*, 130 F. Supp. 2d 23, 31 (D.D.C. 2000) (emphasizing that "moral obligations do not give rise to contractual liability"); *Petrosky v. Embury Crossing Condominium Association, Inc.*, 643 S.E.2d 855, 860 (Ga. App. 2007) ("Wade's statement as the agent of the alleged tortfeasor can be considered, at best, an acceptance of moral responsibility, because . . . the Association has no liability").

¹⁷ See HERBERT L. A. HART, *THE CONCEPT OF LAW* 88 (3d ed. 2012) (1961).

¹⁸ SHAPIRO, *supra* note 15, at 309.

¹⁹ *E.g.*, *Flagiello v. Pennsylvania Hosp.*, 208 A.2d 193, 201 (Pa. 1965) (admonishing adherents of the charitable immunity rule that they "never inquire whether the doctrine is grounded in 'good morals and sound law,' . . . They are content to refer to previous decisions of this court, and of other courts, as if yesteryear could do no wrong and as if the hand of the past must forever clutch the helm of the present").

²⁰ The term *access* in this formulation should not be read as narrowly restricted to those who affirmatively initiate contact with the legal system, but in the broader sense as referring to all those who, for any reason, find themselves interacting with the state's legal apparatus.

those conditions *unfairly* favor some over others, or *unjustly* disadvantage this group but not that one, then the rule-of-law project is impaired.

Because people use *the rule of law* as an informal moral operator by which they evaluate a legal system based on what they deem to be both possible and morally justified at the particular historical moment, the assessment takes account not only of the system's manner of providing access, via its rules and accommodations as outputs, but also of societal conditions that may frustrate the capabilities of individuals and groups to obtain that access, or that may impact legal institutional responses to their participation. This approach renders the rule of law both consequence and context-sensitive, rather than invariant, even as legal theory has tended to view the rule of law in fairly static terms.

Understanding the rule of law as an informal moral operator (1) makes sense of the schism we normally accept between the concepts of law and the rule of law, (2) reorients the source of rule-of-law thinking from theorists bent on fixing a conceptual definition to communities engaged in first-order interactions with the legal system, and (3) helps explain why citizens come to expect law both to constrain official coercive powers and to promote their actual capabilities to partake of the legal system on an egalitarian and dignitarian footing.

Part I will show why a separation between the concept of law and that of the rule of law is analytically motivated. The divergence stems not solely from the differing conceptual nature of the two programs, but also from their distinguishable functions. While legal systems emerge to regulate and coordinate the community's affairs in a way that rests on systems of legislation, argumentation, and adjudication,²¹ the rule of law aims at monitoring the law's operation and accessibility. Resolution of legal controversies in one way or the opposite way may have no impact on the system's status as a legal system, yet simultaneously engender intractable rule-of-law disagreements. This Part disagrees with arguments, however elegant, in favor of the symmetrical alliance between those concepts.

Part II then sets out the positive, structuralist theory of the rule of law. Rather than breaking the rule of law down into its essential features, which may vary in varying contexts, a structuralist approach looks at the rule of law at a more basic level, namely, by asking how the concept actually functions in a society.²² From that perspective, the rule of law is seen as a lens through which people evaluate, usually in moral terms, a legal system in progress. The rule-of-law appraisal does not lavishly assign outcomes, but mostly implicates the procedural values the community counts on the legal system to abide by. These values include not only such well-rehearsed outputs of lawmaking such as the generality, clarity,

²¹ See Jean-Jacques Rousseau, *The Social Contract* (1762), reprinted in JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT AND THE FIRST AND SECOND DISCOURSES* 179 (Susan Dunn ed., Susan Dunn & Henry J. Tozer trans., 2002) (asserting that "[l]aws are properly only the conditions of civil associations").

²² The structuralism I use in this paper refers to the rule-of-law construct, in a fairly straightforward manner, as a device by which people morally evaluate paramount procedural and access-related characteristics of legal systems in relation to the larger society, and does not profess to derive from the method propagated by Ferdinand de Saussure or adopted as a semiotic approach to legal history by the Harvard School of legal structuralism. See generally FERDINAND DE SAUSSURE, *COURSE IN GENERAL LINGUISTICS* (Wade Baskin trans., 1959) (1916); Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 *BUFFALO L. REV.* 205 (1979).

prospectivity, and stability of the laws, but also the opportunity for roughly equal access to legal remedies across individuals and groups. Theorists have failed to account for the significance of the latter requirement, which reaches beyond law's outputs that set up procedures for regulating the community's inputs. The rule-of-law project also touches upon the conditions in which individuals live and the ways in which groups are treated, to the extent that these impact upon their actual capabilities to gain procedural access to the legal system.

Part III continues that, because the rule of law aims at evaluating and regulating law's moral standing, the concept must be supple enough to accommodate the ways in which the legal system interacts with the larger society at the particular historical moment. At the same time, however, the moral dialectic characterizing rule-of-law evaluation should hamper authoritarian leaders' propensities to point to some current affair as an excuse to depart from, or to remain apart from, the rule-of-law values that are actually realizable during the period. Conditions impacting a diversity of stakeholders—and particularly the most disadvantaged within the population—perturb the virtues typically associated with the rule-of-law ideal when those conditions, and the power exercised to maintain them, impair capabilities for fair, dignified, and equal access to legal remedies. Whether the legal system debilitates efforts at lessening the oppression of disfavored groups by impairing their practical ability to summon law's remedial potential, or alternatively empowers struggles toward this end, is relevant to the sort of evaluation of the legal system's functioning that constitutes a rule-of-law exercise.

In sum, viewing the rule of law as a moral evaluative vehicle, this paper's account is structural rather than attribute- or virtue-driven. Except in a broad functional sense, I do not hash out the terms or parameters of a concept of the rule of law. In the structural analysis, a mechanism for evaluating the legal system—the rule of law—has to consider both sides of the matter: not solely the legal system's superintendence over the people, but also the impact of the conditions the people encounter and under which they live on their capabilities to access the system. A structuralist approach views the rule of law as it fits and operates in a society's discourse, and thereby concerns its implications both for the legal system and for the population subject to or empowered by that legal system. Being structural, this analysis does not clutter the ontology of attributes or make unconstrained assignments for the rule of law. For this reason, the structuralist concept, even in service of an expansive ethos that implicates the conditions in which people live, shouldn't be seen as imprudently promiscuous.²³

I. REALIGNING CONCEPTS OF LAW AND THE RULE OF LAW

Because theoretical discrepancies both reflect and influence what scholars, legal officials, and ordinary speakers mean by *the rule of law*, the term's use and meaning remain unsettled. Commentators report that “it is not entirely clear exactly what the concept of the rule of law amounts to,”²⁴ “the current pervasive disagreement about

²³ RAZ, *supra* note 3, at 211.

²⁴ Imer B. Flores & Kenneth E. Himma, *Introduction to LAW, LIBERTY, AND THE RULE OF LAW* 1, 2 (Imer B. Flores & Kenneth E. Himma eds. 2013); *see also* Aleardo Zanghellini, 28 YALE J. L. & HUMANITIES 213, 213 (2016) (saying that “[a]n uncontroversial definition of the rule of law eludes us”).

the ‘Rule of Law’ has resulted in a discourse where participants are often talking past one another,²⁵ and “[t]he danger of this rampant uncertainty is that the rule of law might devolve to an empty phrase”²⁶ As can be seen just from these expressions of angst, however, there is some degree of confusion about whether we want to be talking about the rule of law as a societal phenomenon, or about *the rule of law* as an expression we use in various ways.²⁷

The phenomenal question concerns how people experience the rule of law. The semantic one is: what do we mean by *the rule of law*? The two questions are not the same, and may lead in slightly different directions. If we take a realist stance toward the rule of law, then we accept that it is endowed with functional properties that we can know and make true or false statements about.²⁸ Because we conclude in both ordinary and theoretical discourse that there is a phenomenon, constructed in our collective consciousness, that we rightly view as constituting the rule of law, we should not be bothered, at least for purposes of this paper, by any divergence between that phenomenon’s characteristics and what we mean when we use *the rule of law* in our discourse. Rather, if we begin with the charitable idea that most beliefs are indeed correct, and that, “if we want to understand others, we must count them right in most matters,”²⁹ then it should make sense methodologically to rely on uses of *the rule of law* in working out a concept of the phenomenon.

What, then, might explain the “rampant uncertainty” about what the concept of the rule of law amounts to?³⁰ There is little controversy about whether we, at least here in the United States, but also in the overwhelming majority of the world’s countries, have law and a legal system. Yet the status of the rule of law, and the extent to which it is in effect or broken, is questioned daily.³¹ Of course, in some

²⁵ Courtney T. Hamara, *The Concept of the Rule of Law*, in LAW, LIBERTY, AND THE RULE OF LAW, *supra* note 24, at 11, 12.

²⁶ TAMANAHA, *supra* note 2, at 114.

²⁷ See Donald Davidson, *Quotation*, 11 THEORY AND DECISION 27 (1979), *reprinted in* DONALD DAVIDSON, INQUIRIES INTO TRUTH AND INTERPRETATION 79, 79 (1984) (hereinafter “DAVIDSON, INQUIRIES”) (“an expression that would be used if one of its tokens appeared in a normal context is mentioned if one of its tokens appears in quotation marks (or some similar contrivance for quotation)”).

²⁸ Such properties would be epistemologically objective, even as they are phenomena constructed in the larger community’s collective understanding, hence ontologically subjective. See Mirjan Damaška, *Truth in Adjudication*, 49 HASTINGS L. J. 289, 292 (1998).

²⁹ Donald Davidson, *On the Very Idea of a Conceptual Scheme*, 47 PROCEEDINGS AND ADDRESSES OF THE AM. PHIL. ASSOC. 5 (1974), *reprinted in* DAVIDSON, INQUIRIES, *supra* note 27, at 197.

³⁰ TAMANAHA, *supra* note 2, at 114.

³¹ *E.g.*, *Tanzanian President Backs Official Who Beat Students With a Stick*, N.Y. TIMES, Oct. 4, 2019 (Reuters, Elias Biryabarema & David Gregorio eds.) (reporting that “[s]ome western diplomats have complained that Tanzania is giving short shrift to due process, human rights and rule of law. The government rejects the criticism”); William Goldman, Letter to Editor, N.Y. TIMES, Oct. 3, 2019 (opining that “[t]he rule of law has been usurped by the Trump administration”); Dan Bilefsky, *E.U. Chides Poland for Failing to Uphold Rule of Law*, N.Y. TIMES, June 1, 2016; Henry J. Hyde, *The President’s Trial; Linking the People’s Trust in the President to the World’s Trust in America*, *reprinted in* N.Y. Times, Jan. 17, 1999 (asserting that “[t]he issue here is whether the President has violated the rule of law and thereby broken the covenant of trust with the American

circumstances, the partial breakdown of the legal system itself engenders outcries that “[t]here’s no rule of law anymore.”³² But it seems fair to say that, at a more general level, complaints about the degradation of the rule of law mostly home in on the legal system’s mistreatment of litigants, tyrants’ extra-legal mistreatment of those engaging in activities citizens believe should be legally protected, and on official nonfeasance, ineptitude, or aggravation of perceived societal ills that hamper fair access to legal remedies. These ills can include the sorts of political and even economic inequities that citizens come to believe themselves justified in expecting law to ameliorate.³³

For Joseph Raz, because the law brings with it a substantial risk of the arbitrary exercise of power, “the rule of law is designed to minimize the danger created by the law itself.”³⁴ Jeremy Waldron disagrees, viewing the rule of law “as an ideal designed to correct dangers of abuse that arise in general when political power is exercised, not dangers of abuse that arise from law in particular.”³⁵ In contrast to Raz, Waldron sees the goal of the rule of law ideal as aimed at making government’s political and administrative workings “more law-like.”³⁶ Waldron’s view rests on his commitment to “a richer and more discriminating notion of law,”³⁷ rendering it vigorously “a distinctive mode of governance that is worth having and worth distinguishing from other modes of governance.”³⁸

Alternatively, however, law should be described phenomenologically. For it is also worth having a concept of law that coincides, to some large extent, with the

people”); Mo Zhang, *The Socialist Legal System With Chinese Characteristics: China’s Discourse for the Rule of Law and a Bitter Experience*, 24 TEMP. INT’L & COMP. L.J. 1 35 (“It may be inferred from Chinese legal history that while the country had a legal system in place for thousands of years, the rule of law, as both a legal concept and an actual practice, was alien to it”); see also Stephen Williams, *The More Law, the Less Rule of Law*, 2 GREENBAG 403, 405-06 (1999) (discussing ways in which, by Judge Williams’ lights, “the growth of law may impair the rule of law”).

³² *Teenager Shot as Violence Flares Hours After Hong Kong Imposes Emergency Powers*, N.Y. TIMES, Oct. 4, 2019 (Reuters).

³³ See, e.g., Garrett Epps, *What to Do If Congress Can’t Get More Information*, THE ATLANTIC, Oct. 3, 2019 (opining that “[t]he rule of law is being shattered, but Congress does have what it needs”); see generally *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 107 (2001) (reporting that the circuit court’s strict scrutiny analysis had relied on “regulations designed to channel benefits . . . to firms owned by individuals who hold themselves out to be socially and economically disadvantaged”); *Agostini v. Felton*, 521 U.S. 203, 213 (1997) (noting estimates given about 1985 that “some 20,000 children in the city of New York . . . and some 183,000 children nationwide . . . would experience a decline in Title I services”); PROCEDURAL ENVIRONMENTAL RIGHTS: PRINCIPLE X IN THEORY AND PRACTICE xvii (Jerzy Jendroška & Magdalena Bar eds., 2017) (addressing issues of “access to information, public participation in decision making and access to justice in environmental matters”).

³⁴ RAZ, *supra* note 3, at 224.

³⁵ Waldron, *supra* note 8, at 11.

³⁶ Jeremy Waldron, *Hart and Principles of Legality*, in THE LEGACY OF H.L.A. HART: LEGAL, POLITICAL, AND MORAL PHILOSOPHY 67, 79 (Matthew H. Kramer, et al., eds. 2008) (saying that “[t]he aim of the Rule of Law in general is not to make laws and legal institutions more law-like; it is to make government and government institutions more law-like”).

³⁷ Waldron, *supra* note 8, at 19.

³⁸ *Id.* at 36.

people's felt experience of what they take to be their society's legal system. Rule-by-law and the-rule-of-law experiences are likely to diverge in varying degrees, dependent on such factors as the nature of the legal system actually in progress, the witness's relationship to that system,³⁹ and the range of principles the subject associates with the rule of law as opposed to other virtues she expects the law to possess.⁴⁰

On the other hand, a thin understanding of law may tend to suggest a thin and fairly formal notion of the rule of law. This would be so if we tie the notion of the rule of law to our view about law. The concept of the rule of law will then likely tend toward the criteria famously articulated by Lon Fuller that any legal system must aspire towards. By these criteria, the legal system adopts general rules that help officials avoid merely ad hoc decision-making, publishes those rules so that participants will be capable of knowing what is expected of them, generally prohibits abusive retroactive legislation, articulates rules in a way that renders them understandable, maintains a fairly stable set of rules so as to avoid frequent and disorienting changes, sustains a practice of official conduct congruent with the rules as announced, and so forth.⁴¹ It is not difficult to see why this fairly thin rule-of-law schema may constitute a rule-by-law paradigm.⁴²

Fuller believed that "[a] total failure in any one of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all, except perhaps in the Pickwickian sense in which a void contract can still be said to be one kind of contract."⁴³ He thereby expressed an existential view of law's minimal institutional constraints. Notice, however, Fuller's use of the adjectival *total*.⁴⁴ On this articulation of law's "internal morality,"⁴⁵ law is capable of remaining afloat on quite a thin reed indeed.

And, indeed, ad hoc decision-making is disfavored yet occurs widely in the legal system.⁴⁶ Large and complex regulatory apparatuses are a part of most

³⁹ Cf. Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989) (observing that "[t]he emerging jurisprudence of outsiders uses the experience of subordination to offer a phenomenology of race and law").

⁴⁰ See RAZ, *supra* note 3, at 228.

⁴¹ LON L. FULLER, *THE MORALITY OF LAW* 39, 81 (1964); see TAMANAHA, *supra* note 2, at 94.

⁴² Fuller is careful to guard against too thin of an understanding of law and the rule of law, distinguishing these from a social ordering that constitutes merely "managerial direction." FULLER, *supra* note 41, at 207-10. The latter sort of system would likely do without the principles of "generality" and of "congruence between official action and declared rule." *Id.* at 208-09. I thank Martin Krygier for pointing me toward these passages.

⁴³ FULLER, *supra* note 41, at 39.

⁴⁴ *Id.*

⁴⁵ *Id.* at 132.

⁴⁶ See *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95 (1990) (self-critically acknowledging "a continuing effort on our part to decide each case on an ad hoc basis, as we appear to have done in the past"); *Gaffey v. Babb*, 624 P.2d 616, 621 (Or. Ct. App. 1981) (noting that the "general rule that a declaratory judgment action is not available to interpret or challenge a criminal enactment . . . has been continually eroded by ad hoc exceptions"); see generally Kenneth Culp Davis, *Administrative Law Surprises in the Ruiz Case*, 75 COLUM. L. REV. 823, 833 (1975) (reporting that "[a]ll agencies make ad hoc decisions").

modern legal systems, characterized by the delegation of legislative authority to administrative agencies, the legal regulations of which “rarely can be considered classically general.”⁴⁷ Judicial decisions articulating common law rules and principles are often left “unpublished.”⁴⁸ Much legislation is applied retroactively, in a variety of situations.⁴⁹ Contextual settings may, on occasion, excuse even legal rules that are far from readily understandable.⁵⁰ Frequent changes in the rules seem to afflict our highly politicized regulatory system, and have traditionally characterized certain areas of the law.⁵¹

Jeremy Waldron handily acknowledges that governing systems that are clearly legal systems will exhibit “occasional lapses” such as those just mentioned.⁵² He denies, however, that these have much purchase on the relationship between the concept of law and that of the rule of law. Rather, the lapses may be seen either as rendering the system of governance a more marginal example of a legal system, or as calling for a more rigorous application of the rule of law ideal.⁵³ Notwithstanding its elegant symmetry, this perspective begs the question concerning the potentially significant divide that will appear to exist between the concept of law and that of the rule of law.

Indeed, uncertainty about the concept of the rule of law may well flow from the sometimes grating tension between law and the rule of law that Jeremy Waldron cannot condone. The fairly commonplace characteristics noted above that tend to fall short of the Fuller criteria will engender perceptions, particularly by those disadvantaged by a ruling or policy, that the rule of law is thereby somewhat degraded, but even that subclass of individuals will overwhelmingly deem the legal norms obligatory, and the legal system to be intact. Acceptance of an enduring rule by law often coexists with skepticism about the integrity of the rule of law under more extreme circumstances, as well.⁵⁴

⁴⁷ WILLIAM E. SCHEUERMAN, BETWEEN THE NORM AND THE EXCEPTION: THE FRANKFURT SCHOOL AND THE RULE OF LAW 75 (1994); see also Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 372 (1989) (saying that, “[i]n a modern administrative state, legislation consists of . . . the mobilization of governmental power to achieve particular results”).

⁴⁸ See *Cox v. LNU*, 924 F. Supp.2d 1269, 1275 (D. Kan. 2013) (noting a federal district court rule that “requires parties to attach cited unpublished decisions to their briefs or memoranda, if the decisions are unavailable electronically”).

⁴⁹ E.g., *Scharfschwerdt v. Kanarek*, 553 So.2d 218, 220 (Fla. Ct. App. 1989) (noting circumstances in which “[t]he legislature can amend statutes of limitations to apply retroactively without running afoul of the constitutional *ex post facto* prohibition”).

⁵⁰ See *Barron v. Marusak*, 359 S.W.2d 77, 84 (Tex. Ct. App. 1962) (acknowledging that “a statute may be too unreasonable, uncertain and vague to be a valid criminal statute yet valid as prescribing a rule of civil conduct”).

⁵¹ See *Flora v. United States*, 362 U.S. 145, 197 (1960) (discussing “legislation in an area such as internal revenue, where countless rules and exceptions are the subjects of frequent revisions and precise refinements”) (Whittaker, J., dissenting on other grounds); *Meredith v. Atlanta Intermodal Rail Servs.*, 561 S.E.2d 67, 70 (Ga. 2002) (noting that “the General Assembly has failed to overturn either the court decisions or agency rules despite frequent amendments to the [Workers’ Compensation] statute”).

⁵² Waldron, *supra* note 8, at 46.

⁵³ *Id.* at 46-47.

⁵⁴ E.g., Wei Jingsheng, Op-ed: *A Return to the Cultural Revolution?*, N.Y. TIMES, Apr. 20, 2011, at <https://www.nytimes.com/2011/04/21/opinion> (visited Jan. 22, 2020)

One illustrative case of the divergence between law and the rule of law arises when courts are called upon to interpret statutes safeguarding the community from official corruption. Anti-corruption statutes both aim at protecting the democratic process and impinge on the freedom of the political maneuvering, presumably on behalf of constituents, of democratically elected officials or those who might seek to influence them.⁵⁵ Waldron nicely says that “[i]t is part of our idea of law that, even if it does not regulate everything, it must be effective in governing many—if not most—of the more important interactions and conflicts in a given society.”⁵⁶ Regulating and restraining official use of authority, law remains law regardless of the way it tilts in its construction of anti-corruption measures. Yet some interests will inevitably deem the resolution of a dispute arising under the statute to be morally objectionable in relation to law’s procedural integrity, and thereby to impinge on the rule of law.

Consider, for example, the well-known case of *McDonnell v. United States*.⁵⁷ The United States indicted Robert McDonnell and his wife on bribery charges stemming from their acceptance, when McDonnell was Governor of Virginia, of loans and gifts from the chief executive officer of a company that sought the Governor’s help in getting Virginia’s public universities to research its product.⁵⁸ The controversy turned on whether McDonnell had traded an “official act” for favors received.⁵⁹ The Supreme Court held that the statute would be unconstitutionally overbroad were acts such as setting up a meeting, calling another public official, or hosting an event to qualify as official acts.⁶⁰ Rather, only “a formal exercise of governmental power” would violate the statute.⁶¹

No one would have reasonably deemed the status of the legal system as a system of law, even in some manifest degree, to hinge upon whether the *McDonnell* Court favored the government’s versus the defendant’s interpretation of the bribery statute. Yet, as one commentator on the *McDonnell* opinion put it, “Democracy and the rule of law are threatened by public corruption, but they are threatened every bit as much by those who would erect a wall between people and their representatives.”⁶² The rule of law is here positioned as a moral filter by which to evaluate the legal system’s handling of the democratic relationship between elected officials and their constituents. Because “moral disagreements are endemic and

(critiquing “the evolution of a new brand of repression: the perverted ‘rule by law’ instead of the ‘rule of law’”); Martin Krygier, *The Rule of Law: Pasts, Presents, and Two Possible Futures*, 12 ANNUAL REV. LAW SOC. SCI. 199, 208 (2016) (discussing sociolegal scholarship showing, “of Myanmar and Sudan, respectively, the deliberate and systematic use of law to serve ends contradictory to those of the rule of law”).

⁵⁵ E.g., 18 U.S.C. § 201 (titled “Bribery of public officials and witnesses”).

⁵⁶ Waldron, *supra* note 8, at 43.

⁵⁷ 136 S. Ct. 2355 (2016).

⁵⁸ *Id.* at 2361.

⁵⁹ 18 U.S.C. § 201(a) (3) (defining “official act” as “any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official’s official capacity, or in such official’s place of trust or profit”).

⁶⁰ 136 S. Ct. at 2368.

⁶¹ *Id.* at 2369.

⁶² C. Borden Gray, *Why the Robert McDonnell case is a threat to the Constitution*, WASHINGTON POST, Sept. 3, 2015, at www.washingtonpost.com.

intractable,”⁶³ it makes sense that people will clash sharply over the implications of a legal ruling for an informal moral operator such as the rule of law.⁶⁴

There are other examples of legal decision-making that similarly suggest that law and the rule of law run on separate tracks. Consider the toxic tort setting in which rules settled in typical tort context safeguard the interests of one class of litigants while thereby depriving another class of its ability to obtain redress. Product manufacturers, for instance, whose toxic components caused individuals’ latent harms not manifesting until after the standing statute of limitations has run, emerge free and clear of accountability. Legislation retroactively reviving those individuals’ claims, at least for limited periods of time, gives voice to their grievances against those powerful interests, in this way promoting the rule of law.⁶⁵ As Waldron says, “[t]he procedural side of the Rule of Law presents a mode of governance that allows people a voice, a way of intervening on their own behalf in confrontations with power.”⁶⁶ Yet, by virtue of the same official action, industry entities and corporate officials are deprived of the benefit of a set legal rule offering them respite from the need to defend “stale” claims,⁶⁷ in this way impairing the rule of law from another point of view.

⁶³ Ian P. Farrell, Book Review: *Legality*. By Scott Shapiro, 90 TEX. L. REV. 187, 217 (2011); see Michael P. Zuckert, *Hobbes, Locke, and the Problem of the Rule of Law*, in 36 NOMOS: The Rule of Law 63, 65 (1994) (saying that partisans on both sides of legal theoretical “wars” are no less confident “that the rule of law is on their side and their side alone than warriors in hotter wars have claimed God as theirs and theirs alone”).

⁶⁴ Seen as an informal “moral operator,” the expression’s grammatical form is such that *the rule of law* connotes an argument implicitly attached to the normative operator *ought*, such that relevant existing conditions and normative possibilities *give a moral reason (an “ought”) for the legal system* to behave in a certain manner that comports with the speaker’s interpretation of the rule-of-law ideal. See generally Laura Kallmeyer & Rainer Osswald, *Combining Predicate-Argument Structure and Operator Projection: Cause Structure in Role and Reference Grammar*, PROCEEDINGS OF THE 13TH INT’L WORKSHOP ON TREE ADJOINING GRAMMARS AND RELATED FORMALISMS 61, 61 (2017); Brian Sheppard & Fiery Cushman, *Evaluating Norms: An Empirical Analysis of the Relationship Between Norm-Content, Operator, and Charitable Behavior*, 63 VANDERBILT L. REV. 55, 59 (2010) (noting that the 1908 Canons of Ethics “largely utilized aspirational norm operators and moral standard norm-content . . . such as ‘should’ or ‘ought’”) (omitting citations). In this paper I will also assume, without arguing, the normativity of evaluative statements. See, e.g., RICHARD M. HARE, THE LANGUAGE OF MORALS 152-53 (1952) (arguing that, although “[i]n general, ‘ought’ behaves more like ‘right’ than it does like ‘good’ . . . , there are sufficient similarities between the words ‘good’, ‘right’, and ‘ought’ for us to classify them all as value words”). For a very good recent discussion on this issue, see Christine Tappolet, *The Normativity of Evaluative Concepts*, in 2 MIND, VALUES, AND METAPHYSICS. PHILOSOPHICAL ESSAYS IN HONOR OF KEVIN MULLIGAN 39, 52-53 (Anne Reboul ed., 2014) (concluding that the “great many equivalences [that] allow us to build bridges between the evaluative and deontic domains . . . suggest[] that evaluative concepts and deontic concepts are two kinds of concepts that belong to the same conceptual level”).

⁶⁵ See *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069, 1079-80 (N.Y. 1989) (upholding the legality of the statutory revival of previously time-barred claims to cure injustice that “calls for a remedy”).

⁶⁶ Waldron, *supra* note 8, at 8.

⁶⁷ *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008).

We don't use the appellation *law* "casually" simply by finding no meaningful impact on the system's status as a legal system regardless of the direction taken, either judicially or by legislation, in resolving various controversies.⁶⁸ But groups holding conflicting interests or convictions within society are justified in discerning an impact on the rule of law, depending on the legislative or judicial outcome. The point is that the quite elegant symmetry Waldron posits—departure from the rule of law ideal as the mirror image of deterioration of the legal system⁶⁹—doesn't hold.

Waldron is right in acknowledging that law may well not actually promote the public good, but is likely not exactly right in asserting that, nevertheless, "nothing is law unless it *purports* to promote the public good . . ." ⁷⁰ For law often abstains from the moral or economic project of ascertaining whether outcomes will affirmatively promote the public good, and rests on taking action that is *not contrary* to the public good.⁷¹ At times, legal decisions even acknowledge, without great qualms, privileging private over public interests.⁷²

Even as the idea of an orientation to the public good highlights a similarity between law and the rule of law, it disjoins the two concepts. The rule of law would not be what it is unless it is evaluated as both purporting to promote the public good and actually doing so. Law, however, does not inexorably promote the public good, but also, as just seen, does not even necessarily *purport* to do so, *pace* Waldron. But even if law does generally purport to advance the public good, this is not its uniquely defining feature; the legal system would plainly not be alone in making this institutional claim. Although the outlaw gang cannot legitimately claim to be out for any interests but its own, legitimate institutions broadly purport, with varying degrees of justification, to promote the good of the larger society.⁷³

So law's claim to promote the public good does not necessarily align it with the rule of law, but rather with ordinary institutional reality. That law does not necessarily actually promote the public good, however, and that it sometimes may not even claim to do so, cleaves it from the rule of law. The rule of law claims to, and by its nature does, promote the public good. The concept of the rule of law would otherwise be meaningless.

Like the rule of law, democracy is a political ideal that, when realized in practice, by its nature delivers a social good. At least we are usually justified in

⁶⁸ Cf. Waldron, *supra* note 8, at 13-14.

⁶⁹ *Id.* at 46-47.

⁷⁰ *Id.* at 32 (emphasis in original).

⁷¹ *E.g.*, *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 377 (1991) (acknowledging that "[f]ew governmental actions are immune from the charge that they are 'not in the public interest', and emphasizing that "it is not universally considered contrary to the public good if the net economic loss to the losers exceeds the net economic gain to the winners"); *Mulder v. McDonald*, 805 F.3d 1342, 1348 (Fed. Cir. 2015) (reiterating that "'Congress has explicitly concluded that if taxpayers are financing a veteran's incarceration, it is contrary to the public good to also pay him full VA disability benefits'") (quoting *Wanless v. Shinseki*, 23 Vet. App. 143, 148 (2009), *aff'd*, 618 F.3d 1333 (Fed. Cir. 2010)).

⁷² *City of Columbia*, 499 U.S. at 377 (revisiting a marketing scheme deemed legal valid although it "put the 'private' interest of the State's raisin growers above the 'public' interest of the State's consumers") (discussing *Parker v. Brown*, 317 U.S. 341 (1943)).

⁷³ *See, e.g.*, Chris Kocher, *Apple Helps GE "Bring Good Things to Life,"* INDUSTRY WEEK (Oct. 19, 2017).

taking this as a given.⁷⁴ Waldron wants to go a step further, and analogize the way we use *law* to the way we use the term *democracy*.⁷⁵ Uncontroversially remarking that democracy and the *rule of law* fall within “a cluster of ideals constitutive of modern political morality,”⁷⁶ he then extends the analogy to law itself. He most pointedly says that, as the very concept of democracy connotes “free and fair elections,” so the absence of “hearings and impartial proceedings” would disqualify a societal arrangement from being deemed a legal system.⁷⁷

This analogy is problematic. Elections are free and fair, hence democratic, when neither the legislative organism nor the ruling power has the ability to predetermine the outcome.⁷⁸ The outcome is determined based on the voters’ first order actions, either by way of counting their direct votes and applying them to the total, or via another sort of pre-defined and transparent electoral method.⁷⁹ In legal proceedings, by contrast, officials engage in interpretive and higher order supervisory oversight, typically evaluating the validity of the inferences advanced by the litigants, and the integrity of the evidentiary mechanisms at play. Also, as Joseph Raz explains, “the fact that what is law is a matter of interpretation shows – according to some – that, since any object of interpretation allows for multiple interpretations, the law is subjective”⁸⁰ And legal realists press the view that judges decide based on “how the facts of the cases strike them,” as conditioned by psychological and sociological factors rather than strictly legal rules and principles.⁸¹

At the least, the notion of the impartiality of law’s adjudicative mechanisms can become ambiguous, depending somewhat on whether the focus is on the particular litigants or, more generally, open-mindedness regarding policy or legal issues. In the latter case, the commitment to impartiality is, inevitably, in some tension with the deference afforded to prior judicial positions, precedents, and legislative histories.⁸²

⁷⁴ *But see* JASON BRENNAN, *AGAINST DEMOCRACY* 3 (2016) (arguing that “[w]e should hope for even less participation, not more. Ideally, politics would occupy only a small portion of the average person’s attention”).

⁷⁵ Waldron, *supra* note 8, at 13.

⁷⁶ *Id.* at 3.

⁷⁷ *Id.* at 22.

⁷⁸ *See generally* Jeffrey G. Hamilton, *Deeper into the Political Thicket: Racial and Political Gerrymandering and the Supreme Court*, 43 EMORY L. J. 1519, 1561 (1994).

⁷⁹ *See generally* Jeffrey C. O’Neill, *Everything That Can Be Counted Does Not Necessarily Count: The Right to Vote and the Choice of a Voting System*, 2006 MICH. ST. L. REV. 327, 333 (2006) (surveying various types of voting systems); MATHEMATICS AND DEMOCRACY: RECENT ADVANCES IN VOTING SYSTEMS AND COLLECTIVE CHOICE (Bruno Simeone & Freidrich Pukelsheim eds., 2006).

⁸⁰ JOSEPH RAZ, *BETWEEN AUTHORITY AND INTERPRETATION* 225 (2009); *see also* Thomas Morawetz, *Law as Experience: The Internal Aspect of Law*, 52 SMU L. REV. 27, 49 (1999) (opining that, “[i]nsofar as insiders participate in controversies and use notions such as fairness, justice, correctness, and rights, they fail to recognize that all such arguments are systematically devalued by bias and partisanship, by commitments and dispositions hidden from disputants themselves”).

⁸¹ Brian Leiter, *Legal Realism*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 261, 261 (Dennis Patterson ed., 1996).

⁸² *See* *Republican Party of Minnesota v. White*, 536 U.S. 765, 775-79 (2002).

Apart from these sorts of considerations, Part II below will flesh out why, for other far more troubling reasons, law is not necessarily impartial in its relation to the average citizens. If it is a critical aspirational ideal that, in legal proceedings, both sides be treated respectfully and given an equal opportunity to confront power,⁸³ then inequalities within the broader society will manifest as inequalities within the legal system. If segments of society are saddled with unequal capabilities to function and to take advantage of legal and other institutional structures, then this will necessarily impair law's ability to deliver on the aspiration that it provide a mode of governing that shows "equal concern for the fate of every person over whom it claims dominion."⁸⁴

In any event, analogizing law and democracy appears to be a further instance of begging the question in favor of law. As suggested,⁸⁵ it has been taken as a given that democracy "is one of our most prominent political ideals."⁸⁶ But it remains to be shown that law, like the rule of law, carries an equivalent stature. I believe that the better analogy for law would be to government. *Government* is a far more expansive term that allows for its many variants.

As with law, an arrangement requires certain features to qualify as government. Scholars in that area would identify the exercise of certain functions, the provision of certain services, and a capability to stand for the whole in diplomatic encounters with outside entities. However, even as most people would agree that it is better to have a government than not, it is fairly debated whether its "administration of populations" delivers a net public good in particular circumstances.⁸⁷ That debate doesn't impinge, however, on the presupposition that the system qualifies as a government. Moreover, in contrast to the democratic ideal, "on the plane of governmentality, populations do not carry the ethical significance of citizenship."⁸⁸

Finally, we have noted the disagreement between Raz and Waldron concerning the function of the rule of law.⁸⁹ Raz views the rule of law as a check on the legal enterprise itself,⁹⁰ whereas Waldron struggles to uphold an august view of law, and considers the rule of law a check on abuses in the exercise of political power.⁹¹ Neither view, however, would remotely begin to describe law's function. Law's distinctive processes, such as its hearings and formal proceedings, as elucidated by Jeremy Waldron,⁹² mostly aim at goals quite different from constraining official exercises of political power, although this may occur in particular cases. Distinguishing the functions of law and the rule of law both sets the concepts apart

⁸³ Waldron, *supra* note 8, at 8, 23.

⁸⁴ RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* 2 (2011).

⁸⁵ *See supra* text accompanying note 74.

⁸⁶ Waldron, *supra* note 8, at 13.

⁸⁷ Andrea Mennicken & Peter Miller, *Michel Foucault and the Administering of Lives*, in *THE OXFORD HANDBOOK OF SOCIOLOGY, SOCIAL THEORY, AND ORGANIZATION STUDIES* 11, 15 (Paul Adler et al., eds., 2014); *see* BARON DE MONTESQUIE, *THE SPIRIT OF THE LAWS* 19 (Thomas Nugent trans., 1949) (1748) (describing monarchical, despotic, and republican forms of government).

⁸⁸ PARTHA CHATTERJEE, *LINEAGES OF POLITICAL SOCIETY: STUDIES IN POSTCOLONIAL DEMOCRACY* 14 (2011).

⁸⁹ *See supra* notes 34-38, and accompanying text.

⁹⁰ RAZ, *supra* note 3, at 224.

⁹¹ Waldron, *supra* note 8, at 11.

⁹² *Id.* at 22.

and facilitates a moral concept of the rule of law that is compatible with a positivist concept of law itself.

One thinker critically respected by Waldron for his functional view of law was the Bolshevik legal philosopher Evgeny Pashukanis.⁹³ As Waldron puts it, Pashukanis “believed that law was a particular and distinctive form of social ordering, organized around the coordination and empowerment of private, independent agents.”⁹⁴ Consistently, Pashukanis asserted that “[a] basic prerequisite for legal regulation is therefore the conflict of private interests.”⁹⁵ Regardless of how far one agrees with the overall theory, the view does seem to capture the conceptual nature of the emergence of a legal system.

As the pre-legal social group engages in private transactions, broadly defined to include accidental occurrences—promising, injuring, commanding, planning and so forth—these give rise to entitlements, commitments, obligations and other deontic facts, including deontic emotions such as blame and resentment.⁹⁶ Questions inevitably arise about how to organize, coordinate and prioritize those obligations, resentments, powers, and practiced means to intended ends. Particular groups, based on some circumstance such as brute physical might, talent, risk-taking, or perhaps merely luck, or some combination of those, will be more powerful than others and form dominant cliques or even classes.⁹⁷

A legal system emerges, via collectively recognized regulative and constitutive rules, and local and regional institutions aimed at balancing competing interests and settling disputes peacefully. The system engenders strata of legal and governmental officials, empowers individuals in the community and affords them guidance and constraints in the conduct of their transactions, but also ensures and reifies the privileges and exploitative capabilities of the dominant group.⁹⁸ The next section argues that the rule of law concomitantly forms in the community’s collective consciousness as an informal moral operator aimed at tempering the legal system’s functioning in relation to the larger society’s conditions and normative possibilities.

⁹³ *Id.* at 15.

⁹⁴ *Id.* at 16 (citing EVGENY B. PASHUKANIS, *LAW AND MARXISM: A GENERAL THEORY* 100-01 (Chris Arthur ed., Barbara Einhorn trans., 1978) (1929)).

⁹⁵ PASHUKANIS, *supra* note 94, at 81.

⁹⁶ JOHN R. SEARLE, *MAKING THE SOCIAL WORLD: THE STRUCTURE OF HUMAN CIVILIZATION* 147-48 (2010); *see also* Carla Bagnoli, *Introduction to MORALITY AND THE EMOTIONS* 1, 26 (Carla Bagnoli ed., 2011).

⁹⁷ *See, e.g.*, Hendrik Hartog, *Coverture and Dignity: A Comment*, 41 *LAW & SOC. INQUIRY* 833, 837 (2016) (discussing the “prelegal and primordial fact of male sexual violence and power”);

⁹⁸ *See* Jean-Jacques Rousseau, *Émile*, in 4 *OEUVRES COMPLÈTES* 524 (Bernard Gagnebin & Marcel Raymond eds., 1969) (1762), *quoted in* Holmes, *supra* note 3, at 47 (stating that “[t]he universal spirit of the Laws of all countries is always to favor the strong against the weak, and the one who has against the one who has nothing”); *see also* T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 *COLUM. L. REV.* 1060, 1084 (1991) (explaining that “[d]ominant groups generally do not consider themselves to be oppressive, particularly in a society in which tolerance for diversity is valued, and they can provide descriptions of themselves and the disadvantaged that explain inequality as either justified or natural”).

II. THE RULE OF LAW AS A MORAL OPERATOR

Commitment to the rule-of-law project supports an endorsement of rule by law,⁹⁹ which might also be framed as the rule of laws. At the same time, however, believing in the project's merit, and engaging in its practice of morally evaluating legal systems, do not require endorsing the rule of a surfeit of laws.¹⁰⁰ Proliferation of laws can ironically be in some tension with rule-of-law constraints on the coercive state power that backs those laws. These are considerations that historically launched the rule-of-law project.

Let's begin with Plato, not to privilege the Western canon but to trace the concept's lineage in modern popular discourse as well as theoretical writing. Plato did not expressly refer to "the rule of law," and he counted adherence to law as the "second-best method" of organizing a government.¹⁰¹ With idealized expertise, the king would be able to rule without law, as each situation demanded. If so, law's stable or fixed nature would render it something akin to "some self-willed and ignorant person, who allows no one to do anything contrary to what he orders, nor to ask any questions about it . . ." ¹⁰² Waldron has taken this language to mean that, for Plato, one would use legal rules "only as a (distant) second-best, if one felt one couldn't discern or trust the appearance of expertise in political life."¹⁰³

Plato's theological cosmology envisioned an era, the Age of Cronos, in which the universe rotated in an opposite direction, such that divine spirits governed all living things, and human beings experienced no private conflict.¹⁰⁴ Responding to the paradox that one cannot search either for what one knows—because this is already known—or for what one does not know—because one would not know what to search for—Socrates says in Plato's *Meno* that the soul is immortal, has been born often and has seen everything before, and is left with the task of "recollect[ing] the things it knew before, both about virtue and other things."¹⁰⁵

Statesman is not as unforgiving about law as Professor Waldron's parenthetical might suggest. The work's lead pedagogic character, the Stranger or Visitor, asks why it is "ever necessary to make laws, given that law is not something completely correct."¹⁰⁶ So, after all, in this world, in the Age of Zeus, laws are necessary and corrective, even if not "completely" correct. Importantly, in the *Republic*, Plato explains that the painter is none the worse if, having painted a portrait of the

⁹⁹ See HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 536 (1983).

¹⁰⁰ See Jerome Hall, *Plato's Legal Philosophy*, 31 *INDIANA L. J.* 171, 181-82 (1956) (remarking that, notwithstanding Plato's statement in *Laws* that properly educated citizens will be able to determine their own standards of behavior in certain areas, there was "no incompatibility between rigorous adherence to the rule of laws and rigorous restriction of the scope of law").

¹⁰¹ PLATO, *Statesman* 297d-e, 300b-c, in PLATO: COMPLETE WORKS 294, 342, 344 (John M. Cooper ed., 1997).

¹⁰² PLATO, *Statesman* 294c, in *id.* at 338.

¹⁰³ Jeremy Waldron, *The Rule of Law*, in *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (2016), available at <http://plato.stanford.edu/archives/fall2016/entries/rule-of-law/>.

¹⁰⁴ PLATO, *Statesman* 269c-272b, in PLATO, *supra* note 101, at 310-14.

¹⁰⁵ PLATO, *Meno* 80d-81d, in *id.* at 870, 880.

¹⁰⁶ PLATO, *Statesman* 294d, in *id.* at 338.

finest human being, “he could not prove that such a man could come into being.”¹⁰⁷ Neither the philosopher king nor the best possible constitution may ever be realized in practice.¹⁰⁸

And, indeed, Plato’s longest work was *Laws*, consisting of twelve books revolving around the idea that the lawgiver organizes “the entire life of the state.”¹⁰⁹ Although many of Plato’s ideas would, of course, be anathema to a modern rule-of-law devotee, he did, in this late work, conceive of the formulation of a legal code comprised of “all these regulations [that] may be welded into a rational whole, demonstrably inspired by considerations of justice and self-restraint, not of wealth and ambition.”¹¹⁰ This language wouldn’t be substantially out of line if used to express a modern view of the rule of law.

Plato even articulated a basic norm instructing his view of governance, namely, that the rulers ought to “preserve” the city and make it “better than it was so far as they can . . .”¹¹¹ Although Plato’s rarified view of the expertise required to govern tilted his ranked preferences in order from monarchy, to a more diffuse aristocracy or oligarchy, to his disfavored democracy,¹¹² he viewed law’s function as supporting this superimposed directive. His very articulation in *Statesman* of an overriding norm sets a context for evaluating the legal system, for discretely examining the system’s normativity apart from assaying the system’s discrete norms.¹¹³

Modern theorists need not be distracted by Plato’s period recommendations to appreciate his evaluative project. Morality is a subspace within the broader normative expanse, and Plato introduced not solely the idea of “good written rules, which we call laws,”¹¹⁴ but of the existence of a moral standard for evaluating the larger legal system. He even articulated an orderly decision process, compatible with modern notions of the rule of law, for developing the laws, namely, “on the basis of much experiment, with some advisors or other having given advice on each subject in an attractive way, and having persuaded the majority to pass them.”¹¹⁵

I next defend the position that, following Plato, the concept of the rule of law has tended to function as a moral operator for evaluating the legal system in progress, at the particular historical moment, and in the context of the conditions of the larger society. As a moral operator, the rule of law is fated to generate robust disagreement.¹¹⁶ Issues will include which attributes of the legal system in progress are beneficial or detrimental to sustaining governance’s moral well-being, and whether the manner in which legal institutional actions are taken at the particular

¹⁰⁷ PLATO, *Republic* 472d, in *id.* at 971, 1099.

¹⁰⁸ PLATO, *Republic* 473c-e, in *id.* at 1100.

¹⁰⁹ PLATO, *Laws* 632c, in *id.* at 1326.

¹¹⁰ PLATO, *Laws* 632c-d, in *id.* at 1326-27.

¹¹¹ PLATO, *Statesman* 293d-e, 297b, in *id.* at 337, 341.

¹¹² PLATO, *Statesman* 291c to 292b, 303a-b, in *id.* at 335, 348; PLATO, *Republic* 544c, in *id.* at 1156.

¹¹³ See Mitchell N. Berman, *Of Law and Other Artificial Normative Systems*, in DIMENSIONS OF NORMATIVITY: NEW ESSAYS ON METAETHICS AND JURISPRUDENCE 137, 142 (David Plunkett *et al.*, eds., 2019).

¹¹⁴ PLATO, *Statesman* 302e, in PLATO, *supra* note 101, at 347.

¹¹⁵ PLATO, *Statesman* 300b, in *id.* at 344.

¹¹⁶ See generally Jeremy Waldron, *Moral Truth and Judicial Review*, 43 AM. J. JURIS. 75, 78 (1998) (noting that “the persistence of widespread moral disagreement about rights informs many people’s rejection of moral realism as a metaethical position”).

historic moment diminish or bolster the rule of law. The underlying question is whether law's way of proceeding—from the point of view of procedures followed and access for all those affected—weakens or improves the moral situation.

Understandably, however, theorists have sought to more concretely define attributes critical to the rule of law. They have not conceptualized the rule of law in structuralist terms, being the structural role the idea of the rule of law plays in a society's discourse, as an informal moral operator. Reifying the attributes, many academics have converged around the Fuller criteria,¹¹⁷ or similar desiderata, rigidly assigning such qualities such as generality, publicity, clarity, prospectivity, and stability as the *sine qua non* for determining whether a legal system realizes the rule of law ideal.¹¹⁸ By the moral operational view, however, although these criteria certainly provide markers for a contemporary rule-of-law evaluation, neither they nor any other reified attributes in themselves fixedly *constitute* the rule of law.

Aristotle linked the evaluation of legal systems to that of their host governments, a defective government engendering bad or unjust laws.¹¹⁹ To ensure good legal decision-making, the norms governing legal practices would have to respond to governmental structures. Because, for instance, magistrates in the Lacedaemonian system were selected “from the whole people,” including from those who, “being badly off, are open to bribes,” their discretion ought to be held in check such that they decide not “merely on their own judgement, but according to written rules and to the laws.”¹²⁰ The deontic operator *ought* indicates a moral constraint on the magistrates' exercise of discretion,¹²¹ and Aristotle's prescription thereby provides a moral ground for a rule-of-law evaluation of Spartan magisterial practice.¹²²

¹¹⁷ See *supra* notes 41-51, and accompanying text.

¹¹⁸ See Mark Tushnet, *The Possibility of Illiberal Constitutionalism?*, 69 FLA. L. REV. 1367, 1370 (2017); Jeremy Waldron, *Preface*, 11 HAGUE J. ON THE RULE OF LAW 251, 251 (2019) (remarking that legal philosophers writing on the rule of law “compete with one another to come up with more and more carefully formulated lists . . . , tak[ing] for granted that the rule of law requires some such list”). It is conceivable that, at some historical moments, unyielding adherence to a traditional rule-of-law attribute might approach a *reductio ad absurdum* of the rule-of-law aspiration. Cf. Herbert L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 619-20 (1958) (advocating that officials practice “candour” in acknowledging the retrospectivity of a criminal sanction imposed, “as the lesser of two evils,” on an individual whose pro-Nazi misconduct was technically “legal” when performed); Ernest Weinrib, *The Intelligibility of the Rule of Law*, in THE RULE OF LAW: IDEAL OR IDEOLOGY 59, 59 (Allan Hutchinson & Patrick Monahan eds. 1987) (questioning whether, “[i]f law inescapably implies the rule of some men over others, can a notion of the Rule of Law with its implicit contrast to the rule of men be in any sense intelligible or coherent?”).

¹¹⁹ ARISTOTLE, *Politics* 1282^b1-12, in 2 THE COMPLETE WORKS OF ARISTOTLE 1986, 2035 (Jonathan Barnes ed., rev. Oxford trans., 1984) (hereinafter “COMPLETE WORKS”).

¹²⁰ ARISTOTLE, *Politics* 1270^b7-31, in *id.* at 2016.

¹²¹ See PABLO E. NAVARRO & JORGE L. RODRÍGUEZ, DEONTIC LOGIC AND LEGAL SYSTEMS xx, 85 (2014).

¹²² There are, of course, several “flavors” of the normative word *ought*, not solely the moral, including the prudential (“John ought to take his vitamins”), teleological (“to hang the picture, you ought to use a thicker nail”); and the generally evaluative (“Sally ought to have a relaxing vacation”). See MATTHEW CHRISMAN, THE MEANING OF ‘OUGHT’: BEYOND DESCRIPTIVISM AND EXPRESSIVISM IN METAETHICS 71 (2016); see also JOHN BROOME, RATIONALITY THROUGH REASONING 4, 9 (2013) (noting that “[o]ught” is not

For Aristotle, law was general, systematic, legislated and typically written. He acknowledged the thinking “by some” that a sovereign’s arbitrary rule, characterizing absolute monarchy, was “quite contrary to nature.”¹²³ And he took note of the view that the rule of law, here meaning rule by law, “is preferable to that of any individual.”¹²⁴ Aristotle explained, however, that in the broader functioning of the legal system, individuals would have to decide issues arising in specific cases, which involved “matters of detail” that “cannot be included in legislation.”¹²⁵ This was acceptable, and could even improve the moral situation over that attained by rote adherence to written laws, precisely because the law would train officials “for this express purpose.”¹²⁶ For controversies left undecided by general legislation, individuals are appointed to determine those matters “to the best of their judgment,” ideally mimicking “God and Reason alone,” so as to avoid as much as possible emotional bias in the form of desire, “spite and partiality.”¹²⁷

Aristotle thereby set up parameters for morally evaluating the legal system’s functioning. In this exercise, citizens would evaluate whether officials were judging “truly” by applying reason, as they ought, rather than spite and partiality.¹²⁸ And he continues, in the following passage, to set down a decision procedure and decision-making attitude, markers by which to morally appraise the practice:

Hence it is evident that in seeking for justice men seek for the mean, for the law is the mean. Again, customary laws have more weight, and relate to more important matters, than written laws, and a man may be a safer ruler than the written law, but not safer than the customary law.¹²⁹

In a right-functioning legal system, those well trained in the law have been “stimulate[d] to excellence” and should, by advancing good laws that take good public care, urge the populace on toward a similar noble character.¹³⁰ The Aristotelian analogue to the rule of law required that officials be capable of studying customary as well as written laws, and of judging “what is good and bad and what enactments suit what circumstances.”¹³¹ When needed, although only with great

particularly a moral word It is a general normative word,” but is also often used non-normatively). Although some expressions of the rule of law construct may express merely prudential or other nonmoral aspirations, I believe that it overwhelming serves a stronger, morality-based evaluative function.

¹²³ ARISTOTLE, *Politics* 1287^a10-11, in COMPLETE WORKS, *supra* note 119, at 2042.

¹²⁴ ARISTOTLE, *Politics* 1287^a19-20, in *id.* at 2042.

¹²⁵ ARISTOTLE, *Politics* 1287^b21, in *id.* at 2043.

¹²⁶ ARISTOTLE, *Politics* 1287^a25-26, in *id.* at 2042.

¹²⁷ ARISTOTLE, *Politics* 1287^a27-37, in *id.* at 2042-43.

¹²⁸ ARISTOTLE, *Politics* 1287^a36 to 1287^b2, in *id.* at 2043. Compare the thoughts of Aristotle’s contemporary, the fourth century B.C. Chinese philosopher Zhuang Zhou, in ZHUANGZI: THE ESSENTIAL WRITINGS (Brook Ziporyn trans., 2009), at 51 (expressing Lao Dan’s view that, “[w]hen a clear-sighted sovereign rules, . . . [t]here is something unnameable about him that allows all creatures to delight in themselves,” & 109-10 (speaking of community and government, stating that, “the Great Man joins and brings all things together to make the unbiased,” and that “[a]ll things have their differing guidelines, but the Course is not partial to any of them. Thus, it has no name”).

¹²⁹ ARISTOTLE, *Politics* 1287^b2-7, in COMPLETE WORKS, *supra* note 119, at 2043.

¹³⁰ ARISTOTLE, *Nicomachean Ethics* 1180^a6-1180^b1, in *id.* at 1729, 1864-65.

¹³¹ ARISTOTLE, *Nicomachean Ethics* 1181^b6-10, in *id.* at 1867.

caution, officials should change the law, including by legislating abandonment of customary law that no longer suits present morality and sensibilities.¹³²

Although some of the specific attributes Aristotle assigned to law, in his complex and sometimes ambiguous writing on the subject, would not accord with modern notions of the rule of law, and although many would do so, the *corpus aristotelicum* engendered a moral evaluative operation by which to assess a legal system. While rooted in order and stability, the Aristotelian system was not static but in motion, guided by legislators and officials possessed of agency and a fine-tuned capability, and obligation, to discriminate between the good and the bad in existing and contemplated law.

It may seem that the moral operational concept of the rule of law is an aspect of natural law legal theory, which in its strong sense maintains that there is a necessary connection between morality and the existence and validity of laws, but in its weak form appraises the moral force of laws rather than their very existence or validity.¹³³ Natural law legal thinking, however, leaves the connection between morality and the concept of the rule of law both transparently direct and misleadingly opaque. The former is so, because evaluating the legal system as a whole from the point of view of its being both obligated to improve the moral situation and generative of genuine moral obligation aligns with natural law legal theoretical motivations.¹³⁴

And the latter is so, because appraising laws from the moral perspective doesn't pin down one's concept of the rule of law. A law or constitutional interpretation protecting the right to abortion, for instance, might seem to some natural law advocates as invalid or leastwise defective on moral grounds, but so, for other natural law legal thinkers, might a law or interpretation *restricting* such a right.¹³⁵ To the extent, however, that the right-to-choose/right-to-life debate does not implicate the aims and concerns underlying the rule-of-law ideal—for example, values concerning lawmaking procedures, the formal characteristics of laws, access to the legal system, and so forth—this debate will not have any discernable rule-of-law impacts.

Although Aristotle is routinely cited as advancing a natural law legal theory, some have seen this claim as somewhat arguable.¹³⁶ The same cannot so readily be

¹³² ARISTOTLE, *Politics* 1268^b26 to 1269^a17, *in id.* at 2013-14.

¹³³ See Philip Soper, *Some Natural Confusions About Natural Law*, 90 MICH. L. REV. 2393, 2395-96 (1992).

¹³⁴ This is not to say, however, that the moral evaluative concept of the rule of law favored in this paper is in itself a natural law legal theory, or that it rests on any particular sort of metaethical theory, whether cognitive or noncognitive, realist or antirealist, objective or subjective.

¹³⁵ See Eric Rakowski, *The Sanctity of Human Life*, 103 YALE L. J. 2049, 2057 (1994) (reviewing RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* (1993)) (noting, *inter alia*, "Dworkin's argument that the Free Exercise Clause gives most American women a right to abortion, because they believe, at least implicitly, that abortion in their circumstances best respects the sanctity of life"). In some jurisdictions, advocates might even feel comfortable raising a natural law argument as part of their courtroom presentation. See Keith S. Kroger, *Ireland's Abortion Information Act of 1995*, 29 VAND. J. TRANSNAT'L L. 1117, 1139 n.148 (1996).

¹³⁶ E.g., W. Von Leyden, *Aristotle and the Concept of Law*, 42 J. ROYAL INS. PHIL. 1, 13 (Jan. 1967) (suggesting that there is a sense "in which on Aristotle's view there is no

said for Samuel Rutherford, whose use of the term *rule of law* was likely the first in English, albeit without the definite article, and expressive of a critically important aspect of the concept. In his 1644 treatise *Lex, Rex*, Rutherford instructed that “*conscientia humani generis*, the natural conscience of all men, to which the oppressed people may appeal unto when the king exponeth a law unjustly, . . . is the last rule on earth for expounding of laws.”¹³⁷ The work scathingly, and at great bodily risk, addressed then Archbishop of Canterbury John Maxwell’s *Sacro-Sancta Regum Majestas*, which defended the divine right theory and the royal prerogative of kings.

Rutherford’s title, *Lex, Rex*, places the law before the king, in contravention of Maxwell’s royal absolutism and the *rex est lex loquens* (the king is the law speaking) doctrine. So Britain and Scotland burned and banned the book, and in 1688 charged Rutherford with high treason, although he died before trial.¹³⁸ In *Lex, Rex*, Rutherford responds to forty-four questions, the twenty-sixth being “whether the king be above the law or no.”¹³⁹ Explaining that emperors began as “but princes of the commonwealth,” Rutherford announces the *rule of law, not of man* ideal, saying that “the prince remaineth, even being a prince, a social creature, a man as well as a king; one who must buy, sell, promise, contract, dispose: therefore, he is not *regula regulans* [the governing rule], but under rule of law.”¹⁴⁰

Yet this *rule of law, not of man* precept requires, in the first instance, a moral evaluation of the promulgation and administration of the laws. For, like Nero, the king will “seek[] to make new laws for himself,” in furtherance of machinations “seeking to destroy” structures of governance and the people.¹⁴¹ So the laws, their source and content, will have to be scrutinized. That evaluation is necessary to ensure that the law conforms to the “one fundamental rule, *salus populi*,” such that the laws actually do conform to “the law of nature, and the law of nations,” and not be made “so obscure, as an ordinary wit cannot see their connexion with fundamental truths of policy, and the safety of the people.”¹⁴² Whether or not embedded within natural law legal presuppositions, a distinct moral operation occurs by which the community evaluates its legal system.

We leap a few centuries ahead to the work of Albert Venn Dicey. Joseph Raz has referenced “Dicey’s unfortunate doctrine,”¹⁴³ which in 1885 introduced readers to the modern concept of the rule of law, however limited by contemporary

necessary connection between law and morality [given that] it is possible to make morally iniquitous laws”).

¹³⁷ SAMUEL RUTHERFORD, *LEX, REX, OR THE LAW OF THE PRINCE* 137 (1982) (1644) (hereinafter “*LEX, REX*”).

¹³⁸ Thomas Murray, *Sketch of the Life of Samuel Rutherford* (1827), in *id.* at xv,xix.

¹³⁹ *LEX, REX*, *supra* note 137, at 125.

¹⁴⁰ *Id.* at 129; see also JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* § 202, at 103 (C. B. Macpherson ed. 1980) (1690) (opining that “[w]here-ever law ends, tyranny begins, . . . and whosoever in authority exceeds the power given him by the law, . . . ceases in that to be a magistrate”).

¹⁴¹ *LEX, REX*, *supra* note 137, at 128.

¹⁴² *Id.* at 137.

¹⁴³ RAZ, *supra* note 3, at 218 n.7.

lights.¹⁴⁴ Dicey offered three central “though kindred” principles,¹⁴⁵ which he attributed to the English system: first, that no one should be punished except for a distinct violation as established in the ordinary courts and according to established, ordinary procedures¹⁴⁶; second, that no one is above the law, such that every person, “whatever be his rank or condition,” is subject to the ordinary law as administered in the ordinary courts¹⁴⁷; and third, that general constitutional principles evolve over time as a result of continual judicial decision-making in individual cases adjudicating private rights.¹⁴⁸

Dicey’s concept of the rule of law thereby announced a set of standards by which commentators could critically assess the legal system’s workings. Not fully recognizing that the normative and moral evaluation of the legal system was itself constitutive of the rule of law, Dicey continues by naively declaring, for example, that officials, like all others, are subject to nothing other than “the ordinary law of the land administered by the ordinary Law Courts,”¹⁴⁹ and, most vociferously, that the rule of law cannot accommodate administrative law or administrative tribunals, which involve special rather than ordinary bureaus.¹⁵⁰

Yet counting against a reified view of the rule of law for both Dicey and Raz is their recognition that, at least to some significant extent, the ideal follows from, rather than defines, certain other conditions. For his part, Joseph Raz allows that many rule-of-law principles “depend for their validity or importance on the particular circumstances of different societies.”¹⁵¹ Reasonably understood, the intuition is that the rule of law is a function from societal conditions to constraints on the legal system that are justified by some sort of moral evaluative exercise.

Dicey’s view was stiffer but somewhat analogous in this particular regard. He insisted that the rule of law expresses the idea that constitutional rules “are not the source but the consequence of the rights of individuals, as defined and enforced by the Courts.”¹⁵² The rule of law thereby manifested in the evolutionary development of rights to freedom, and of various official duties.¹⁵³ The courts afford redress for infringements of those rights, and help to define them over time.¹⁵⁴ Because *habeas corpus* statutes were illustrative of a vehicle by which “the acknowledged right to personal freedom may be enforced,”¹⁵⁵ it followed that law must provide judicial compensatory relief for harms caused by the suspension of *habeas corpus*,

¹⁴⁴ ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (3d ed., 1889) (1885). Note, however, Professor Waldron’s comment disagreeing that Dicey in 1885 “was the first jurist to use the phrase ‘the Rule of Law,’ . . . except in the most pedantic sense of exact grammatical construction.” JEREMY WALDRON, THE RULE OF LAW AND THE MEASURE OF PROPERTY 7 (2012).

¹⁴⁵ DICEY, *supra* note 144, at 175.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 181.

¹⁴⁸ *Id.* at 182-83.

¹⁴⁹ *Id.* at 190.

¹⁵⁰ *Id.*

¹⁵¹ RAZ, *supra* note 3, at 214.

¹⁵² DICEY, *supra* note 144, at 190.

¹⁵³ *Id.* at 191.

¹⁵⁴ *Id.* at 195.

¹⁵⁵ *Id.* at 207.

which “in truth arm the executive with arbitrary powers.”¹⁵⁶ In this regard, Dicey did summon some embryonic criteria for a rule-of-law evaluation of the regime’s reaction to perceived crises, including whether an extraordinary situation immediately necessitated the suspension of *habeas corpus* to remedy what had become a “dangerous limitation on the authority of the executive government,”¹⁵⁷ and whether the executive’s discretionary exercise was “for the public good.”¹⁵⁸ If so, this would warrant the (all but inevitable) follow-up Act of Indemnity by the sovereign parliament shielding state agents from prosecution.¹⁵⁹

As just suggested, following Blackstone and Sir Edward Coke, Dicey also announced a doctrine of Parliament’s absolutely sovereignty.¹⁶⁰ He went so far as to opine that “[n]o one of the limitations alleged to be imposed by law on the absolute authority of Parliament has any real existence.”¹⁶¹ The theorist attempted, however, to reconcile his seemingly disparate views of legislative sovereignty and the law’s supremacy. He argued that sovereign power was tempered both by narrow judicial oversight and interpretation of legislative acts, and by Parliament’s combined authority residing in the Crown and the bicameral House of Lords and House of Commons system.¹⁶²

Dicey’s views on sovereignty are somewhat of a digression, except with regard to his acknowledgment of the “actual limitations” on parliamentary power,¹⁶³ which will reconnect to this paper’s concept of the rule of law. Dicey objected that, in his *Jurisprudence*, John Austin had conflated the separate notions of legal and political sovereignty, incorrectly ascribing the former power to the Commons as “trustees” for the electorate, rather than to the House of Commons itself.¹⁶⁴ Legal sovereignty, to the contrary, was unhampered by any such trustee relationship for Dicey. But

¹⁵⁶ *Id.* at 221.

¹⁵⁷ *Id.* at 215, 219; see Dyzenhaus, *supra* note 3, at 2008-09 (discussing Dicey’s Note X appearing in the eighth edition to the *Introduction to the Study of the Law of the Constitution*, whereby Dicey “adamantly rejects that there is a ‘doctrine of political necessity or expediency’” empowering the regime to suspend the law, in favor of a “‘doctrine of immediate necessity’” held by “all individuals . . . to counter immediate dangers.” Here, too, and perhaps even more readily, this license is constrained by an evaluative standard protective of the rule-of-law project, namely, that “once the emergency has passed, the exercise of this power will have to be shown to meet the test of necessity if the person who wielded it is to escape punishment for having committed an illegal act”).

¹⁵⁸ DICEY, *supra* note 144, at 220.

¹⁵⁹ *Id.* at 220-21.

¹⁶⁰ *Id.* at 39.

¹⁶¹ *Id.* at 66.

¹⁶² *Id.* at 331-32. Critics claimed, however, that Dicey had thereby inadvertently elevated the despot to the status of an absolute sovereign, and also that his doctrine had inadequately accounted for the distinction between legislative powers and procedures. See Arthur L. Goodhart, *The Rule of Law and Absolute Sovereignty*, 106 U. PENN. L. REV. 943, 950-51 (1958); RICHARD A. COSGROVE, *THE RULE OF LAW: ALBERT VENN DICEY, VICTORIAN JURIST* 76 (1980) (explaining that Dicey “clearly never considered” the distinction between procedural rules constraining a sovereign legislature and the substantive power exercised by that legislature).

¹⁶³ DICEY, *supra* note 144, at 72.

¹⁶⁴ *Id.* at 71 (citing 1 JOHN AUSTIN, *LECTURES ON JURISPRUDENCE, OR THE PHILOSOPHY OF POSITIVE LAW* 253 (4th ed. 1873) (1863)).

politically, or in a *de facto* sense, the sovereign's actual power was constrained, externally, by the capability of its subjects to disobey or resist, and internally by historical circumstances, including, even for the despot, "the moral feelings of the time and the society to which he belongs."¹⁶⁵

Dicey's internal, political constraint on sovereign power approaches the nature of the rule of law as moral operator. Though similarly an evaluative mechanism rooted in the particular historical period, the rule of law is a more interactive concept, and addresses the procedural integrity of the legal system in the context of conditions existing in the larger society. The rule of law concept is also far more dynamic than is Dicey's internal constraint on sovereignty, because it is capable of generating the sort of widespread disagreement characteristic of fundamental moral questions.¹⁶⁶ For this reason, too, the idea of the rule of law is vulnerable to being hijacked and manipulated by interests that may be opposed to the public good.¹⁶⁷ The rule of law, however, is a subtle concept, and the moral vigilance it embodies is presumed to be self aware and analytically astute enough to improve the moral situation.

Early development of the values embodied in the rule of law, from Plato and Aristotle, then Rutherford and Dicey, and on to contemporary commentators, points to the concept's moral evaluative operation. Rather than continuing seriatim from theorist to theorist, it should now be more useful briefly to probe the concept itself a bit more deeply. Unlike other writings, this article is not concerned with designating rule-of-law attributes—which can misleadingly seem fixed and unresponsive to historical periods and "the particular circumstances of different societies"¹⁶⁸—but rather with the concept as a structural, evaluative vehicle for improving the moral situation at the intersection of legal systems and their subjects.¹⁶⁹

¹⁶⁵ DICEY, *supra* note 144, at 73-76.

¹⁶⁶ See Soper, *supra* note 133, at 2405.

¹⁶⁷ See, e.g., Marcin Matczak, *Poland: From Paradigm to Pariah? Facts and Interpretation of Polish Constitutional Crisis*, in *NEW POLITICS OF DECISIONISM* 141, 141, 154 (Violeta Beširević ed., 2019) (explaining that, given the Polish legal culture's "excessive formalism," "[p]aying lip-service to the rule of law allows Poland's politicians to mask their attacks on the independence of the judiciary"); Krygier, *supra* note 1, at 752 (discussing the efforts of "rule of law" reformers whose measures "rather legitimise the power of a dictatorship that is 'already accustomed to using any available legal tools and resources for political gain'" (quoting MARK FATHI MASSOUD, *LAW'S FRAGILE STATE: COLONIAL, AUTHORITARIAN, AND HUMANITARIAN LEGACIES IN SUDAN* 206 (2013)); Donald J. Trump, *Text of State of the Union Address*, N.Y. TIMES, Feb. 5, 2020 ("saying, "With every action, my administration is restoring the rule of law and reasserting the culture of American freedom"), at www.nytimes.com (visited Feb. 5, 2020).

¹⁶⁸ RAZ, *supra* note 3, at 214; see also Nick Cheesman & Ronald Janse, *Martin Krygier's Passion for the Rule of Law (and His Virtues)*, 11 HAGUE J. OF THE RULE OF LAW 255, 272 (2019) (paraphrasing Martin Krygier's view that "[s]imilar rules and institutions may have different effects in different societies. Those that may contribute to the rule of law in some places may have no significant effect or even undermine it in others").

¹⁶⁹ Cf. Martin Krygier, *The Rule of Law: Legality, Teleology, Sociology*, in *RELOCATING THE RULE OF LAW* 45, 54 (Gianluigi Palombella & Neil Walker eds., 2009) (praising E.P. Thompson's work, *Whigs and Hunters: The Origin of the Black Act* (1977), saying that, "[p]erhaps fortunately, Thompson was not a lawyer, and unlike Dicey and most other lawyers who write about the rule of law, he did not seek to spell out just what legal elements allegedly produced it"); PHILIP SELZNICK, *LAW, SOCIETY, AND INDUSTRIAL*

If we are willing to view the rule of law as a moral operator, then this concept should analogize to other sorts of operators.¹⁷⁰ Logical operators, for instance, are well known. A simple one is the conjunction operator *and*, notated as the & sign. The conjunction relationship is not, however, determined by use of &, but rather by the context in which terms or items arise. For instance, the sentence “Rutherford was a courageous theorist” is plausibly seen as the conjunction “Rutherford was courageous” and “Rutherford was a theorist.” At the same time, merely using the conjunctive form does not guarantee a conjunction relationship. If we were to say, for example, “Plato and Aristotle were contemporaries,” *and* would not function as a conjunction operator.¹⁷¹ Finally, the status of the logical operator depends on each element, such that, for example, the value of the conjunction *A & B* depends on both the value of *A* and the value of *B*.

Although use of the term *the rule of law* by theorists and in the larger community will tend to reflect the concept’s nature and significance at the historical moment, the term’s use is not necessarily always illustrative.¹⁷² Contextual analysis indicates whether the term is being applied toward a moral evaluation of the exercise of official power in line with legal procedural values. But also, the concept of the rule of law stands for a multifaceted relationship between societal conditions and the legal system’s manner of governance from a mostly procedural point of view. Adjustments made at any relevant intercept in that relationship can alter the way in which citizens or theorists appropriately apply *the rule of law*. The end of the matter is the moral situation attained by law in its procedural operation and accessibility, in relation to the larger society.

III. THE RULE OF LAW IMPLICATES CONDITIONS THAT IMPACT ACCESS TO LAW

Theorists, practitioners, and social activists writing about the rule of law have consistently fixed their gazes on its constitutive core principles. These range from being the characteristics of laws, lawmaking, and the legal system that are minimally necessary for ascribing rule by law to the society, to those that are more expansive and conducive toward securing substantive rights and delivering some meaningful form of justice.¹⁷³ Even as they remain fairly

JUSTICE 14 (1969) (saying that, “[p]roperly understood, the concept of legality is more critical than celebrationist. . . . An affirmative approach to legal values need not accept the defensive rhetoric of men in power. On the contrary, it offers principles of criticism to evaluate the shortcomings of the existing system of rules and practices”).

¹⁷⁰ See *supra* note 64.

¹⁷¹ See generally ARNOLD KOSLOW, A STRUCTURALIST THEORY OF LOGIC 7-8 (1992).

¹⁷² See *supra* note 165; see also, e.g., Louise Arbour, Op-Ed: *The Rule of Law*, N.Y. TIMES, Sept. 26, 2012, at nytimes.com (visited Jan. 2, 2020) (writing that “repressive regimes are more than happy to refer to ‘rule of law’ as they crack down on dissent at home”); Josh Chin & Te-Ping Chen, *China Targets Human-Rights Lawyers in Crackdown*, WALL ST. J., July 12, 2015, at wsj.com (visited Jan. 2, 2020) (reporting one Amnesty International researcher’s comment that “[t]his coordinated attack on lawyers makes a mockery of President Xi Jinping’s claims to promote the rule of law”).

¹⁷³ See, e.g., RONALD DWORKIN, A MATTER OF PRINCIPLE 11-12 (1985) (reasoning that a “rights” conception of the rule of law does not distinguish “between the rule

unified in their quest to demarcate rule-of-law attributes, commentators divide over which attributes to assign, and how to conceptualize the construct.

I believe that the attribute-driven project is problematic, least of all because the diverse and sometimes undisciplined interpretations of rule-of-law values generate anxiety that the rule of law “might devolve to an empty phrase”¹⁷⁴ This paper alternatively sees the rule of law as a structural, evaluative component of collective social consciousness, one that is relativized in relation to societal conditions. Only a very strained account will assess the status of the rule of law at any historical moment by looking solely at lawmaking formalities and the judicial procedural rules by which participants in the legal system are abiding.

Jeremy Waldron’s project nimbly loosens up the rule of law analysis, albeit by melding the concept of law and that of the rule of law. Claiming some distance from the received approach to the rule of law, he sees courts as an essential component of an arrangement that can rightly be called a legal system.¹⁷⁵ Waldron criticizes Hart for his limited focus on the courts’ “output function,” their delivery of “authoritative determinations of the question whether . . . a primary rule has been broken.”¹⁷⁶ He also confronts Raz, who views the courts as the primary norm-applying organ that decides individual cases, for his similar concentration on the judicial system’s outputs.¹⁷⁷ But after noting Raz’s comments elsewhere about the need for impartiality and fair hearings as “‘obviously essential for the correct application of the law and thus . . . to its ability to guide action,’”¹⁷⁸ Waldron unhappily but correctly locates Raz’s normative procedural point as “relevant to law only at an evaluative level, rather than at the conceptual level.”¹⁷⁹

It is easier to establish, however, that morally evaluative claims fall within the concept of the rule of law than within the concept of law itself. Closely linking the concepts of law and the rule of law will appear problematic to those who resist ascribing rule-of-law virtues to the very idea of a legal system. Fair and impartial hearings—markers by which to evaluate the system’s moral standing—are more readily seen as integral to the rule of law than as ingredients required to qualify an arrangement as a legal system. Indeed, pronouncements urging that “an independent, impartial judiciary; the presumption of innocence; the right to a fair and public trial without undue delay; a rational and proportionate approach to punishment; [and] equality of all before the law” be counted as “essential characteristics of the Rule of Law” seem to presuppose, as the underlying problem, that these are *not otherwise essential* characteristics of law *per se*.¹⁸⁰

of law and substantive justice”); World Justice Project, *Rule of Law Index 2019*, at worldjusticeproject.org (visited Jan. 24, 2020) (assessing countries’ rule-of-law performance based on factors that include the extent to which they guarantee “fundamental rights” and civil and criminal justice, as well as constraints on government powers and absence of corruption).

¹⁷⁴ TAMANAHA, *supra* note 2, at 114.

¹⁷⁵ Waldron, *supra* note 8, at 20.

¹⁷⁶ *Id.* at 21 (quoting HERBERT L. A. HART, *THE CONCEPT OF LAW* 96 (2d ed. 1994) (1961)).

¹⁷⁷ Waldron, *supra* note 8, at 21-22 (critiquing JOSEPH RAZ, *PRACTICAL REASON AND NORMS* 132-36 (1990)).

¹⁷⁸ Waldron, *supra* note 8, at 22 (quoting RAZ, *supra* note 2, at 217).

¹⁷⁹ Waldron, *supra* note 8, at 22.

¹⁸⁰ Mark Ellis, *Toward a Common Ground Definition of the Rule of Law Incorporating*

So for now let's bypass Waldron's angst about the thinner concept of law, and take the attributes he deems essential to a legal system as ingredients in the rule of law.¹⁸¹ Intricately formal argument structures do seem to fairly uniquely characterize legal systems,¹⁸² but these can serve bad purposes as well as good. It is when these structures are made available to community members with equal access and fair treatment upon entry that they promise to improve the moral situation. Waldron's *The Concept and the Rule of Law* is remarkable for its language turning from an exclusive focus on the legal system's outputs to the ways in which the system accommodates communities' and individual litigants' participation. Legal theorists have paid insufficient attention to the conditions allowing for the inputs, which may seem a digression from the characteristics of lawmaking and legal decision-making familiar to law students and practitioners.

Waldron marshals procedural features necessary to the respectful treatment of litigants and others engaging in the legal system. Litigants are able to submit their arguments along with supporting evidence, and to have their presentations supervised by an impartial official who keeps things orderly and relevant to the issues. The parties have a right of reply and rebuttal toward convincing the adjudicator, and the tribunal is expected to consider all of the proffers and to give reasons for its ruling.¹⁸³ In addition to the qualities Waldron highlights, legal institutions also invite the public in to the courtroom to accomplish non-adversarial goals defined by power-conferring laws.¹⁸⁴ Citizens depend on the law to effect a name change, get a will administered, a divorce decreed, a mortgage registered, and so on, all of which tends toward respect for the dignity of the individuals.

However, even this richer view of the rule of law, which is conscientious about inputs and not solely the legal system's outputs, remains less than adequate. Although characteristics such as those just discussed guide and govern inputs into the legal system, they are themselves the system's outputs, in the form of legal and procedural rules or norms developed and adhered to by legal officials.¹⁸⁵ They apply to all participants equally and, like tort law principles, are blind to distinctions between eggshell and fortified craniums. In tort law, however, the eggshell skull rule is a substantive principle that aims at safeguarding the rights of weaker litigants who may have been more vulnerable than others to the harm inflicted.¹⁸⁶ When the rigors of the legal system's own mazes, preconceptions, abstractions, and presumptions are at issue, along with "the majestic equality of the laws, which forbid rich and poor alike to sleep under the bridges, to beg in the streets, and to

Substantive Principles of Justice, 72 U. PITT. L. REV. 191, 196 (2010) (quoting International Bar Association, *Rule of Law Resolution* (2005)).

¹⁸¹ Notably, four years after publishing *The Concept and the Rule of Law*, Waldron spoke of "the values that motivate the traditional formal/procedural aspects of the Rule of Law," and of such virtues as generality, prospectivity, and stability as "Rule-of-Law requirement[s]." WALDRON, *supra* note 144, at 50-52.

¹⁸² See Waldron, *supra* note 8, at 23.

¹⁸³ *Id.*

¹⁸⁴ See HART, *supra* note 17, at 26.

¹⁸⁵ E.g., N.Y. C.P.L.R. § 101 (2019 ed.) (prescribing that "the civil practice law and rules shall govern the procedure in civil judicial proceedings in all courts of the state and before all judges").

¹⁸⁶ See *Bushong v. Park*, 837 A.2d 49, 55 (D.C. Ct. App. 2003).

steal their bread,”¹⁸⁷ rule-of-law virtues do not tend to look the same to the socially, economically, and politically eggshell skulled as they do to the powerful.

Theorists view law’s public character, a rule-of-law principle, as providing everyone with the opportunity, at the least, for equal access to legal norms and legal data.¹⁸⁸ But the more powerful persons and entities have continual access and updates on laws, regulations, and legal developments that impact their planning and inform their expectations, whereas the less powerful routinely wing it and encounter legal information only at times of special need or personal crisis. Legal data is privatized or at least commodified, available to the few on prohibitively costly or otherwise restricted online platforms such as Lexis, Westlaw, and Pacer. Legal services are also often prohibitively costly, and attorneys may be sparsely available to serve the general public, notwithstanding codified *pro bono* requirements.¹⁸⁹ All of this engenders a good amount of *pro se* practice, but procedural rules that condition participants’ inputs frequently trip up not only lay litigants, but licensed counsel as well.¹⁹⁰

Disadvantages in the legal system arise not solely from lesser access to resources and expertise, or less sophisticated legal capabilities, but rather from biases held and discrimination practiced by the privileged and more powerful against groups singled out for disfavored treatment. The point is not that an overly broad concept of the rule of law ought to apply, so as to promiscuously target all manner of societal inequities.¹⁹¹ The point is rather that the principles most people ascribe to the rule of law depend for their vitality not solely on their inherent, *ex ante* virtues but on their actual *ex post* effects.¹⁹² Critical is whether law’s impacts liberate the community to participate robustly in the legal system, or

¹⁸⁷ ANATOLE FRANCE, *THE RED LILY* 75 (1917) (1894); see *Martin v. City of Boise*, 920 F.3d 584, 603 (9th Cir. 2019) (incorporating France’s insight into constitutional jurisprudence, ruling that “the Eighth Amendment’s prohibition on cruel and unusual punishment bars a city from prosecuting people criminally for sleeping outside on public property when those people have no home or other shelter to go to”).

¹⁸⁸ Waldron, *supra* note 8, at 26.

¹⁸⁹ See, e.g., *Amendments to Rules Regulating the Florida Bar – 1-3.1(a) and Rules of Judicial Administration – 2.065 (Legal Aid)*, 630 So.2d 501, 502 (Fla. 1993) (reiterating “that this Court, as the administrative head of the judicial branch, has the responsibility to ensure that access to the courts is provided for all segments of our society”).

¹⁹⁰ See, e.g., James S. Casebolt, *Procedures and Policies of the Colorado Court of Appeals*, 24 COLO. LAW. 2105, (1995) (reporting that, even for the one court in this one state in the fiscal year ending June 30, 1995, “664 cases were eventually dismissed because of procedural defects, settlement or lack of jurisdiction”); Alexandra Harwin, *Title VII Challenges to Employment Discrimination Against Minority Men with Criminal Records*, 14 BERKELEY J. AFR.-AM. L. & POL’Y 2, 12-13 (2012) (reporting that, in cases filed since the late 1980s, “[p]laintiffs lost almost every [such] case identified during this period, [and] the high loss rate reflected the fact that over fifty percent of the cases were brought pro se. Many pro se plaintiffs floundered because of procedural defect”); PAUL H. ROBINSON, *AN EMPIRICAL STUDY OF FEDERAL HABEAS CORPUS REVIEW OF STATE COURT JUDGMENTS* 13 (1979) (noting that 55% of petitions challenging state court convictions and sentences were dismissed because of procedural defects).

¹⁹¹ See RAZ, *supra* note 3, at 211.

¹⁹² For a different argument that the ideal of treating people with equal concern, in more strictly economic terms, is best suited by an *ex ante* approach, because this demonstrates “the right respect for individual responsibility,” see DWORKIN, *supra* note 84, at 358-60.

reinforce significant limitations on people’s actual capabilities to do so by masking inequalities and oppressions that reinforce the status quo.¹⁹³

Under a quite thin, formalist version of the rule of law, there will still be two sides of the coin. We have just noted some problems even with the formal ideal that laws be made publicly available. This gives the public the opportunity to know, understand, and follow the legal rules, and to plan accordingly. But if one group is significantly better able to know, follow, and plan, or if one is significantly hampered in doing so, is it inconceivable that this might impact, or cause fissures in, the moral, rule-of-law evaluation of the legal system?¹⁹⁴ And isn’t it conceivable that formal principles such as publicity, generality, stability, and prospectivity work injustice in certain cases, if inequality is the default?¹⁹⁵ Hence, “it is widely accepted that moral principles are defeasible when it comes to determining the overall moral status of an action”¹⁹⁶

Waldron would harness the rule of law’s formal and procedural virtues toward a conceptual slide “in a particular substantive direction.”¹⁹⁷ By this elegant move, for instance, the rule-of-law requirement of generality might point us in the direction of the just treatment alike of like cases, or the prospectivity requirement move the ball toward honoring human agency and interests in planning.¹⁹⁸ What Waldron is seeking to avoid is a bloated concept of the rule of law by which everyone competes to promote their own favorite value or political ideal.¹⁹⁹

Certainly, the rule of law cannot cater to every expectation, even if the expectation has been subjectively engendered by the law’s own pronouncements. But Waldron’s theory is too parsimonious in its derivative approach to the substantive dimension to the rule of law. Few people—whether lay individuals, legal practitioners, or theorists—would shrink from alleging deterioration of the rule of law were legal or government officials to declare that, while preserving all of the people’s formal and procedural rights, they no longer intended to follow

¹⁹³ Cf. AMARTYA SEN, RESOURCES, VALUES AND DEVELOPMENT 316 (1984) (arguing that “[t]he category of capabilities is the natural candidate for reflecting the idea of freedom to do”).

¹⁹⁴ *In re Daniels v. Department of Human Res.*, 953 P.2d 1, 12 n.4 (Nev. 1998) (Springer, C.J., dissenting) (quoting Lord Justice Sir James Mathew statement that, “[i]n England, Justice is open to all, like the Ritz”); cf. Robin West, *The Limits of Process*, in GETTING TO THE RULE OF LAW 32, 46 (James E. Fleming ed., 2011) (stating that “Waldron’s procedural Rule of Law does not protect plaintiffs in court, against, for example, the immunities of various actors – not only prosecutors and police officers but also church officials or spouses or parents or charities – from liability or against rules of evidence designed to protect various ‘privileges’ that drastically limit the liability of entire classes of defendants”).

¹⁹⁵ See Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 369 (1992) (claiming that, “despite law school indoctrination and belief in ‘the rule of law’ – abstract principles lead to legal results that harm blacks and perpetuate their inferior status”); cf. Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L. J. 1281, 1325 (1991) (arguing that, “[i]n societies governed by the rule of law, law is typically a status quo instrument; it does not usually guarantee rights that society is predicated on denying”).

¹⁹⁶ MAIKE ALBERTZART, MORAL PRINCIPLES 152 (2014).

¹⁹⁷ Waldron, *supra* note 144, at 51.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 47.

the constitution,²⁰⁰ or did not any longer deem themselves bound by substantive constitutional guarantees.²⁰¹ Nor would such concerns be insufficiently constrained in relation to the concept of the rule of law. Rights to freedom of speech or assembly, for instance, or adherence to the constitutionally mandated separation of powers, ultimately implicate the capability of the people to make their voices heard within the legal system, either directly or by means of representation in the lawmaking process.

At the same time, when appraising the legal system's moral standing, the community weighs whether officials are adhering to or frustrating core expectations about the rule of law that appear justified by constitutional provisions, law's previous outputs, or official pronouncements. The moral pressure citizens place on law reinforces legal officials' *prudential*, if not moral, considerations that help rein in their exercises of discretion or potential abuses of authority. Questions are not solely how far the court should go or how limited it should be, but also how far it can go or how constrained it must be.

Respect for mainly procedural and access-related expectations stemming from law's own publicly-appraised conduct or constitutional interpretations constrains the rush to include just any favored value in the rule-of-law formulation.²⁰² Ultimately, however, legal and political authority pays more attention to some appraisers than to others. As Stephen Holmes has put it: such authority "has no incentive to treat all groups equally, because it needs the cooperation of some groups more than the cooperation of others. In particular, it needs the cooperation of well-organized groups with assets that can be easily mobilized for war and other state purposes."²⁰³

Yet legal officials' prudential concerns should respond not only to "well-organized groups" and the pressures and assets they muster, but also to "the moral feelings of the time,"²⁰⁴ if cogently expressed in some particular direction.²⁰⁵ These expressions will likely be broken across constituent or party lines, and the directions far from univocal. Nevertheless, the moral dialectic characterizing a healthy rule-of-

²⁰⁰ See *International Refugee Assistance Project v. Trump*, 883 F.3d 233, 350 n.4 (4th Cir.) (Wynn, C.J., concurring) (stating that "[o]ur country adheres to the rule of law in preserving core constitutional protections"), *vacated on other grounds*, 138 S. Ct. 2710 (2018); *Dennis Mogambi Mong'are v Attorney General*, Civil Appeal 123 of 2012, at *33 (Nairobi, Kenya, Ct. App. 2014) (eKLR) (Odek, J.) (emphasizing that "[t]he rule of law requires that all judicial and administrative action must comply with the law including the Constitution").

²⁰¹ Although the constitution might be seen as primarily a procedural document or set of practices, it certainly reaches substantive guarantees as well. See HANS Kelsen, *GENERAL THEORY OF LAW & STATE* 265 (2005) (1949).

²⁰² See *generally* *Janus v. American Fed'n*, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting) (writing that "[t]o dismiss the overthrowing of . . . settled expectations as entailing no more than some 'adjustments' and 'unpleasant transition costs,' . . . is to trivialize *stare decisis*").

²⁰³ Holmes, *supra* note 3, at 21.

²⁰⁴ DICEY, *supra* notes 144, at 76; see *supra* text accompanying notes 165-66.

²⁰⁵ It is also possible that the larger community's evaluative expression may be incoherent at times. See Stephen Sedley, *How Laws Discriminate*, 21 LONDON REV. BOOKS (Apr. 1999) (noting, for example, that "public comprehension of sentencing has been so damaged by media presentation that the public simultaneously believe that judges sentence too leniently and, when asked what they would do, turn out to favour sentences markedly lighter than those the judges impose").

law evaluation, if not itself quashed, should constrain an authoritarian summoning of historical circumstances as an excuse to depart from, or to remain apart from, the rule-of-law values that are actually realizable during the period. And for better or for worse, public morality concerning the rule of law will often likely circle back to the legal community, finding its sources and influences about the legal system's standing in the things lawyers have to say about it all.²⁰⁶

CONCLUSION

Rousseau concludes his Notes to his *Second Discourse* by saying, “[t]he magistrate is the judge only of what is strictly law; the people are the true judge of morals”²⁰⁷ Although he idealizes the “people” in advancing his vision of equality, Rousseau’s dichotomy between legal and moral judging sits well with the distinction set down in this paper between the law and the rule of law. The legal system regulates a rich and broadly-defined array of transactions, its formal structures allowing people to argue their claims and adjudicators and legislators to determine the law. The people evaluate the law and the legal system in various ways, and when they express moral concern over such matters as the system’s formal and procedural integrity—including not only such issues as the generality, clarity, prospectivity, and stability of the laws, but also the system’s equal accessibility to, and fair and dignified treatment of, individuals and groups—then they are participating in the rule-of-law project.

The difference, however, between traditional concepts of the rule of law and the structuralist concept presented in this paper is that the latter situates the legal system in the context of the larger society, and implicates the actual capabilities of the people as an integral aspect of the rule-of-law project. The structuralist approach doesn’t abandon the “*ought implies can*” principle, but rather extends the domain of what is actually possible beyond the narrow confines of existing legal procedures. Conditions in society count as well and this renders the rule of law doctrine a potentially subversive evaluative vehicle,²⁰⁸ however much the *rule of law* slogan can be manipulated and perverted to affirm the status quo.²⁰⁹ Pashukanis identified some of the internal tension when he said that “the logic of the relations of dominance and subservience can only be partially accommodated within the system of juridical concepts.”²¹⁰

²⁰⁶ Cf. DWORKIN, *supra* note 173, at 26 (saying about “political” judicial decisions about rights, that “the public sense of illegitimacy would presumably disappear if it were recognized by lawyers and other officials that such decisions are consistent with democracy and recommended by an attractive conception of the rule of law”).

²⁰⁷ JEAN-JACQUES ROUSSEAU, A DISCOURSE ON INEQUALITY 172 (Maurice Cranston trans., 1984) (1755).

²⁰⁸ See generally Krygier, *supra* note 54, at 209 (addressing the “critical potential of the concept and the tradition” of the rule of law, supplying a language by which those in power “might be condemned”).

²⁰⁹ See, e.g., *supra* note 167, and accompanying text.

²¹⁰ PASHUKANIS, *supra* note 94, at 96. Applying the structuralist, moral-operator theory to the lingering Schmittian challenge to the concept of the rule of law is for another day. That challenge arises from Carl Schmitt’s decisionist claim that the sovereign is “he who decides on the exception,” and that therefore, during times of crisis, the general legal order

and decision-making based on discussion and dialogue will have to be jettisoned in favor of the executive's dictatorial exercise of personal judgment. CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 5 (George Schwab trans. 1985) (1922). Rare periods of emergency warranting minimally-constrained executive and administrative decision-making capabilities, or even an outright suspension of rule *by law* – a legally created black hole – might happen. See Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1134 (2009). But the rule-of-law project works to limit the Schmittian exception to the most narrowly-practiced and shortest-lived period that would be strictly necessary to address the emergency. See Dyzenhaus, *supra* note 2, at 2008-10. By the structuralist view, however, that project is shared by a broader constituency than that considered by theorists such as Dicey, who viewed judges as the main guardians of the rule of law, or Dyzenhaus, who allows for the further contributory role by Parliament or the executive. *Id.* at 2011; see Krygier, *supra* note 54, at 208 (opining that “[a] tradition in which the rule of law has been an animating value shared, always unevenly but still significantly, among initiates, lay people, and institutions is a good one to have”); cf. Bruce Ackerman, *The Emergency Constitution*, 113 YALE L. J. 1029, 1068 (2004) (speculating that prolonged exercise of emergency powers “may help provoke a popular movement in support of the constitution – or it may not”).

LAW AS A LANGUAGE, LAW AS AN ART: REFLECTIONS ON JAMES BOYD WHITE’S *KEEP LAW ALIVE*

H. Jefferson Powell*

ABSTRACT

Keep Law Alive, the latest book by law and literature scholar James Boyd White, is an important apologia for the traditional understanding and practice of law in the United States. Law, White argues, has served as a language in a sense closely parallel to what we mean by referring to English or Spanish as a language: law provides those fluent in it with the tools to describe the social world and to imagine its transformation, but without scripting what the speaker must say. White also envisions law as an art that evokes imagination, emotion and personal judgment, as well as the mind, and that is fundamentally oriented toward the realization of justice. Intellectual, social and political changes, however, threaten to displace law as a language and art with a view of law as an essentially empty rhetoric that cloaks the use of abstract and impersonal reasoning often borrowed from other disciplines. The survival of law depends on the willingness of those who speak it to continue its practice as an art that serves a humane vision of political life.

KEYWORDS

Law as Language, Law as an Art, Imagination, Form of Life, Justice

CONTENTS

I. INTRODUCTION	156
II. LAW AS A LANGUAGE.	158
III. LAW AS AN ART.	161
IV. “CAN THESE BONES LIVE?”	169

* Professor of Law, Duke University. This essay began as notes for a conference discussion of *Keep Law Alive* that did not take place because of the pandemic. I am deeply grateful to Linda R. Meyer for inviting me to be part of the panel, and to her, Sarah Higinbotham, and Jim White, for their comments and encouragement.

I. INTRODUCTION

For almost half a century, the idea of “law and literature” as a serious field of inquiry and debate has been closely linked with James Boyd White, whose pathbreaking book *The Legal Imagination* addressed questions of legal meaning by treating seriously the embodiment of law in texts that can be read as literary works.¹ Over that period, law and literature has become a recognized and even mainstream mode of American legal scholarship, a fact which makes it easy to forget that at the time White began writing, he and other scholars were engaged in a serious intellectual struggle over how to understand law and what it means to study law critically.² White was not proposing an elegant but essentially abstract theory; his call to attend to the literary and rhetorical aspects of the law was an existential challenge to understand, teach and practice law in a particular manner. And White’s literary understanding of law entailed a warning as well: he sought to persuade his readers to question or reject approaches to legal thought that would convert it into something resembling – or pretending to resemble – a value-free science.

In his recent book *Keep Law Alive*, White once again offers a vision of law, a vision that is continuous with that he first proposed long ago, but developed and presented with a clarity that comes only with long reflection on a governing idea. And it is, once again, a vision that is also an invitation and a warning. The title *Keep Law Alive* expresses vividly the urgency White wants us to feel about the task he is summoning American readers to undertake. “This is a moment,” perhaps the last moment, “before [law] changes or goes entirely, when we can see it, and hear it,

¹ See, e.g., Eliza S. Walker, “*Terms of Heart*”: *Judicial Style in Obergefell v. Hodges*, 61 B.C. L. REV. 1935, 1954 (2020) (“The genesis of the Law and Literature movement is commonly traced to the 1973 publication of *The Legal Imagination* by James Boyd White. White advocated for the inclusion of the ‘great books’ of literature in the law curriculum, and argued that the tools of literary theory and criticism had something to bear on the study and interpretation of legal texts.”); Menachem Mautner, *Three Approaches to Law and Culture*, 96 CORNELL L. REV. 839, 861 (2011) (identifying White as “the founding father of the ‘law and literature’ movement in American law”). By pointing out White’s central role in the emergence of law and literature as a serious field of study, I do not mean to ignore the important work of other scholars. See, e.g., Gary Minda, *Reflections*, 26 CARDOZO L. REV. 2397, 2398 (2005) (bringing together White and Richard Weisberg, whose *The Failure of the Word* appeared in 1984, as “the founding fathers” of the movement).

² See Minda, *Reflections*, *supra* note 1, at 2398 (discussing the origins of both law and literature and law and economics “in the intellectual ferment in the University of Chicago of the 1970s and 1980s”). Compare RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* (1st ed. 1988) (contrasting the realistic and scientific discipline of law and economics with romantic and aesthetic law and literature approaches such as White’s) with James Boyd White, *What Can A Lawyer Learn from Literature?*, 102 HARV. L. REV. 2014, 2015 (1989) (reviewing Posner, *Law and Literature*) (Posner “is committed to a mode of thought and expression, to a sense of language and of law—at its heart it is scientific and economic in character—that prevents him from seeing in the texts he studies the most important part of their meaning.”). It is fair to observe that Judge Posner’s views have not remained static. See POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* 6 (3d ed. 2009) (asserting that later editions rejected “the negative and even defensive character” of the book’s original version).

and think about it.”³ The context in which White is writing is a time when all that American law has been, or aspired to be, may disappear forever, and his book seeks to bring to full consciousness the practices and implicit commitments of that law at its best before those practices and commitments disappear. I fully share White’s alarm, and his belief that those of us who know something of the American tradition of law from the inside have a special responsibility to act. I know of no other work on law that as powerfully urges action in and for the law.

At the same time, I can imagine a skeptic, and not necessarily someone simply being captious, asking just what White, or I, can possibly mean. After all, it is hardly the case that public life in the United States lacks for arguments over law, invocations of law, threats of legal action, accusations and counter-accusations of law-breaking. Depending on the critic and the particular controversy in view, the institutions of law— courts, the profession, the police, even (occasionally) law teachers and law schools—are praised or damned with tedious regularity. But even the negative commentary generally assumes that law and the judiciary are highly significant factors in the life of the nation. Concern about the law isn’t limited, furthermore, to talking heads or opinion columnists: it is widely believed that significant numbers of voters care enough about who fills federal judgeships to choose a presidential candidate on that basis. Law in some sense is alive and well. So just what is this “law” that White warns us is under threat and may disappear, that we must take steps to keep alive?

The answer that *Keep Law Alive* provides cannot easily be summarized: law, as James Boyd White has long understood law, resists abstraction and oversimplification. But two aspects of the rich portrait he has given us particularly stand out to me, and in this essay I want to reflect on what it means to say that law is a language, and that law is an art.⁴ By talking about these descriptions of law separately I do not mean to suggest that White treats them as discrete and unrelated. Quite the opposite: *Keep Law Alive* talks about law as a language that can be used or reshaped through artistry or craftsmanship, and the art of law is a “language art” in the most literal sense, dependent on the lawyer-artist’s mastery of its words and grammar, and her ability to translate human experience into the law’s terms and the law’s concerns into ordinary language. If we keep the two ideas apart for the moment, however, I think we will be able to see more clearly what White means by each description of law, and indeed how they relate to one another.

³ JAMES BOYD WHITE, *KEEP LAW ALIVE* 160 (2019).

⁴ These are, I believe, two of the overarching and unifying themes in the book, but my selection of them for attention in this essay is not a suggestion that other aspects of *Keep Law Alive* are of less interest or importance: his powerful restatement of his long-held conviction that the law, like other admirable and complex human activities, lives through the never-ending negotiation of its internal tensions; his penetrating observations about the destructive effects of substituting economic for legal reasoning; his powerful essay on the American language of race; and his reading of Augustine’s *Confessions* and François Ost’s play *Antigone Voilée* as resources for learning to live responsibly in a time when law, democracy, and human decency are all under siege.

II. LAW AS A LANGUAGE.

Keep Law Alive is written throughout in a personal tone unusual in legal scholarship, but only to be expected from White. “Living speech,” speech that matters and can be taken seriously, brings the reader into contact with the mind and thought of the writer, because the latter has put himself into his work.⁵ White’s work is always living speech, and he explains his assertion that the law is a language by drawing the reader into his personal experience.

When I was an undergraduate I studied Greek, and I found myself asking questions like the following: ... What are the forms of thought and imagination that this language invites and makes possible? What, in short, can be said and done in this language that cannot be said and done in English? When I came to law school I felt that in learning law I was also learning a new language. It was like learning Greek, except that it was a language in which to think about and debate important contemporary questions of our shared existence. ... The questions I had for it were much the same as those I had about Greek.⁶

In the past, the point of law school was often said to be learning to *think* like a lawyer, an image that might suggest a cerebral and even individualistic accomplishment. White’s experience was that law school more closely resembled the process of coming to participate in a new linguistic *community*, a community that existed to serve the “shared existence” of Americans in general but to do so through “forms of thought and imagination” that cannot easily be said or acted on in the natural languages spoken by the Republic’s people.

As a description, a phenomenology, of what goes on in law school, the image of learning the law as learning a new language seems to me, as a former law student and long-time law teacher, entirely convincing. Even after many years, I recall how difficult it was at first simply to understand what was being said in an opinion or statute, while as a teacher of first-year law students I find it very useful to understand what I am trying to help them do in terms of becoming fluent in a new tongue: I have no direct access to how they are *thinking* about law, but in almost every class I listen to students and attempt to shape how they are *talking* the law. But the value of describing law as language is not limited to the way it captures the experience of legal education.

Earlier in the book, White explained what he means by calling the law a language in a less personal manner: legal knowledge, what one knows as a lawyer, “is a species of cultural competence, like learning a language ... for what a lawyer knows at the center is how to speak and write the language of the law, in actual situations in the world—how to use legal language to create legal meaning.”⁷ The common non-lawyer belief that “the law” consists of a lengthy list of rules, and that what distinguishes the lawyer from others is that she knows the list’s contents,

⁵ See JAMES BOYD WHITE, *LIVING SPEECH: RESISTING THE EMPIRE OF FORCE* (2008).

⁶ WHITE, *supra* note 3, at 82-83.

⁷ *Id.* at 7.

mistakenly treats the law as a closed system of directives that map onto the world in a straightforward manner. In reality, however, law is “an open system, like a language” that creates “a set of possibilities for original thought and expression” and “not only mak[es] creativity possible, but requir[es] it.”⁸ Learning a new language enables one to read hitherto inaccessible texts, to express oneself in ways not previously available, but the new language does not dictate what must be said. It expands the new speaker’s “set of possibilities” for effective learning, thought and expression, but the speaker must decide what to read and say. In the same way, law as a language makes it possible for the lawyer to address many disputes and issues in the community’s life in potentially effective ways, but it does not script for her how she deploys the law’s language.

Envisioning law as a language also enables us to see more clearly three other truths about law. First, law cannot be reduced to some other form of human discourse that can tell us what is “really” important or “really” the issue in some controversy. People with appointments on contemporary American law faculties are especially prone to think that law is a façade behind which the real subject matter lurks, waiting to be unveiled by the use of economics, say, or another social science, or some sort of policy study, or history, or a moral philosophy (whether John Locke, John Dewey, or John Rawls). Ideally, the methods and findings of the real discourse simply displace anything that is distinctively legal in the process of decision making.⁹ But languages don’t work that way: they require translation rather than substitution. “Neither economics nor sociology nor psychology nor any other field can address, let alone resolve, the distinctive legal questions about the identity and meaning of authoritative texts and about the degree of deference due the judgments of others. ... [I]n no case can the language of the external discipline substitute for that of the law; it must be translated into it.”¹⁰ Other fields of knowledge very often have critical roles to play in sound legal thought, but lawyers must translate what they have to contribute before the legal system can make effective use of the contributions. The *Iliad* can speak with power to fundamental questions about conflict, personal and social, but it must be translated by those with the ability to do so before Homer can play a role in Anglophone culture.

Because law can be seen as a language, second, becoming a good lawyer is not a matter of mastering an expansive set of facts about rules as the non-lawyer may imagine—as if one could become fluent in a natural language by memorizing a dictionary and a list of grammatical rules. We know someone truly knows a language when through practice she has become skillful in its use, able to understand nuance and complexity, and in turn to communicate with clarity and

⁸ *Id.* at 101.

⁹ Fortunately, judges and others who must actually make legal decisions seldom fall into this trap, with the partial exception of those judges who embrace originalism as constitutional dogma as opposed to one of several legitimate tools in constitutional analysis. And even originalist judges generally write opinions and reach decisions that fit within a more traditional common-law style of constitutional law. *See, e.g., Maryland v. Shatzer*, 559 U.S. 98 (2010) (Scalia, J., for the Court) (a fourteen-day break in custody terminates the presumption that a waiver of *Miranda* rights was not voluntary if it occurs after the suspect invokes the right to counsel).

¹⁰ WHITE, *supra* note 3, at 118 & n. 12.

beauty. Becoming fluent in the law demands a parallel process of practice at using the words and concepts of the law to answer what White calls “the distinctive legal questions.” And we know someone is a good lawyer when she can address, and give persuasive answers to, complicated questions about the meaning of the law’s authoritative texts and relationships among its institutions and speakers. Some law professors who believe in the law-as-façade mistake barely conceal a kind of contempt for colleagues whose expertise lies in the language of the law, but even the less arrogant are committed, by virtue of their understanding of law, to a view of legal education and legal research that relegates distinctively legal knowledge to a secondary role. Seeing law as a language makes the errors in this view obvious.

Understanding law as a language, third, enables us to see that what is problematic or wrong about a flawed legal doctrine or decision is often rooted in the limitations of the linguistic tools lawyers employ. A natural language enables its speakers to see and think and express ideas not available to non-speakers, but by the same token it sets limits to their capacities of thought and imagination. And any language can be used in obfuscating or degrading ways. White illustrates these facts in a powerful chapter on “What’s Wrong with Our Talk about Race?” The answer he gives in the end to this question is that “our”—the American, not just the legal—“language of race works like a language of war ... since its origins were as a language of war, a language that would justify the war of whites against blacks—their seizure, sale, and total subjugation, by torture and murder if necessary.”¹¹ Americans cannot speak well about issues involving race because the very language we use, even if we intend to reject racism altogether, has been shaped by the moral horror of chattel slavery. The American language of law has not escaped this profound warping: most of our legal discussion of race employs terms and concepts so abstract that they obscure the unique place in American life played by the enslavement of African Americans and its aftermath of white Americans’ racism toward black Americans.¹² The result is that legal decisions tend to transform questions about “the power of the state to address our gravest and deepest social evil” into calculations about the relative costs and benefits of programs that existing constitutional doctrine does not even allow Americans to discuss in terms of that evil.¹³

The vision of law as a language in *Keep Law Alive* offers a deeply traditional, and to me entirely persuasive, alternative to the strong tendencies in contemporary American public and professional life to treat law as reducible to a closed system of pre-determined answers, or that view law as the packaging to be removed from

¹¹ *Id.* at 76.

¹² “I believe that for most white Americans ‘race’ really refers to the line between white and black.” *Id.* at 54. White’s argument that the problem of racism directed toward African Americans is paradigmatic, and in certain important respects unique, fully acknowledges that “the other [American] forms of racial abuse and hatred are unique, too, [since] each group has its own characteristic experiences of abuse and contempt and injury.” *Id.* at 57. This is no mere throwaway line: throughout, White successfully attempts to explain the personal as well as intellectual bases for his viewpoint in a fashion that recognizes the possibility of disagreement. The language of the chapter on race is a wonderful example of “living speech.”

¹³ *Id.* at 62. The Supreme Court’s rejection of “societal discrimination” (itself an abstract label for a concrete social reality) as a legitimating basis for addressing racism goes back to the controlling opinion in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

the extra-legal substance that counts, or that dismiss attention to distinctively legal questions as a political smokescreen or, at best, an intellectually uninteresting distraction that the cognoscenti should ignore. Keeping law alive will require Americans to regain or reassert a robust confidence in law as a distinctive and meaningful language that cannot be replaced without profound injury to the American community's ability to pursue its highest, humane ideals.

III. LAW AS AN ART.

Keep Law Alive tells us that the young Jim White found himself, first as a student of Greek and later as a student of law, asking various questions about the language he was learning. One that the book specifically mentions concerned the ways in which this new language would broaden the range of ideas and actions open to him: "What are the forms of thought and imagination that this language invites and makes possible?" The answer the Jim White of today gives us is that learning the language of law invites and enables the student of law to practice an art, and this vision of law as an art is central to *Keep Law Alive*.¹⁴ But just what does it mean to see law as an art rather than, say, a science or a form of mathematical or economic calculus?

To some degree, the assertion that law is an art works to show what law is *not* according to White: "I have been resisting an image of laws as rules and policy, but behind those things there is a deeper vision to resist: of law as abstract, mechanical, impersonal, essentially bureaucratic in nature, narrowing rather than broadening the human capacity for experience, understanding, and empathy."¹⁵ Such a vision of law as "anti-art" strives to eliminate the role of personal evaluation and traditional legal argument in reaching legal conclusions in favor of an allegedly objective set of tools borrowed from some other discipline, often economics (or in constitutional law, history), that can turn legal analysis into a science delivering incontestable "results" rather than judgments that are necessarily open to discussion and challenge. By arguing that law is an art, White is asserting that law cannot be the exercise in algorithmic decision making, or value-neutral policy analysis, or plain-or-original-meaning textualism that so many law professors (and unfortunately some judges) apparently long for.¹⁶ The image of law as an art identifies law as fundamentally incompatible with any of these fashionable attempts to deny the role of the individual and of his or her judgment in legal argument and decision.

More often, however, White talks about what follows from recognizing law as an art in affirmative terms, and specifically identifies the ways in which the knowledge and practice of law broadens human capacity and human understanding,

¹⁴ The centrality of this image of law is clear from the fact that three of the six chapter titles refer to it.

¹⁵ *Id.* at 103.

¹⁶ In his seminal essay on "Law as an Art," the great constitutional lawyer Charles L. Black, Jr., long ago warned against "the present trend, in some academic circles at least, to discard altogether the traditional techniques of law, and simply to drive toward what is conceived as the right result [and] pass[] over the almost infinitely rich resources of traditional law ... in favor of comparatively thin and incomplete systems of thought." BLACK, *THE HUMANE IMAGINATION* 31-32 (1986).

individually and interpersonally. Except when the term is bandied about as an empty compliment, to call a human activity an *art* is to imply that its practitioners are personally involved in the creation or performance of the art, and that the art calls on its recipients to participate meaningfully in what the artist has fashioned.

My own sense is that what law calls for in those who practice it, or teach it, or live with it in other ways, is at heart an art, an art of language and composition. The law in this living sense is ... an activity of the mind and imagination—a form of life—that has the value of justice at its heart.

[The] kind of knowledge [law] requires and makes possible ... is knowledge not just of rules or concepts, but of an art that is essentially literary and compositional in nature.¹⁷

I will return to White's observation about justice later. For now, let us focus on three other features of law as an art to which these passages point.

First, law is an art of language. That might seem obvious or banal—after all, no one denies that the law uses words—but it is clear here and elsewhere that White is not offering us a truism. Law, he tells us, is an art of language that involves at its heart *composition*, the creation of new texts (whether written or oral), and not just the deciphering of an authoritative oracle.¹⁸ Law as an art is therefore “essentially literary,” and what good lawyers are engaged in is more like writing (or reading) a poem than solving an equation. For that reason, the appropriate mode of evaluation for legal texts such as judicial opinions is “by judging [the writers’] work as performances of an art” rather than by our “political agreement or disagreement with the outcome.”¹⁹ And if law is a *literary* art, then its performances—at least when they are skillful—will be constituted, of necessity, by the interplay of tradition and creativity. A lawyer who tried to ignore “the inheritance of thought and experience expressed in what we call the materials of law— prior cases and statutes, existing understandings and expectations” would not be engaged in law at all.²⁰ But a lawyer who thinks that those materials supply all the answers to all possible questions is deluding himself, or in the grip of one of the “abstract, mechanical, impersonal” accounts of law that attempt to reduce law to rules or extra-legal policies.

That law is an art entails, second, that it is far broader than the austere ratiocination some anti-art visions of law praise. Both the legal speaker and the lawyers who answer or evaluate her work must call on not only the logical and technical skills of the mind, but the creative and intuitive faculties of the imagination.

¹⁷ *Id.* at xiv, 3.

¹⁸ Of course law involves the interpretation of authoritative legal texts, which are sometimes Delphic in meaning, as well as the translation into legal terms of non-lawyers' ordinary English as well as the findings of other disciplines. But even these ostensibly hermeneutical rather than creative tasks are “an activity, that requires its own complex art.” *Id.* at 118, n. 12.

¹⁹ *Id.* at 102, n. 17. On the parallels between the work of lawyers and judges and that of poets, see *id.* at 100-01 & n. 15, and 102 n. 18.

²⁰ *Id.* at 3.

Indeed, for all the traditional talk about thinking like a lawyer, law being a learned profession, and so on, "at its deepest, legal knowledge is imaginative in character."²¹ What lawyers *know* is not so much facts of any kind (including the facts of what one can find in the statute books or case reports) but how to identify and construct "patterns of thought and imagination" that connect the legal and historical past to the facts of today or tomorrow that demand the lawyer's attention.²² "[T]he life of the law is full of opportunities and occasions ... for imagination, for invention, for creation in language, or what I call 'writing.'"²³

Keep Law Alive's chapter on "Reading (and Writing) a Judicial Opinion" provides an extended example of how seeing law as an art that engages the imagination as well as the intellect can deepen our understanding of the relationship between law and the society it serves and to some degree constitutes. The chapter focuses on Justice Oliver Wendell Holmes's celebrated opinions in the 1919 *Schenck* and *Abrams* decisions, opinions that are universally recognized as the inauguration of serious Supreme Court thought about the first amendment's protection of freedom of speech. Much of the writing on those much-written-about opinions has taken one of two tacks. Holmes's switch from rejecting the first amendment claim in *Schenck* in the spring to accepting it in his *Abrams* dissent in the fall has always been intriguing, and scholars have often tried to work out just what in Holmes's thinking changed and why. Others have been more concerned with the conceptual content of Holmes's enigmatic but powerful discussion of free speech's importance in *Abrams*. White, instead, invites us to see how Holmes the artist of law was "almost without knowing it [beginning in the spring in *Schenck*] to provide material for thought about" the first amendment, materials that he then used in the fall in *Abrams* to construct "a way to give meaning to the text by imagining the world in which it occurs, including himself and others within it, in a new and coherent way."²⁴

What is of critical importance and lasting significance about the *Abrams* dissent is not its doctrinal content, which in any event is more hinted at than developed, but the shift in perspective that Holmes achieved and then provided his readers. Rather than leaving the free speech clause an almost empty or formal rule, "Holmes found a way to imagine the world in such a way as to give the first amendment meaning and scope ... a way of imagining that is not ideological or mechanical in character." The Constitution broadly protects speech, even speech "that we loathe and believe to be fraught with death,"²⁵ because doing so makes sense in the world that Holmes has (in one way) called into being, but also (in another way) constructed out of the materials and tools the American legal tradition provided him.

For his imagined universe is populated with people who are striving to understand and speak, disagreeing to the point of war, claiming power, asserting truth, and he says that this activity, in which he himself is engaged, in this very paragraph and throughout his work as a Justice, is one that must be in its nature local and

²¹ *Id.* at 40.

²² *Id.* at 6.

²³ *Id.* at 42.

²⁴ *Id.* at 28, 36.

²⁵ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

provisional. Just when we are most sure we are right, we must recognize that we may be wrong; and not only about matters of truth, as he puts it, but about matters of justice as well.²⁶

Almost at the end of *Keep Law Alive*, White returns to Holmes, and expands on how he understands the role of imagination in Holmes's 1919 first amendment opinions.

This is a crucial moment in the development of law, as it would be in the making of any composition ... from history to philosophy to music or painting; the moment, that is, when a person who is engaged deeply and sincerely, and with an open mind, in a practice of thought and imagination finds unconscious resources within the self that produce a new direction, a change in the way the enterprise is imagined. Holmes does that, not by a kind of leap, but by building on his tradition, which he keeps alive as he remakes it.²⁷

Law at its best, law practiced as an art as Holmes wrote his opinions in *Schenck* and *Abrams*, is like other arts both a profoundly individual activity and one that always takes place within a tradition and a history that define the art and its limits, but always does so provisionally, open to moments, performances, that transform the art and the artists.

In light of White's insistence that law as an art engages more than just the calculating mind, the third aspect of his vision of law is unsurprising. Law as an art is a "form of life,"²⁸ and to practice law in that manner is to make a deeply personal commitment. One of the most striking aspects of *Keep Law Alive* is the unguarded and self-revealing way in which White writes about law and his relationship to law.

What I hope comes through more than anything else is the love that I have for the law that I am trying to make real for my reader. It has been a blessing to be able spend my life doing it.

²⁶ This passage, and the quotation from White before the phrase from *Abrams*, are from *Keep Law Alive*, at 38.

²⁷ *Id.* at 157-58. Commentators on the Holmes opinions regularly miss the foundations in legal tradition on which Holmes was building. The error is easy to make if one is thinking about freedom of speech in overly conceptual terms – the first amendment had played almost no role in Supreme Court decision making before *Schenck*, and a scholar looking for judicial discussion couched in those terms will likely conclude that the *Abrams* dissent was a bolt out of the blue, or a reaction to a district court opinion by Learned Hand or to academic commentary. See *id.* at 36, n. 27 (briefly discussing these issues). By thinking about law as an art, and thus expecting that Holmes's opinions will rely both on tradition and on his creative imagination, White is able to explain the process by which Holmes transformed features of the criminal law of attempt and conspiracy into the foundations for a constitutional law of free speech.

²⁸ I don't understand White to be putting great weight on the semi-technical sense "form of life" often bears in post-Wittgenstein philosophy, but instead primarily to mean by it something like "moral, emotional, and spiritual mode of living a human life." But Wittgenstein's usage and what I think White has chiefly in view are not incompatible.

This book is driven by love of something that seems now to be under threat. I do not want to lose it.²⁹

Legal writing often aspires to an impersonal and even Olympian tone,³⁰ but *Keep Law Alive* consistently adopts the opposite approach. No reader can miss White's passionate concern for a practice and tradition that has shaped his individual experience and identity—or White's desire to communicate his passion and commitment.³¹ (Note White's reference to "my reader." The book, furthermore, frequently addresses his reader directly, as an individual whom White seeks to inspire as well as inform.) Nor does White distance himself as a person from what he writes about controversial or disturbing topics, most strikingly in his chapter on "What's Wrong with Our Talk about Race?" "To put it bluntly, I think that we whites are as a general matter much more racist in our attitudes towards blacks than towards any other group, and that this shows up in our behavior and in the social structures we fashion and support."³²

To speak about loving the law is to invite condescension from those uncomfortable with or dismissive of emotive and self-involving language; to write candidly, as a white American, about white American racism is to risk condemnation from more than one perspective. That Jim White does not hesitate to do so, but in fact repeatedly invites the reader to respond to the person he is showing himself to be,³³ might seem either naïve or courageous.³⁴ But I think White would respond he could not truly write *Keep Law Alive* in any other way. Because his assertion that law is an art is not just as a vague compliment but a serious and substantive description of law as he understands law, White was obliged to make his own involvement—moral and emotional as well as strictly intellectual—clear. There is simply no other honest way to speak about law as an art.

At this point, we should turn to the facet of law as an art that I deferred earlier, White's claim that the art of law that is "an activity of the mind and imagination—a

²⁹ *Id.* at xix, 160 (from, respectively, the Foreword and the Afterword).

³⁰ I do not mean to imply that this is always a bad thing. Part of the persuasiveness of a brief, for example, sometimes lies in the way an impersonal tone lends weight to substantive arguments. The adoption of a style that distances the writer from his or her words, furthermore, is logical if one views law as what I've called "anti-art," as the opposite of what White is commending. But of course neither White nor I think that view is correct.

³¹ *See id.* at xiv ("I am speaking about law as I learned it and practiced it and taught it."). There are many similar acknowledgements throughout *Keep Law Alive*.

³² *Id.* at 56-57.

³³ Each chapter ends with a series of questions and suggestions for reflection that are written as direct addresses from White to the individual reader. At the end of the chapter on the American language of race, the questions include "What is your judgment about what I do? If the heart of law lies in a set of responsibilities and practices, how does what I say here define them? ... What character and identify do you see in me, as the writer of this chapter." *Id.* at 78-79.

³⁴ My friend and doctoral supervisor, the theologian Stanley Hauerwas, is fond of saying that to speak of a tenured professor displaying courage in something he writes is an oxymoron. I take his point, but at the least it takes a certain degree of fortitude for someone to associate his personal identity with viewpoints that will predictably excite ridicule or invective. Not the least of the many admirable qualities *Keep Law Alive* embodies is White's willingness to take that risk.

form of life—that has the value of justice at its heart.”³⁵ This claim is central to White’s understanding of law as an art, as he makes clear: “the main goal of law is ... justice ... Justice in fact is part of the definition of law;” the legal tradition is “a continuing and collective effort to imagine justice into reality;” every judicial decision “performs an answer to the question: ‘What are our institutions of justice? How well—how justly—do they work?’”³⁶ The obvious problem, as White fully recognizes, is that American society is shot through with disagreement over fundamental issues of justice that we have no apparent means of resolving. “There is no arbiter, no one who can tell us that this is truly just, that truly unjust. We are debating competing conceptions of social justice.”³⁷ How then can American law have justice as its goal or end, when it is unimaginable that the American political community will ever agree on which legal outcomes are just?

I do not think White ever fully answers this last question, although as I explain below I think this is a strength, not a weakness or oversight in his book. But first let us see what partial answers *Keep Law Alive* provides. There are, first, two explanations of the statement “the end of American law is justice” that I think White clearly rejects. He is not offering or assuming a view of “justice” that would limit the concept to a thin notion of purely procedural regularity or fairness.³⁸ Still less is White the moral relativist that Justice Holmes is sometimes accused of being. Americans disagree over issues of justice “as a social fact,” but that doesn’t mean there are no right answers to such questions. For White, ethical judgments are debatable claims about moral reality rather than incorrigible assertions of private preference; as he puts it in discussing Holmes’s *Abrams* dissent, “we may be *wrong*; and not only about matters of truth, as [Holmes] puts it, but about matters of justice as well.”³⁹

And here, I think, we begin to see part of what it means to say that justice is at the heart of law. One of the questions the young Jim White asked himself as he was learning the language of law is “what will it mean for me to give myself the mind and character of a lawyer, of one who speaks this language?”⁴⁰ There is no mystery about the assumption here that language shapes character; to give a painful example, as White shows in his powerful chapter on the American language of race, the ways in which white Americans speak about black Americans, and about race

³⁵ *Id.* at xiv. The image of justice as the heart of law recurs in the same words at 81.

³⁶ *Id.* at 5-6, 43, 83.

³⁷ *Id.* at 104.

³⁸ That White’s understanding of justice sees it as reaching substantive issues rather than merely procedural due process is unmistakable throughout *Keep Law Alive*. Two particularly clear illustrations are White’s discussion of racial justice which ends with the admission that “[t]here is no easy way to imagine ourselves out of the world of deep and violent injustice we have created,” *id.* at 77, and his analysis of the internal tensions (between substance and procedure, the particular and the general, law and justice, past and present) a judge must confront and work with in coming to a just and lawful decision, *id.* at 92-97.

³⁹ *Id.* at 103, 38 (emphasis added). To borrow a bit of jargon from the philosophers, I think Holmes was a nonfoundationalist but not a relativist in ethics; the impression that he was the latter comes in large measure, I think, from Holmes’s tendency at times to state his views in deliberately provocative language. But the correct reading of Holmes as *moraliste* (or, perhaps, *moraliste manqué!*) is a question for another essay.

⁴⁰ *Id.* at 83.

more generally, distort our perceptions, our emotions, and our moral characters. The same is true about misogynistic and xenophobic habits of speech. But not all languages are morally objectionable or problematic,⁴¹ and White believes that law as a language and an art can shape the mind and character in deeply positive ways.

Consider what a skilled litigator must do in building the case for her client. She will argue that the outcome in her client's favor is "required by the law," and seek to substantiate that claim by offering the strongest possible technical arguments from the relevant statutes and precedents. She will also argue that a decision for her client is "fundamentally just. An argument that ... admitted that the result was unjust, would be profoundly incomplete."⁴² But she cannot advance her moral claim by talking about "justice" or "fairness" abstractly; the claim must take account of the institutional context in which legal decisions are made. "We [lawyers] recognize that power and authority are already distributed among many actors, present and past, each of whom has his or her own zone of authority. If made within their jurisdiction, their judgments are entitled to some degree of respect even if we disagree with them—the precise degree of respect being an important question of law and justice."⁴³ And she will craft her claims about law and justice on the assumption that the judge will take them seriously, and evaluate their cogency fairly and intelligently rather than treat them as window-dressing for a political or ideological position: "we talk to the judge not as the bundle of prejudices and beliefs and commitments and character traits that form part of his or her character, but as an ideal judge, one who is always seeking to do justice under the law."⁴⁴

Of course, "[o]ften enough lawyers or judges are thoughtless, crude, unimaginative, inarticulate, and dull."⁴⁵ White is portraying an aspirational ideal, but it is an ideal that can shape, when all goes as it should, the words and actions of the imperfect lawyers and judges who actually make up the legal system. Precisely because she wants to be effective in a practical sense, an able litigator must display respect and even a kind of humility, not only toward the judge in the case, but as well toward the judges, legislators, and others whose decisions and actions make up the legal materials relevant to the case.⁴⁶ In doing so, she is acting to that extent as a just person herself—"Justice requires us to find open and respectful ways of imagining ourselves and each other"⁴⁷—and contributing to the culture of respect

⁴¹ About the language of race, White writes of "the simultaneous moral impossibility of racial thought and its unavoidability" at this point in American history. *Id.* at 77. In fact, he argues, one of the ways in which American talk about race goes awry is through abstraction and generalization. Americans will come to the honest reckoning with racial injustice that is necessary if we are finally to address it only by speaking more directly. *See generally id.* at 61-62.

⁴² *Id.* at 95-96.

⁴³ *Id.* at 104.

⁴⁴ *Id.* at 96, n. 6.

⁴⁵ *Id.* at 101. White goes on immediately to add that "such things are sometimes true of us all. But not always, in every way."

⁴⁶ On this, see as well White's insightful discussion of the ways in which opposing counsel are "obviously opposed to each other [while they] are also in fact cooperating" when they play their parts properly. *Id.* at 89-90.

⁴⁷ *Id.* at 41-42.

for all that is central to equal justice under law.⁴⁸ And she must assume that it is meaningful to talk about “justice” in a context where there is no preordained agreement about debatable moral issues, and that the ultimate decision will reflect “open-mindedness and intellectual honesty—the core of judicial ethics.”⁴⁹ The art of law thus demands that its participants (including judges) embody virtues of good faith and respect for others, and employ the language of justice in explaining their arguments and decisions.⁵⁰

The answer to the young Jim White’s question about what learning to speak the law would do to him as a person is that law’s language commits one to speaking about, and therefore thinking about, justice. Law’s art, furthermore, is “a way of being a grown-up: learning to live in a world in which people think differently from each other and to respect the judgments of those with whom we disagree.”⁵¹ While no lawyer grows completely into the just person the law presupposes, and some do not try at all, the practice of law and the pursuit of justice overlap. And in that overlap we see a justification, in part, for White’s claim that justice lies at the heart of law. But only in part. A “real aspiration to achieve justice”⁵² is a highly admirable personality trait, but justice is more broadly the central characteristic of a decent and humane society: “nothing is more important to a healthy community than justice.”⁵³ But one has only to think about the long history of legal discrimination against African Americans to wonder if White is right to say that the goal of American law as an art is justice.

To this concern, I think White does not, and indeed by his own understanding of law and justice *cannot* give a complete answer. In some context other than law, it is possible to talk about justice *simpliciter*, as if we were “writing on a clean slate.”⁵⁴ Of course no person can in fact discuss justice wholly free of his or her cultural, historical, philosophical and religious context, but White’s image makes the point vividly that a moral philosopher, say, or indeed anyone thinking about his or her personal views on justice, is under no *a priori* obligation to take the views of others into account. In contrast, the lawyer is *always* under such an obligation, if she is practicing the art of law. As we saw above, White stresses the fact that “[b]oth lawyer and judge constantly turn to other texts, composed by other persons, who have made judgments which they are bound to respect.”⁵⁵ This dramatically shifts the basis on which one can speak about justice or identify what is just and unjust.

“[I]n the world of theory,” the world in which we can speak about justice in itself or in the abstract, “the rightness of [a particular] result depends upon its congruence with the theory,” and if our particular theory permits, we may

⁴⁸ See *id.* at 157 (lawyers’ respect for “the authority of legal institutions, and public and private actors within them [is] a form of respect that can do much to ensure that we also respect the dignity of those to whom law speaks”); *id.* at 130 (“one thing we mean by justice is a fundamental equality before the law”).

⁴⁹ *Id.* at 117.

⁵⁰ See at 95 (“in our system the lawyer and judge alike must ask not only ‘What does the law require?’ but ‘What does justice require?’”).

⁵¹ *Id.* at 90.

⁵² *Id.* at 23.

⁵³ *Id.* at 83.

⁵⁴ *Id.* at 104.

⁵⁵ *Id.* at 121.

be able to give a complete account of what is just and unjust.⁵⁶ But “the world constructed by the law is one that distributes the power to decide such questions [of institutional authority and substantive justice] differentially to various public and private agents,” and it is not possible, even in principle, to resolve in advance the tensions and potential conflicts within those legitimate sources of legal authority that will bear on the specific questions law may have to address. A moral theory can be authoritarian and absolute since it rests on “the commitments of those who are persuaded by it,” and one of those commitments may involve rejecting other theories or viewpoints as simply wrong and unreasonable. In contrast, “what the law teaches us is that we live in a world in which different people can have different, decent, and reasonable views [and] that we need a way to respect these views and judge among them fairly, that is, openly and honestly.”⁵⁷ Because the law’s goal is justice within that world, any specification of what justice requires must recognize that it is provisional and open to further consideration and debate.

IV. “CAN THESE BONES LIVE?”

Keep Law Alive is not an optimistic book. As I noted at the beginning of this essay, Jim White speaks of the present time as a moment when it is still possible to “see ... and hear ... and think about” American law, “perhaps more clearly than we could before the threat [to law as language and art] occurred.” But in the final sentence in the Afterword, White describes his “aim in this book” as giving “to the law, and to the culture of which it is a part, a voice that might be heard in a different world.”⁵⁸ Much of his book seems to accept that this different world, a world without law in White’s sense, already has the upper hand in American public life, including the life of American legal institutions.⁵⁹

White gives ample reasons for pessimism about law’s fate,⁶⁰ but I think *Keep Law Alive* is also a deeply hopeful book.⁶¹ Because law is a language, it will live as long as there is a community that speaks it. Because the art of law is a form of life, not simply a set of governmental practices, we can “keep a version of law alive as a way of approaching life itself, even if in its institutional forms it withers

⁵⁶ *Id.*

⁵⁷ *Id.* at 121-22.

⁵⁸ *Id.* at 160.

⁵⁹ For me, the most poignant expression of this suspicion or fear that law has already died is White’s comment about the law professoriate’s “almost total silence about law teaching. When I went into law teaching it was with great doubt about whether I would ever write anything, but with great confidence that the teaching of law was itself an activity—an art with a meaning – that could occupy a mind and justify a life. I wonder if anyone thinks that today.” *Id.* at 118. White also expresses his sense that contemporary Supreme Court opinions often seem to rest on a “kind of formulaic jurisprudence [that] does not expose the true reasons and thinking of the Court” and so cannot “be read with the kind of care and attention we are used to giving texts in the law.” *Id.* at 116. *See also id.* at 116 n. 9 (“the kind of criticism of judicial opinions, positive and negative, that I and many others have engaged in over the years is no longer possible”).

⁶⁰ See especially chapter x, “LAW, ECONOMICS, AND TORTURE.”

⁶¹ Hope and optimism are not synonyms.

away.”⁶² This does not mean that Americans who know and love the law can simply retreat into private conventicles of the like-minded: “The law is interwoven in the world in an inescapable way.”⁶³ But the difficulty, in this moment, in seeing how Americans are to maintain or restore the law’s vital role in public life is the same difficulty in principle that law has confronted, and successfully overcome, at other junctures in the past. As Holmes did in his day, in order to give meaning and life to the first amendment, so we too in our day, must “imagin[e] the world in which [law] occurs ... in a new and coherent way” in order to keep law alive and meaningful.⁶⁴ That will be no easy task, but there is reason to hope that it is within the “capacity of the imagination and the heart” that law evokes and nourishes.⁶⁵ Like the ancient prophet, we may not yet see how dry bones are to live again, but as he also recognized, we can look for the vision.⁶⁶

⁶² *Id.* at 153.

⁶³ *Id.* at 152. White continues (emphasis added): “If we *simply* continue to practice and teach as we have been taught we may find ourselves increasingly disconnected from the larger culture, irrelevant to other people, and unable to do the very thing we want to do, to keep law alive.” A few sentences earlier, White wrote that the “effort to keep law alive” demands that we “continue to practice and teach” law “in the traditional way.” His point about the danger of disconnection is that we must seek as well new ways to engage law with the world.

⁶⁴ *Id.* at 36.

⁶⁵ *Id.* at 153.

⁶⁶ *See Ezekiel 37:1-4* (King James Version): “The hand of the LORD was upon me, and carried me out in the spirit of the LORD, and set me down in the midst of the valley which was full of bones, and caused me to pass by them round about: and, behold, there were very many in the open valley; and, lo, they were very dry. And he said unto me, Son of man, can these bones live? And I answered, O Lord GOD, thou knowest. Again he said unto me, Prophesy upon these bones, and say unto them, O ye dry bones, hear the word of the LORD.”

JUSTICE HOLMES AND THE QUESTION OF RACE

Thomas Halper*

ABSTRACT

Notwithstanding his youthful dalliance with abolitionism, Holmes' votes and opinions in Supreme Court cases involving race reveal a stubborn indifference to discrimination on a range of issues. Whether this reflects a cold personal aloofness, a preoccupation with life as struggle, a commitment to judicial restraint or merely an insensitivity pervading the enlightened opinion of the day, his performance will continue to stain his reputation.

KEYWORDS

Holmes, Race, Segregation, Giles v. Harris

CONTENTS

I. INTRODUCTION	172
II. VOTING RIGHTS	176
III. PEONAGE CASES	180
IV. SEGREGATED EDUCATION	184
V. TRANSPORTATION SEGREGATION	185
VI. RESIDENTIAL SEGREGATION	188
VII. JURY EXCLUSION	190
VIII. LYNCHING	192
IX. MISCELLANEOUS	193
X. CONCLUSIONS.....	194

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I. INTRODUCTION

Born into a life of intellectual and social privilege, where “the flowering of New England was almost a family affair,”¹ Oliver Wendell Holmes, Jr., as a young man was a bit of an idealist. As the nation was careening toward what William H. Seward was famously to call an “irrepressible conflict” between slavery and freedom,² Bostonians in the Holmes’ circle immersed themselves in the question of race. Holmes’ mother, normally reserved, was emphatic in denouncing slavery as evil and in lauding its antidote, abolitionism. His father, on the other hand, a renowned essayist, dean of the Harvard Medical School, and one of the nation’s most prominent public intellectuals, disapproved of slavery but regarded it as a “physical act” to be accepted “to the minimum consistent with our existence as a united people.”³ Some members of his monthly Saturday Club, however, like Hawthorne⁴ and especially Emerson,⁵ were committed abolitionists, and bright, young Holmes, who often mixed with his elders,⁶ perhaps also felt their influence.

Years later, Holmes recalled that “in my day I was a pretty convinced abolitionist and was one of a little band intended to see [abolitionist] Wendell Phillips through if there was a row after the meeting of the Anti-Slavery Society just before the war.”⁷ His closest friend at Harvard, Penrose Hallowell, whom he called “the most generously gallant spirit [and] the greatest soul I ever knew,”⁸ had volunteered for the underground railroad.⁹ Holmes could easily have avoided service in the Civil War with a \$300 payment his family could have afforded without difficulty, but, encouraged by his mother, he withdrew from Harvard and enlisted.¹⁰

¹ Philip Kurland, *Portrait of a Justice as a Young Man*, 25 U. CHI. L. REV. 206, 208 (1957).

² WILLIAM H. SEWARD, THE IRREPRESSIBLE CONFLICT: A SPEECH BY WILLIAM HENRY SEWARD DELIVERED AT ROCHESTER, MONDAY OCTOBER 25, 1858 (1860).

³ OLIVER WENDELL HOLMES, Sr., *Oration: The Pilgrims of Plymouth*, in 2 NEW ENG. SOC. ORATIONS: ADDRESSES, SERMONS AND POEMS DELIVERED BEFORE THE NEW ENG. SOC. IN THE CITY OF N.Y., 1820-1885 297, 296 (Cephas & Evelyn Warner Brainerd eds., 1901). Holmes, Sr. considered blacks “the half-filled outlines of humanity.” *Id.* at 298.

⁴ Celebrating the outbreak of the Civil War, Hawthorne wrote that “it is delightful to share in the heroic sentiment of the time.” HORATIO BRIDGE, PERSONAL RECOLLECTIONS OF NATHANIEL HAWTHORNE 168 (1893).

⁵ Looking back many years later, Holmes wrote that “the only firebrand of my youth that burns as brightly as ever is Emerson.” 1 HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK, 1874-1932 264 (1941). *See generally*, Adam H. Hines, *Ralph Waldo Emerson and Oliver Wendell Holmes, Jr.: The Subtle Rapture of the Postponed Power*, 44 J. SUP. CT. HIST. 39 (2019). Louis Menard thought that Holmes’ “posture of intellectual isolation [was] essentially Emersonian.” LOUIS MENAND, THE METAPHYSICAL CLUB: A STORY OF IDEAS IN AMERICA 68 (2002).

⁶ On young Holmes as a conversationalist, see PETER GIBIAN, OLIVER WENDELL HOLMES AND THE CULTURE OF CONVERSATION 59-212 (2001).

⁷ 2 HOLMES LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI 893 (Mark DeWolfe Howe ed., 1953).

⁸ HOLMES-EINSTEIN LETTERS: CORRESPONDENCE OF MR. JUSTICE HOLMES AND LEWIS EINSTEIN, 1903-1935 90 (James B. Peabody ed., 1964).

⁹ NORWOOD P. HALLOWELL, SELECTED LETTERS AND PAPERS OF N.P. HALLOWELL 25 (1963).

¹⁰ On the psychological importance of his enlistment, see Saul Touster, *In Search of Holmes from Within*, 18 VAND. L. REV. 437 (1965).

When he learned that his unit would be based in Boston, he transferred to another that saw combat, the Twentieth Massachusetts Voluntary Infantry, which suffered more combat deaths than nearly any other unit in the army. A Boston abolitionist, recalling the euphoria of the day, said that “it was as if one had learned to swim in air, and were striking out for some new planet.”¹¹

Yet at a Memorial Day speech nearly twenty years after the war, Holmes remembered thinking only that “slavery had lasted long enough,”¹² possibly the most tepid condemnation imaginable from a writer whose “words were feathered arrows, that carried to the heart of the target, from a mind that searched and saw.”¹³ The “issue of slavery [had] captured Holmes’ attention”¹⁴ and sent him on to war, but the abolitionist commitment was not rooted in personal experiences with slaves or free blacks nor did it even induce him to avoid relationships with Southerners at Harvard from slave owning families. He later recalled of his generation that “our hearts were touched with fire,”¹⁵ but in truth it was a kind of kindling that quickly burned itself out.

Nonetheless, Holmes’ war experiences were transformative, leaving him with “more cold steel in his make-up.”¹⁶ “I am not the same man (may not have quite the same ideas),” he wrote his mother after the Overland Campaign.¹⁷ He was seriously wounded three times, very nearly died from dysentery, and saw his best friend, Henry Abbott, killed in action. The ignorance and stupidity of some of his commanding officers – an ignorance and stupidity that many soldiers and friends of his paid with their lives – left him shaken. “I see [a] youthful lieutenant . . . when I looked down the line,” he recalled. “The advance was beginning, we caught each other’s eye and saluted. When next I looked, HE WAS GONE.”¹⁸ The Battle of Ball’s Bluff made an especially heavy imprint. Union soldiers were surrounded on three sides by Confederates and on the fourth by a sheer cliff overlooking a swift flowing river. The result was a massacre that left Holmes shot and contemplating taking poison his father had given him, if facing death. “I made up my mind to die,” he wrote his mother, but having passed the test for combat valor, he boasted, “I felt and acted very well and did my duty, I am sure.”¹⁹ Everywhere were men struggling to fight and to survive, all for no real purpose, and randomness so often seemed to determine life, death, injury. At one point in the war, he wrote home, “As you go through the woods you stumble constantly, and if after dark perhaps tread on the swollen bodies already fly blown and decaying, of men shot in the head, back, or bowels.”²⁰

¹¹ THOMAS W. HIGGINSON, *CHEERFUL YESTERDAYS* 249 (1898).

¹² OLIVER WENDELL HOLMES, JR., *SPEECHES* 1 (1891).

¹³ FRANCIS BIDDLE, *MR. JUSTICE HOLMES* 2 (1942).

¹⁴ G. E. WHITE, *OLIVER WENDELL HOLMES, JR.* 10 (2006).

¹⁵ HOLMES, *supra* note 12, at 11.

¹⁶ Harry C. Shriver, *Oliver Wendell Holmes: Lawyer*, 24 *A.B.A.J.* 157 (1938). *But cf.*, Mark D. Howe, *Oliver Wendell Holmes, Jr.: The Shaping Years, 1841-1870*, 274 (1957).

¹⁷ OLIVER W. HOLMES, JR., *TOUCHED WITH FIRE: CIVIL WAR LETTERS AND DIARY OF OLIVER WENDELL HOLMES, JR.* 129 (Mark D. Howe ed., 1946).

¹⁸ OLIVER WENDELL HOLMES, JR., *SPEECHES* 6 (1913).

¹⁹ HOLMES, *supra* note 17, at 13, 17-8.

²⁰ *Id.* at 51.

By the time of the Emancipation Proclamation in 1863, which his mother hailed emotionally, he dismissed her high spirits and spoke of the fighting that lay ahead. In 1864, he wrote home that he had “felt for some time that I didn’t any longer believe in this being a duty.”²¹ He had had enough of the war, perhaps suffering from undiagnosed post-traumatic stress disorder.²² By this time, he had drifted away from Hallowell and become close friends with Abbott, a courageous soldier (“In action he was sublime”²³), who flaunted his contempt for abolitionists and blacks. He recalled Abbott’s “splendid coolness,”²⁴ and later celebrated a soldier’s faith “to throw away his life in obedience to a blindly accepted duty, in a cause which he little understands, in a plan of a campaign of which he has little notion, under tactics of which he does not see the use.”²⁵ But this was not his way. He wrote his mother that “I can no longer endure the horrors of the line. . . . war demoralizes me. . . now I honestly think the duty of fighting has ceased for me.”²⁶ When his three year enlistment ended, he returned to Boston. “I started in this thing as a boy,” he wrote, “and am now a man.”²⁷

Back home, Holmes found that his idealism had peeled away like bruised skin off a fruit. “The law had broken down in America,” wrote Edmund Wilson, and “the Constitution had gone to pieces. It was impossible for an honest man of Holmes’ probing intelligence to pretend that the law was a sacred code, which had simply to be read correctly.”²⁸ Louis Menand thought that the war had caused Holmes to “lose his belief in beliefs,”²⁹ but that is not exactly so, for what remained was a belief, really a fixation, on struggle. As Holmes, Sr. had observed, “Every now and then a man’s mind is stretched by a new idea or sensation and never shrinks back to its former dimensions.”³⁰ Holmes, Jr.’s new idea, as he expressed it in an 1873 article, was that “the struggle for life [is] the law of human existence,”³¹ an idea that seemed validated by his war experiences and the now potent theory of evolution.

But where the typical Social Darwinists of his day imagined that the struggle led inexorably to the improvement of the race, Holmes believed that the randomness of life meant that the results might be negative as well as positive.³² In his eyes, the optimists’ assumption was simply an act of faith, bereft of evidence. All one could say for certain was that struggle led to more struggle. Beyond that, it was hard to know where it led. But Holmes did not collapse in existential despair. For him, as for Nietzsche, the discovery of truth may be beyond human capacity, but we can

²¹ *Id.* at 122.

²² Holmes wrote his parents that “Many a man has gone crazy since the campaign begun from the terrible pressure on body and mind.” *Id.* at 150.

²³ *Id.* at 41.

²⁴ *Id.*

²⁵ OLIVER W. HOLMES, JR. *The Soldier’s Faith*, in SPEECHES 56, 59 (1896).

²⁶ *Supra* note 17, at 143.

²⁷ *Id.* at 142.

²⁸ EDMUND WILSON, PATRIOTIC GORE 765 (1962).

²⁹ MENARD, *supra* note 5, at 4.

³⁰ OLIVER W. HOLMES, SR., THE AUTOCRAT OF THE BREAKFAST TABLE (1853).

³¹ Oliver W. Holmes, Jr., *The Gas Stokers’ Strike*, 7 AM. L. REV. 558, 573.

³² In his notorious eugenics opinion, Holmes ruminated on the fact that “the public welfare may call upon the best citizens for lives,” leaving the less fit to survive. *Buck v. Bell*, 274 U.S. 200, 207 (1927).

at least honor the will to struggle for individual autonomy and greatness.³³ For Holmes, this meant launching his legal career with enormous drive and ambition. Toward the world, though, he looked with his famous (or notorious) detachment: “If my fellow citizens want to go to hell I will help them,” he wrote a friend. “It’s my job.”³⁴

By the time he was a famous judge, Holmes’ abolitionism had quite evaporated. What remained was a distaste for its intensity and moral certainty. Indeed, he admitted that he “came to loathe in the abolitionists the conviction that anyone who did not agree with them was a knave or fool.”³⁵ He derided them for putting “their ideals and prophecies with the slight superior smile of the man who is sure that he has the future. . . . I can only say that the reasoning seems to me inadequate.”³⁶ They seemed to him like the temperance advocates of prohibition.³⁷

By this time, too, the Civil War’s goal of freedom for the slaves had in peace time turned to ashes. Legally required racial segregation, augmented by violence and terror, had enshrined white supremacy in the South and left the black population in poverty and subjugation. Most whites in the North hardly seemed to notice, but not Holmes. To complaints about the Sacco and Vanzetti trial, for example, he answered, “If justice is the interest why do they not talk about the infinitely worse cases of the blacks?”³⁸ And again, “A thousand fold worse cases of negroes come up from time to time but the world does not worry over them.”³⁹

Holmes’ service on the Supreme Court, particularly in the first two decades or so, coincided with an explosion of race riots that inflicted heavy losses in life and property, almost exclusively on blacks. In the South, riots took place in Pierce City, Missouri (1901); Statesboro, Georgia (1904); Atlanta (1906); Houston (1917); Elaine, Arkansas; Jenkins county, Georgia; Charleston; Longview, Texas; Washington; Norfolk; Knoxville; and Annapolis (1919); Ocoee, Florida (1920); Tulsa (1921); Perry, Florida (1922); and Rosewood, Florida (1923). At the same time, rioting also occurred in the North at Denver (1901); Evansville, Indiana (1903); Springfield, Ohio (1904 and 1906); Greensburg, Indiana (1906); Springfield, Illinois (1908); East St. Louis, Illinois (1917); and Indianapolis and Omaha (1919). DuBois had predicted that the “problem of the twentieth century is the problem of the color line.”⁴⁰ Holmes might have been vaguely aware of that. Consider his voting and opinion record on the race related cases decided during his tenure on the Supreme Court.

³³ On Holmes and Nietzsche, see Seth Vannatta & Allen Mendenhall, *The American Nietzsche? Fate and Power in the Pragmatism of Justice Holmes*, 85 UMKC L. REV. 187, esp. 193-202 (2016).

³⁴ 1 HOLMES-LASKI, *supra* note 7, at 249.

³⁵ 2 *Id.* at 1291.

³⁶ 2 *Id.* at 948.

³⁷ 2 HOLMES-POLLOCK, *supra* note 5, at 253.

³⁸ 2 HOLMES-LASKI, *supra* note 7, at 975.

³⁹ 2 *Id.* at 974.

⁴⁰ W.E.B. DUBOIS, *THE SOULS OF BLACK FOLK* xv (1903).

II. VOTING RIGHTS

Giles v. Harris (1903) concerned a class action suit brought by Jackson Giles, the head of the Colored Men's Suffrage Association of Alabama, who alleged that blacks had been disenfranchised by the state in violation of the Fourteenth and Fifteenth Amendments.⁴¹ Alabama's 1901 constitution provided that persons registered to vote before 1903 were registered for life,⁴² while those registered after that date had to meet, in Holmes' words, "severe tests . . . which would exclude, perhaps a large part of the black race. . . as part of a general scheme to disenfranchise them."⁴³ Giles sought an injunction to permit blacks "to obtain the permanent advantages of registration as of a date before 1903,"⁴⁴ that is, to compel Alabama to register him and other qualified blacks. Alabama raised a series of technical mootness and jurisdictional issues that would have allowed the Court to bypass the merits of the case, but the Court chose to reach the merits.

Holmes, speaking for a five-four majority, refused to grant relief. If the "whole registration scheme of the Alabama constitution is a fraud upon the Constitution of the United States," he asked, "how can we make the Court a party to the unlawful scheme by accepting it and adding another voter to its fraudulent lists?"⁴⁵ Even if the Court issued an order, he added, "the great mass of the white population intends to keep the blacks from voting." Hence, if "the conspiracy and the intent exist, a name on a piece of paper will not defeat them."⁴⁶ Relief would require the Court "to be prepared to supervise the voting,"⁴⁷ which lay far beyond its powers. Instead, relief "from a great political wrong, if done, as alleged, by the people of a state and the state itself, must be given by them or by the legislative and political department of the United States."⁴⁸

James v. Bowman (1903) concerned Henry Bowman, a white Kentuckian, who was indicted for preventing blacks from voting in a congressional election by means of bribery and intimidation. Justice Brewer, born into an abolitionist family and an abolitionist as a young man,⁴⁹ speaking for a six-two majority, observed that the Fifteenth Amendment required federal or state action, and so the congressional act at issue that was passed under its authority must be directed at federal or state action, too. But here he found only individual action.⁵⁰ The fact that the offense alleged concerned a congressional election was insufficient to implicate the federal government, which was otherwise not involved in the offense.

⁴¹ The cost and legal representation were secretly arranged by Booker T. Washington. August Meier, *Toward a Reinterpretation of Booker T. Washington*, 23 J. SOUTH. HIST. 220 (1957).

⁴² ALA. CONST. art. 8, §187.

⁴³ *Giles v. Harris*, 189 U.S. 475, 482 (1903).

⁴⁴ *Id.* at 484.

⁴⁵ *Id.* at 486.

⁴⁶ *Id.* at 488.

⁴⁷ *Id.*

⁴⁸ *Id.* Brewer and Harlan, dissenting separately, maintained that courts can give relief in such cases, though they did not focus on the race issue that led Holmes to conclude that this was problematical.

⁴⁹ J. Gordon Hylton, *The Judge Who Abstained in Plessy v. Ferguson: Justice David Brewer and the Problem of Race*, 61 Miss. L. J. 315, 322-26 (1991).

⁵⁰ *James v. Bowman*, 190 U.S. 127, 139 (1903).

Guinn and Beal v. United States (1915) focused on an amendment to the Oklahoma Constitution, adopted three years after the state was admitted to the Union, that required persons not entitled to vote before 1866 to pass a literacy test. Chief Justice White, speaking for a unanimous Court, acknowledged that states could impose literacy tests, but held that restricting it to persons who had not been eligible to vote prior to the Fifteenth Amendment clearly was aimed at disenfranchising blacks, and thus conflicted with the Fifteenth Amendment. Oklahoma had contended that states were empowered to set voting standards and that its amendment was not directed at blacks. But White, a former governor of Louisiana who had fought for the Confederacy, asked, “how can there be any room for any serious dispute concerning the repugnancy” of the Oklahoma amendment?⁵¹ Such grandfather clauses, he concluded, were invalid.⁵²

Myers v. Anderson (1915) concerned an Annapolis, Maryland law that provided three possible voting requirements: that the citizen owned at least \$500 worth of assessed property, that he be a naturalized citizen or their son, or that his descendants had been entitled to vote before 1868. Anderson, who was black, said that he did not own sufficient property nor was he a naturalized citizen, and he had been unable to vote before 1868, when the Fifteenth Amendment barred states from disenfranchising him because he was black. Thus, he contended that the law effectively denied him the vote on account of his race, in violation of the Fifteenth Amendment. Annapolis replied that the Fifteenth Amendment was not involved because each of the three requirements allowed some blacks to vote and disallowed some whites.

White, again speaking for a unanimous Court, held that the 1868 provision clearly violated the Fifteenth Amendment,⁵³ and that the other two requirements also must be dropped because together they meant that a native born citizen had to meet a property qualification, while a naturalized citizen did not, an “incongruous result”⁵⁴ that made no sense.

United States v. Mosely (1915) concerned an Oklahoma county election board member, Mosely, who conspired to fail to count votes from precincts with a sizable number of black voters. Congress had made it unlawful to conspire to prevent citizens from the enjoyment of constitutional or statutory rights.⁵⁵ Mosely argued that the law, which had originally targeted the Ku Klux Klan, did not expressly apply to voting.

Holmes, writing for a seven-one majority thought it was obvious that words that banned conspiracies to prevent blacks from voting also covered not counting their votes.⁵⁶ The Klan might “have passed away,” but regardless of what Congress intended in the law, “we cannot allow the past so far to affect the present as to deprive citizens” of their legal rights.⁵⁷ In the course of his opinion, he dismissed a technical argument tying a provision of the statute to a provision of an earlier statute.⁵⁸

⁵¹ *Guinn v. United States*, 238 U.S. 347, 363 (1915).

⁵² *Id.* at 368. Oklahoma then passed another grandfather clause law that remained in effect until 1939, when it was struck down in *Lane v. Wilson*, 307 U.S. 268 (1939).

⁵³ *Myers v. Anderson*, 238 U.S. 368, 380 (1915).

⁵⁴ *Id.* at 382.

⁵⁵ Pub. L. No. 60-350, 35 Stat. 1088, 1092 (1909).

⁵⁶ *United States v. Mosley*, 238 U.S. 383, 386 (1915).

⁵⁷ *Id.* at 388.

⁵⁸ *Id.* at 386-87.

Love v. Griffith (1924) involved white primary elections in Texas. Around the turn of the century, the primary emerged in the North as a Progressive reform aimed at curbing the influence of party bosses. In the South, where the Democratic party effectively monopolized elections, the primary served a different purpose. By confining the primary vote to white Democrats, it disenfranchised black Democrats, at best leaving them free to vote in an uncontested general election.

The Houston Democratic Executive Committee, on the theory that the party is a private organization like a bowling league, barred blacks from voting in the local Democratic primary. C.N. Love, a black Houston journalist and a Democrat, sought an injunction to forestall the election on the ground that the committee had violated his Fifteenth Amendment right against racial exclusion in voting. Love lost, and was ordered to pay court costs.

Holmes, speaking for a unanimous Court, conceded that Love's complaint could "present a grave question of constitutional law," but observed that the committee's action covered only "a single election," and that as the election had taken place a year earlier, "the cause of action had ceased to exist."⁵⁹ Thus, mootness saved the Court from confronting the issue on its merits – Holmes was unimpressed by the argument that court costs remained a live issue – and no dicta were offered on the constitutional question.

Nixon v. Herndon (1927) also concerned a Texas white primary. Nixon, a black Democrat, was prevented from voting in a Democratic primary by a state statute,⁶⁰ and contended that this violated both his Fourteenth and Fifteenth Amendment rights. Texas maintained that the issue was political, and thus not suitable for judicial determination.

Holmes, again writing for a unanimous Court, dismissed the state's argument as "little more than a play upon words"⁶¹ because political actions that result in private damages may be resolved in lawsuits. It was not necessary to reach the Fifteenth Amendment issue, he said, as "it seems to us hard to imagine a more direct and obvious infringement of the Fourteenth. . . . [I]t is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the right set up in this case."⁶²

Nixon begs to be compared with *Love*. Both rulings are brief – *Nixon* is three pages and *Love* three paragraphs – and both betray a tone so dismissive as to suggest that the losing litigants wasted the Court's valuable time. Yet what is jarring is that in *Love* the dismissiveness is directed against a plaintiff opposing a white primary, and in *Nixon* one supporting it. Also odd was Holmes' citing in *Nixon* his earlier opinion in *Giles* in support of his remark that political matters may pose justiciable issues, when that is precisely what he declined to do in that case.

In four of the six cases involving voting rights, Holmes supported the black plaintiffs, but in the two most important cases, his record is mixed. On the one hand is *Giles*, "Surely one of the most momentous decisions in United States Supreme Court history."⁶³ If the voting scheme is invalid, he asks, how can we accept it

⁵⁹ *Love v. Griffith*, 266 U.S. 32, 34 (1924).

⁶⁰ (1925) Tex. Rev. Civ. Stat. 3107.

⁶¹ *Nixon v. Herndon*, 273 U.S. 536, 540 (1927).

⁶² *Id.* at 541.

⁶³ Richard H. Pildes, *the Canon(s) of Constitutional Law: Democracy, Anti-Democracy and the Canon*, 17 CONST. COMMENT. 295, 297 (2000).

and add new voters to it? But Giles' point was that it was the *exclusion* of blacks that made the scheme invalid; by *including* them, it would become valid. Holmes' reference to a disappearing Klan was also hard to explain, as 1915 saw the release of *The Birth of a Nation*, by far the most popular silent movie ever produced, which glorified the Klan.⁶⁴

Holmes also seemed intimidated by the fact that "the great mass of the white population"⁶⁵ meant to disenfranchise blacks. Certainly, it was obvious that disenfranchisement was the purpose of the provision. The president of the Alabama constitutional convention had declared its goal to be "to establish white supremacy in the state,"⁶⁶ and black voter registration in Alabama had declined from 93% in 1896 to 2.9% in 1902.⁶⁷ Holmes acknowledged as much. The question was: how should the Court respond? Overcome with a sense of the Court's powerlessness, Holmes feared that an order to open the voting would be disobeyed, humiliating the Court and perhaps emboldening future litigants to flout its authority.⁶⁸ His assumption of overwhelming support for black exclusion, however, may be open to question. The constitution was adopted only because Black Belt counties voted overwhelmingly for it; the rest of the state rejected it. As the Black Belt counties had a large black population and would hardly have supported its own disenfranchisement, it was commonly believed that there had been widespread voter fraud.⁶⁹

Holmes' decision, said to "wed legalism to realpolitik,"⁷⁰ has been derided as a "cynical and disingenuous" avoidance of the constitutional question,⁷¹ and a "carte blanche to southern politicians."⁷² Derrick Bell, one of the most prominent civil rights advocates of his day, thought the ruling amounted to "judicial abstention with a vengeance." Yet, Bell continued, "what alternative did Justice Holmes have available? [A] court's power to issue and enforce orders is limited to those orders that at least a substantial percentage of the people want or will permit to be carried out."⁷³ There was an alternative near at hand, however, though not a very satisfying

⁶⁴ It was said that President Wilson viewed the movie at the White House, and proclaimed that it was "like writing history with lightning." Mark E. Benbow, *Birth of a Quotation: Woodrow Wilson and Writing History with Lightning*, 9 J. OF THE GILDED AGE & PROGRESSIVE ERA 509, 528 (2010).

⁶⁵ Giles, *supra* note 43, at 488.

⁶⁶ Qtd. in *Hunter v. Underwood*, 471 U.S. 222, 229 (1985).

⁶⁷ The standard history alleges that the point of the provision was to legalize and formalize black disenfranchisement that had heretofore been pursued in a more informal, ad hoc manner. SHELDON HACKNEY, *POPULISM AND PROGRESSIVISM IN ALABAMA 189-81* (1969).

⁶⁸ That enlightened white sentiment in the North was untroubled by the decision is evident in the response of Harper's Weekly, which pointed to "new negro crime, by which is meant against white women, [which] is due to the notion of political and social equality implanted by the gift of suffrage." *Recent Discussion of the Fifteenth Amendment*, 47 HARPER'S WEEKLY 1144 (July 11, 1903).

⁶⁹ R. Volney Riser, *Disenfranchisement, the U.S. Constitution, and the Federal Courts: Alabama's 1901 Constitutional Convention and the Grandfather Clause*, 48 AM. J. LEG. HIST. 237 (2006).

⁷⁰ Pildes, *supra* note 63, at 298.

⁷¹ William M. Wiecek, *The Emergence of Constitutional Value: The First Century*, 82 CHIKENT L. REV. 233, 267 (2007).

⁷² Saul Brenner, *Airbrushed Out of the Constitutional Canon: The Evolving Understanding of Giles v. Harris*, 107 MICH. L. REV. 853, 856 (2009).

⁷³ DERRICK A. BELL, *RACE, RACISM, AND AMERICAN LAW* 40 (1980). Louise Weinberger

one: accept Alabama's technical arguments, refuse to reach the merits, and deny giving discrimination the Court's tacit approval. This, of course, is exactly what Holmes chose to do in *Love*. Instead, he offered stunningly fatuous advice: look to the electorate or the political branches for relief; like his disciple, Frankfurter,⁷⁴ he urged those wronged to seek redress from the very officials who benefited from the wrong. Holmes also implied that Giles could sue Alabama for damages, but when Giles took him up on that suggestion, Holmes joined seven other Justices in rejecting the claim.⁷⁵

On the other hand, in *Nixon v. Herndon* Holmes struck down the white primary with a decisiveness rare at the time in racial discrimination cases. Thurgood Marshall believed that Holmes "felt that this decision laid the white primary to rest,"⁷⁶ but as it turned out, the battle continued for years.⁷⁷ Yet it was *Nixon* that set the Court on the path that ended with the white primary's abolition.

III. PEONAGE CASES

Peonage, involuntary servitude in payment of debt, was outlawed by Congress in 1867.⁷⁸ Among the first cases to arise under the law⁷⁹ was *Clyatt v. United States* (1905), which raised the question as to whether peonage was barred by the Thirteenth Amendment's prohibition against involuntary servitude. Simon Clyatt captured at gunpoint a pair of black laborers who had worked for him and he claimed owed him money. With the help of a sheriff's deputy, he brought them from Florida to his workplace in Georgia. He pointed to a Florida law that provided for imprisonment under these circumstances and to Florida practice, where judges routinely ordered escaped black laborers to work off their debt. Despite these claims, Clyatt was convicted of violating Congress' Anti-Peonage Act. He appealed his conviction.

Justice Brewer, speaking for a unanimous Court, observed that the Thirteenth Amendment does not require state action, and so the law's applying to private conduct did not render it unconstitutional. But he could find "not a scintilla of

concluded that "deciding for Giles would have meant that big moral battles, as big as any in the Civil War, could be fought in the courts and in equity. This was the one device Holmes, from the beginning, had refused to consider. Weinberger, *Holmes' Failure*, 96 MICH. L. REV. 691, 713 (1997). While she saw this as a failure of nerve, Holmes seems focused on the practical limits of the Court's power and the consequences of its orders being undone.

⁷⁴ "It is hostile to a democratic system to involve the judiciary in the politics of the people," Frankfurter wrote, evidently considering it less hostile to permit gross legislative malapportionment. *Colegrove v. Greene*, 328 U.S. 549, 554 (1945).

⁷⁵ *Giles v. Teasley*, 193 U.S. 146 (1904). Justice Day, "not unmindful of the gravity" of the issues raised, concluded that the Court had no right to review the state court's ruling. *Id.* at 166-67.

⁷⁶ Thurgood Marshall, *The Rise and Collapse of the "White Democratic Primary,"* 26 J. NEGRO ED. 249, 251 (1957).

⁷⁷ *Nixon v. Condon*, 286 U.S. 73 (1932); *Grove v. Townsend*, 295 U.S. 45 (1935); *Smith v. Allwright*, 321 U.S. 649 (1944); *Rice v. Elmore*, 165 F. 2d 387 (C.C.A. 4th, 1947); *Terry v. Adams*, 345 U.S. 461 (1953).

⁷⁸ 14 Stat. 546.

⁷⁹ William Wirt Howe, *The Peonage Cases*, 4 COLUM. L. REV. 279, 281 (1904).

testimony to show that [the men] were ever theretofore in a condition of peonage.”⁸⁰ That is, Clyatt was charged with returning the men to a state of peonage, but the government had failed to demonstrate that their condition before they were captured was one of peonage. Thus, Brewer ordered a retrial, in the meanwhile releasing Clyatt from custody.

Hodges v. United States (1906) concerned black laborers in Arkansas, who had contracted to work for a lumber mill. Hodges and fourteen other white men told the laborers to stop working, and beat them and sent them away. The whites were then prosecuted for conspiring to intimidate persons to deprive them of their Thirteenth Amendment rights. Three of the defendants were convicted, and their appeal was heard by the Supreme Court.

Justice Brewer, writing for a seven-two majority, noted that the blacks claimed to have been mistreated because of their race, the mistreatment constituting a badge of slavery. It was, therefore, irrelevant from their perspective whether they personally had ever been slaves. Brewer found this argument fallacious. For one thing, the Thirteenth Amendment’s prohibition against slavery “reaches every race,” with “the Anglo-Saxon . . . as much within its compass as . . . the African.”⁸¹ Thus, blacks could claim protection of the Thirteenth Amendment no more than anyone else, and the fact that none of them beaten by Hodges had “ever been themselves slaves or . . . the descendants of slaves”⁸² became very relevant, indeed. The amendment, Brewer maintained, may have permitted Congress to deal with “incidents or badges of slavery,”⁸³ but this referred to legal acts only, and thus did not apply here. The Thirteenth Amendment “is not an attempt to commit that race to the care of the nation,”⁸⁴ and so Brewer advised blacks that “their best interests would be subserved [by] taking their chances with other citizens.”⁸⁵

Bailey v. Alabama (1908) concerned a black farm laborer, Alonzo Bailey, who was given an advance on his pay, but left work before his contract period ended and without paying what he owed. Alabama law presumed him guilty of fraudulent larceny, though he could rebut the facts; his leaving the job was prima facie evidence of his intent to defraud; the presumption might be overturned by evidence but not by the defendant’s testimony. Bailey was detained, while a well-organized effort was mounted on his behalf, involving Booker T. Washington, the United States attorney general, and prominent newspapers. Bailey contended that Alabama’s peonage law violated the Thirteenth and Fourteenth Amendments, as well as Congress’ Anti-Peonage Law, and asked that a writ of habeas corpus be granted, freeing him. President Roosevelt’s Justice Department urged that Bailey be given a pre-trial release.

Holmes, writing for the seven-two majority, held that there “is no doubt”⁸⁶ the state can punish fraud. He conceded that “it appears that [Bailey] was held for trial on the statutory evidence and with no other proof of fraudulent intent,” but insisted that Bailey was being punished for fraud and not for breach of contract. He

⁸⁰ *Clyatt v. United States*, 197 U.S. 207, 222 (1905).

⁸¹ *Hodges v. United States*, 203 U.S. 1, 17 (1906).

⁸² *Id.* at 18.

⁸³ *Id.* at 19.

⁸⁴ *Id.* at 18.

⁸⁵ *Id.* at 20.

⁸⁶ *Bailey v. Alabama*, 211 U.S. 452, 454 (1908).

thought that there was no reason to reach the question of the presumption's validity because "it may be that the prosecution will not rely on the statutory presumption but will exhibit satisfactory proof of a fraudulent scheme."⁸⁷ Even "if that evidence was insufficient," he continued, "it hardly will be contended that this Court should require the state courts to release all persons held for trial, where in its opinion the evidence fails to show probable cause."⁸⁸ The two provisions, in any event, were separable. "The trouble with the whole case is that it is brought here prematurely by an attempt to take a short cut,"⁸⁹ and to free Bailey in advance of the trial.

Bailey was subsequently tried, convicted, and sentenced to 136 days of imprisonment at hard labor. Following Holmes' implicit instruction to bring his action after his conviction, Bailey then appealed the conviction, by which time the Supreme Court had somewhat changed in personnel. Both he and the U.S. attorney general in his brief emphasized that peonage laws were almost entirely targeted at Southern black farm laborers.

The second *Bailey* opinion written by Justice Hughes, newly appointed and the son of an abolitionist Baptist minister, noted that peonage targeted "the poor and the ignorant,"⁹⁰ but insisted that the case had nothing whatever to do with race. "We at once dismiss from consideration the fact that the plaintiff in error is a black man. . . . No question of a sectional character is presented."⁹¹ Hughes also conceded that Alabama could punish for mere intent to defraud. However, the only evidence of the intent was Bailey's breach of contract, which created a prima facie evidence of fraud; in effect, Bailey was punished for the presumption of breach of contract. "The contract exposes the debtor to liability for the loss due to the breach, but not to enforced labor."⁹² By requiring labor, which amounted to involuntary servitude, the law violated the Thirteenth Amendment.

Holmes, dissenting, agreed that the fact that it was an Alabama case concerning blacks "does not matter."⁹³ The law did not punish breach, he maintained, but only fraud, and the presumption that breach meant fraud could be disregarded by jurors with "experience as men of the world,"⁹⁴ if the evidence warranted it. As for criminalizing the punishment, he wrote, "it does not strike me as an objection to a law that it is effective. If the contract is one that ought not to be made, prohibit it. But if it is a perfectly fair and proper contract, I can see no reason why the state should not throw its weight on the side of performance."⁹⁵ "Breach of a legal contract without excuse," he declared, "is wrong."⁹⁶

United States v. Reynolds (1914) concerned Ed Rivers, a black man convicted in Alabama of petit larceny. Unable to pay the fine, he agreed to work for J.A. Reynolds, who paid the fine, for nearly ten months to pay off the debt. After about a month, Rivers quit, was convicted of breach of contract, and contracted with

⁸⁷ *Id.*

⁸⁸ *Id.* at 454-55.

⁸⁹ *Id.* at 452, 454.

⁹⁰ *Bailey v. Alabama*, 219 U.S. 219, 244 (1911).

⁹¹ *Id.* at 231.

⁹² *Id.* at 242.

⁹³ *Id.* at 246.

⁹⁴ *Id.* at 249.

⁹⁵ *Id.* at 248.

⁹⁶ *Id.* at 246.

another white man to work off the resulting debt over fourteen months. Rivers then fled and was sentenced to one year on a chain gang. The Alabama criminal surety law permitting enforcement by imprisonment was challenged as violating Congress' ban on criminal surety peonage.

Justice Day, striking down the Alabama law, emphasized that the debt was owed to the surety, not the state, which merely enforced it, and thus the case was a classic instance of peonage, which Congress could prohibit. Criminalizing debt assumed that the obligation to pay was a duty owed the public, as well as the private creditor, but traditionally, debt was considered a private obligation, and thus not to be criminalized. Day's focus was on repeat offenders, like Rivers, who were "kept chained to an ever-turning wheel of servitude."⁹⁷ No mention was made of race.

Holmes, concurring, characterized the victims of peonage as "impulsive people with little intelligence or foresight,"⁹⁸ whose moral defects would lead them repeatedly to breaches of contract.

In these cases, Holmes is indifferent if not hostile to the incontrovertible fact that peonage laws were a tool for keeping Southern blacks in bondage. In *The Common Law*, he had written that the only remedy for breach of contract was payment of damages, not "labor for another,"⁹⁹ but he seems to have forgotten his own lesson. In *Hodges*, he does not seem troubled by Brewer's preposterous assertion that American slavery was not race based. Harlan, in his concurrence in *Clyatt*, had written that the case disclosed "barbarities of the worst kind against these negroes,"¹⁰⁰ and the government's brief had asserted that "upon the decision in this case hangs the liberty of thousands of persons, mostly colored, it is true, who are now being held in a condition of involuntary servitude, in many cases worse than slavery itself."¹⁰¹ Later, in 1908, assistant attorney general Charles W. Russell produced a well publicized *Report on Peonage* that followed his journey in the South. He concluded that the "chief support of peonage is the peculiar system of state laws prevailing in the South."¹⁰² Yet with the lone exception of Harlan's concurrence, none of the Court's opinions alluded to race. Holmes' indifference was shared with his colleagues.

Similarly, in *Bailey I*, Holmes' callousness was revealed in three remarkable comments. In one, he advocated prosecution under a statute of dubious constitutionality because another provision of the law might permit sufficient evidence of guilt. But if the two provisions were separable, as he maintained, why not consider invalidating the dubious provision, in order to forestall the jury from convicting the defendant for the wrong reason? What was there to lose? This is surely judicial restraint taken to an absurd limit.

In the second comment, Holmes thought it self-evident that the state should be able to hold persons for trial in the absence of probable cause, as if white Alabama juries would be likely to disregard a presumption of fraud attaching to black laborers.

⁹⁷ *United States v. Reynolds*, 235 U.S. 133, 146 (1914).

⁹⁸ *Id.* at 150.

⁹⁹ OLIVER WENDELL HOLMES, *THE COMMON LAW* 235-36 (1881). Though there are societal implications if debts are not repaid, Holmes did not conclude that this justified criminalizing the failure.

¹⁰⁰ *Clyatt v. United States*, 197 U.S. 207, 223 (1905).

¹⁰¹ *Id.* at Brief for respondent 3.

¹⁰² CHARLES W. RUSSELL, *REPORT ON PEONAGE* 7 (GPO 1908).

Indeed, there is something odd about a Boston Brahmin referring to white Alabama farmers as “men of the world,” as if, untouched by prejudice, they had only recently returned from a grand tour of *fin de siècle* Europe. Finally, in *Reynolds*, Holmes simply asserts that blacks caught in peonage are ensnared in problems of their own making. No reference is made to their subjugation or exclusion from the criminal justice system that convicted them. From one famous for advocating the separation of law from morality¹⁰³ comes a moralistic condemnation of the peons, but none for the blatantly racist operation of the law.

IV. SEGREGATED EDUCATION

Berea College v. Kentucky (1908) concerned a Kentucky law that made it unlawful for “any person, corporation, or association of persons” to enroll white and black students.¹⁰⁴ Berea College, founded in 1855 by an abolitionist, admitted white and black students,¹⁰⁵ and the law “was obviously directed at Berea College.”¹⁰⁶ The college was found guilty, and fined \$1,000, a substantial sum for a college that charged no tuition.

Speaking for a seven-two majority, Justice Brewer rested his opinion on the college’s corporate charter. Kentucky’s constitution empowered the state to amend corporate charters, so long as the original purpose of the charter was not defeated or substantially impaired. As Berea’s existing charter, very general and brief, failed to refer to integrated education, the college could not claim that barring integration posed a fatal conflict. Neither party had argued charter revision in its briefs.¹⁰⁷ Harlan, dissenting, took for granted that integration was a harmless purpose, although the legislature, fearing race mixing and miscegenation, clearly took the opposite position.

Holmes registered a concurrence without an opinion.

Gong Lum v. Rice (1927) concerned a nine year old Chinese-American girl in Mississippi, who was assigned to a black segregated school and claimed that she belonged in a white school. The Mississippi constitution provided for separate schools “for children of the white and colored races,” and her family read “colored” to mean “black,” while they insisted she was “pure Chinese.”¹⁰⁸ The Mississippi supreme court, however, interpreted “colored” to mean all races, apart from “pure whites.”¹⁰⁹ On appeal to the United States Supreme Court, Gong Lum argued that as segregation was intended to protect whites from blacks, Chinese deserved “just

¹⁰³ Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

¹⁰⁴ Ky. Acts 1904, §1.

¹⁰⁵ Paul David Nelson, *Experiment in Interracial Education at Berea College, 1858-1908*, 59 J. SOUTH. HIST. 13 (1974). Berea’s “golden age of interracial education” began to be reversed in 1892, when a new president favoring growing white student representation took control. *Id.* at 17-27.

¹⁰⁶ Richard A. Heckman & Betty J. Hall, *Berea College and the Day Law*, 66 REG. OF THE KY. HIS. SOC. 35 (1968).

¹⁰⁷ The law was amended in 1950 to permit the admission of “qualified negroes.” *Louisville Courier-Journal*, Apr. 15, 1950.

¹⁰⁸ *Gong Lum v. Rice*, 275 U.S. 78, 81 (1927).

¹⁰⁹ *Id.* at 82.

the same”¹¹⁰ protection, too. In failing to provide it, “The white race creates itself a privilege that it denies to other races; exposes the children of other races to risks and dangers to which it would not expose its own children. This is discrimination.”¹¹¹ Accepting both racial segregation and white supremacy, Gong Lum argued that Mississippi denied her equal protection.

Chief Justice Taft, speaking for a unanimous Court, citing a dozen state cases and two federal district court cases, said that the validity of segregated schools had been decided “many times.”¹¹² He concluded that “The decision is within the discretion of the state in regulating its public schools, and does not conflict with the Fourteenth Amendment.”¹¹³ Segregation was a closed issue not open for debate.

Holmes’ record on educational segregation is passive. In *Berea College*, the “transparent and undisguised evasion”¹¹⁴ approved a state’s mandating segregation even when individuals coming together under the auspices of a private institution oppose it, but the Court’s odd reliance on corporate charters saved it from making constitutional law on the question. Holmes registered a concurrence without an opinion. Was he put off by the evasive charter rationale? Would he have preferred constitutionalizing the segregation of private institutions? Was he willing to defer to the legislature in the absence of a clear mistake? It is impossible to say.

As to *Gong Lum*, Taft treated segregation as a policy that had been approved so often that its validity could be taken for granted. Hence, the Court could focus only on the anomaly of a Chinese girl, who did not fit a traditional white/black classification. Holmes apparently accepted this reasoning, declining to challenge the Court’s assumptions that the black school was substantially equal to the white and that segregation itself was a reasonable goal of public policy. Perhaps because the case seemed to invite only perfunctory attention, Holmes also failed to point out that none of the cases cited by Taft dealt with the state’s policy of assigning students, though this was the heart of Gong Lum’s contention.

V. TRANSPORTATION SEGREGATION

Chiles v. Chesapeake & Ohio Railway Co. (1910) involved J. Alexander Chiles, a black man who purchased a first class passenger ticket on a Chesapeake train from Washington D.C. to Lexington, Kentucky. He changed trains at Ashland, Kentucky, and took a seat in a car reserved for whites; under protest, he was moved by police to a car reserved by Chesapeake for blacks. He claimed that as an interstate traveler, his rights were abridged by Chesapeake’s regulation.

The Court, by a vote of eight to one, found for the railroad. Justice McKenna observed that “the interstate commerce clause does not constrain the actions of carriers. But on the contrary leaves them free to adopt rules and regulations for the government of their business.” The rules must be reasonable, of course, but that

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 86.

¹¹³ *Id.* at 87.

¹¹⁴ ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* 134 (1992).

is no problem in this case.¹¹⁵ *Plessy v. Ferguson* was cited as precedent.¹¹⁶ Harlan dissented without an opinion.

Butts v. Merchants and Miners Transportation Co. (1913) concerned Mary Butts, a black woman who purchased a first class ticket on a boat from Boston to Norfolk, but was forced to take second class accommodations with other blacks. She claimed this policy infringed her right to be free of discrimination in public accommodations under the Civil Rights Act of 1875.¹¹⁷ To the extent that the act applied to conditions within states, it had been declared unconstitutional in the *Civil Rights Cases* (1883),¹¹⁸ but Butts argued that the act remained valid when applied to navigable waters and federal territories.

The Supreme Court unanimously rejected her contention, Justice Van Devanter observing that the “manifest purpose [of the Civil Rights Act] was to enact a law which would have a uniform operation wherever the jurisdiction of the United States extended.”¹¹⁹ Congress would never have adopted a law that applied only in these narrow conditions. It “is not possible to separate that which is constitutional from that which is not,”¹²⁰ and so with the remainder of the act declared unconstitutional, her argument failed.

McCabe v. Atchison, Topeka & Santa Fe Railway Co. (1914) produced a highly unusual opinion. Oklahoma had passed the Separate Coach Law that required separate but equal facilities on railway cars for whites and blacks.¹²¹ The railway, asserting that there was insufficient demand for black dining and sleeping cars, refused to provide them. Justice Hughes, speaking for a unanimous Court, dismissed the railway’s claim. “It makes the constitutional right to depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is that it is a personal one.”¹²² Thus, the question was not whether the policy treated blacks, as a race, equitably, but the much tougher matter as to whether it treated blacks, as individuals, equitably. The policy likely would have passed the first test, but clearly not the second. Though Hughes never questioned the lawfulness of segregation, he plainly believed that there was something noxious about racial classifications. Otherwise, presumably, he would have no reason to question a policy that on purely economic grounds would have seemed entirely reasonable.

However, as none of the complainants ever traveled on the railway, they lacked standing and the suit was dismissed. Had the question of standing been addressed at the outset, where normally such questions are resolved, Hughes’ insistence on the railway’s meeting its separate but equal obligation would never had been written. But as the circuit court had addressed the merits, finding that “quality of service . . . does not require permanent provision of service, irrespective of the demand for it,”¹²³ Hughes had an excuse to confront the merits, and it seems that he

¹¹⁵ 288 U.S. 71, 76.

¹¹⁶ *Id.* at 77.

¹¹⁷ 18 Stat. 335.

¹¹⁸ 109 U.S. 3, 13.

¹¹⁹ 230 U.S. 126, 138 (1913).

¹²⁰ *Id.*

¹²¹ REV. LAWS OKLA., 1910, secs. 860 *et seq.*

¹²² 235 U.S. 151, 161 (1914).

¹²³ 186 F. 966, 971 (8th Cir. 1911).

embraced the excuse with enthusiasm. By addressing standing at the conclusion of his opinion, he made the dicta prominent, and indicated a future path for the Court. In looking at the decades long process of destroying separate but equal, this case, which for the first time took “separate but equal” seriously, deserves pride of place as the initial judicial attack on Jim Crow, and is an excellent example of Hughes’ political sagacity at work.

Holmes joined three Southern Justices (White, Lamar, and McReynolds) in concurring without an opinion.

South Kensington & Cincinnati Street Railway Co. v. Kentucky (1920) concerned a single trolley that travelled five miles from Kentucky to Ohio, charging five cents for the trip. Kentucky required that the white and black races be separated by a “good and substantial wooden partition,”¹²⁴ while Ohio banned segregation in trolleys. The trolley company was indicted in Kentucky for violating its segregation law, but complained that the Kentucky law was an invalid interference with interstate commerce.

Justice McKenna, speaking for a six-three majority, held that the “regulation of the act affects interstate business incidentally and does not subject it to unreasonable demands.”¹²⁵ The railway was chartered in Kentucky, and therefore the law regulates the charter and “is not a regulation of interstate commerce.”¹²⁶ Finally, McKenna emphasized the “necessity, under our system of government, to preserve the power of the states.”¹²⁷

In *McCabe*, we do not have access to Holmes’ unpublished concurrence, but we do have Hughes’ reply indicating that Holmes agreed with the dismissal, but not the separate but equal dicta. Hughes concluded that Holmes’ reading of the equal protection clause did not rule out racial discrimination. He wrote Holmes that the law compelled “a black man [to] sit-up all night – just because he is black, unless there are enough blacks to make a ‘black sleeping car’ pay. I don’t see that it is a case calling for ‘logical exactness’ in enforcing equal rights, but rather as it seems to me it is a bald, wholly unjustified discrimination against a passenger solely on account of race.”¹²⁸

In *McCabe*, Holmes had apparently used “logical exactness” to minimize the discrepancy between the treatment of white and black passengers, but as the railway did not offer black passengers roughly the same accommodations, arguments on equality could hardly be dismissed as logic-chopping; it offered them no accommodations at all. The implication is that Holmes agreed that the suit should be dismissed, and on the merits shared the view of the three Southern justices.

As to *Chiles* and *South Kensington*, Holmes silently agreed with the majority. He had often interpreted the commerce clause broadly. In *Swift & Co. v. United*

¹²⁴ 252 U.S. 399.

¹²⁵ *Id.* at 404.

¹²⁶ *Id.* at 403.

¹²⁷ *Id.* at 404.

¹²⁸ Letter from Holmes to Hughes, (Nov. 29, 1914), in ALEXANDER M. BICKEL & BENNO C. SCHMIDT, 9 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE JUDICIARY AND RESPONSIBLE GOVERNMENT, 1910-1921, at 780 (1984). A few years earlier, Hughes, speaking on behalf of Tuskegee Institute had declared, “We cannot maintain our democratic ideals as to one set of our people and ignore them as to others.” MERLO PUSEY, CHARLES EVANS HUGHES 216 (1951).

States (1905), for example, he emphasized that interstate commerce “is not a technical conception, but a practical one, drawn from the course of business.”¹²⁹ In this regard, Justice Day, dissenting in the trolley case, pointed out that in an earlier case involving the same railway, a local Kentucky law that regulated the number of cars and passengers was struck down as an unconstitutional intrusion into interstate commerce. Day thought that the burden imposed on the railway by segregation was substantial, with the few passengers (and even fewer blacks) served rendering the changes required impractical. Holmes apparently did not agree on the burdensome nature of segregation. Nor did he see a problem in *Chiles*.

VI. RESIDENTIAL SEGREGATION

Prior to 1910, there had been little migration of Southern blacks to border or Northern cities, but drawn by a labor shortage that generated higher wages, black migration at this point began to change.¹³⁰ Activated by white economic and social fears, a number of cities, including Louisville, adopted ordinances that barred whites and blacks from occupying houses on blocks where the majority was of a different race. Charles Buchanan, a white real estate agent, and William Warley, a black home buyer, signed an agreement to purchase a house on a majority white block. Warley declined to complete the purchase when he learned that the ordinance would prevent him from occupying the house, complaining that the law negated specific performance of a real estate contract he had signed. Louisville countered that the law was intended “to prevent conflict and hostility between the white and colored races . . . and to preserve the public peace and promote the general welfare.”¹³¹

Justice Day, speaking for a unanimous Court, conceded that “there exists a serious and difficult problem [of] race hostility,”¹³² but concluded that the ordinance deprives buyer and seller of their due process property rights.¹³³ The law may have been directed only at occupancy, but its connection to buying and selling was obvious. Nor could the law be justified by the goal of racial purity, for it permitted widespread interracial contact.¹³⁴ Nor could it be justified in terms of maintaining whites’ property values, as undesirable whites were not prevented from moving to the block.¹³⁵ Day distinguished the case from *Plessy*, where blacks had no property interest in where they sat, which merely reflected social equality, a topic he believed the equal protection clause avoided,¹³⁶ though he implicitly agreed that “prohibiting the amalgamation of the races” was a legitimate public policy decision.¹³⁷ This was the first decision that found

¹²⁹ 196 U.S. 375, 378.

¹³⁰ William J. Collins & Marianne H. Wanamaker, *The Great Migration of Black and White: New Evidence on the Selection and Sorting of Southern Migrants*, 75 J. Eco. Hist. 947 (2015).

¹³¹ The brief also referred to preserving “racial integrity,” and to “negroes carry[ing] a blight with them wherever they go.” Brief for Defendant in Error 11, 13 (1917).

¹³² 245 U.S. 60, 80.

¹³³ *Id.* at 82.

¹³⁴ *Id.* at 81.

¹³⁵ *Id.* at 82.

¹³⁶ *Id.* at 79.

¹³⁷ *Id.* at 81.

segregation unconstitutional, and was greeted as a great victory for civil rights.¹³⁸ Holmes wrote a dissent, but failing to get another justice to join him, decided not to make it public.¹³⁹ Holmes objected that the case was likely “manufactured,” and thus should not have been heard. In this, he was clearly correct, for both parties colluded to have the law struck down. He also complained that Buchanan’s suit was brought on behalf of Warley, which was improper. As in *McCabe*, Holmes declined to join a majority making a larger policy point, when well established technical concerns dictated that the case should never have been heard.

Corrigan v. Buckley (1926) concerned the practice of racial restrictive covenants, that is, private agreements not to sell or rent real property to certain designated groups, typically blacks but also sometimes Jews, Mexicans, Chinese, Armenians, Japanese, Persians, Syrians, American Indians, and others.¹⁴⁰ The practice first appeared in the South in 1904, and spurred on by the Great Migration sparked by World War I and subsequent race riots, it appeared in the North by 1922, and rapidly became nationalized.¹⁴¹ As a practical matter, the key question was whether courts could enforce such agreements. In *Title Guarantee & Trust Co. v. Garrott* (1919), a California court found no violation of the Fourteenth Amendment because the judiciary “sanctions discriminations that are the outgrowths of contracts made by individuals.”¹⁴²

The Supreme Court heard *Corrigan*, where a suit in equity was brought to enjoin conveyance of real estate in Washington, D.C. in violation of a racial restrictive covenant. Irene Corrigan, a white homeowner, had agreed to a covenant but later had also agreed to sell her property to John Buckley, a black man, claiming that judicial enforcement of the covenant deprived her of Fifth, Thirteenth, and Fourteenth Amendment rights. Justice Sanford, speaking for a unanimous Court, disposed of the suit in fewer than five pages. The amendments she cited, he pointed out, all targeted only governmental action, while the covenant constituted private action. Thus, “in the absence of any substantial constitutional or statutory question giving us jurisdiction,” he concluded, “we cannot determine upon the merits of the contentions.”¹⁴³ Though Sanford, therefore, refused to decide the case on its merits, in dicta he noted that “it is obvious, upon their face, that [the amendments] do not in any manner prohibit or invalidate contracts entered into by private individuals in respect to the control of their property.”¹⁴⁴ Confusing the dicta for the ratio, a number of state courts relied on *Corrigan* in upholding the judicial enforceability of covenants.¹⁴⁵

¹³⁸ WILLIAM B. HIXON, JR., *MOORFIELD STOREY AND THE ABOLITIONIST TRADITION* 142 (1972); William H. Baldwin, Jr., *Unconstitutional Segregation*, *NEW REPUBLIC*, JAN. 19, 1918, 345.

¹³⁹ The opinion may be found at Josh Blackman’s Blog, July 18, 2017.

¹⁴⁰ U.S. DEP’T OF JUSTICE, *PREJUDICE AND PROPERTY* 18 (1948).

¹⁴¹ Michael Jones Corea, *The Origins and Diffusion of Racial Restrictive Covenants*, 115 *POL. SCI. Q.* 541, 550 (2001).

¹⁴² *Title Guarantee v. Garrott*, 42 Cal. App. 152, 183 (1919).

¹⁴³ 271 U.S. 323, 332.

¹⁴⁴ *Id.* at 331.

¹⁴⁵ E.g., *United Cooperative Realty Co. v. Hawkins*, 269 Ky. 563, 565 (1937); *Ridgeway v. Cockburn*, 296 N.Y. 936, 942 (1937); *Meade v. Dennistone*, 173 Md. 295, 302 (1938); *Doherty v. Rice*, 240 Wis. 389, 397 (1942); *Lyons v. Waller*, 191 Okla. 567, 569 (1942).

VII. JURY EXCLUSION

Two nineteenth century cases might have provided powerful precedents for later jury exclusion cases. First, in *Strauder v. West Virginia* (1880), the Supreme Court held that a state law banning blacks from juries denied them equal protection of the laws. As Justice Strong wrote, the law excluding them “is practically a brand upon them, affixed by law; an assertion of their inferiority, and a stimulant to the race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.”¹⁴⁶ Second, in *Yick Wo v. Hopkins* (1886), the Supreme Court accepted overwhelming data of disparate racial impact as sufficient to establish unconstitutional administration of an otherwise valid law that was not discriminatory on its face.¹⁴⁷ No evidence of discriminatory intent was required.

Brownfield v. South Carolina (1903)¹⁴⁸ was the occasion of Holmes’ first civil rights opinion. John Brownfield, a black barber, was convicted of murder and sentenced to be hanged. Brownfield had refused to pay a \$3.10 poll tax; although this was a civil and not a criminal offense, a court officer had pulled his gun and attempted to arrest him; in the scuffle, the officer had been killed. Brownfield filed a pretrial motion to quash the indictment on the ground that blacks had been unlawfully excluded from the grand jury (four-fifths of the county were black), and offered to present corroborating evidence. A judge ruled against the motion, and an oral challenge was also denied. The judge also denied a motion alleging black exclusion from the petit jury, remarking that as he “was not personally acquainted with the jurors selected, I could not assume the facts to be as alleged,” even though he had supervised the voir dire. A judge on the South Carolina Supreme Court (and a brother of the trial judge) found no grounds for discrimination because Brownfield was not entitled to be tried by a jury containing blacks and because the state constitution and statutes did not discriminate. He failed to mention the petit jury.¹⁴⁹ Brownfield complained to the United States Supreme Court that blacks had been excluded from his grand and petit juries on account of race in violation of the equal protection clause.

Holmes, relying on the South Carolina Supreme Court ruling, held in a brief opinion that the allegations were controverted, but the evidence submitted by Brownfield was not agreed to by the judge.¹⁵⁰ In the absence of proven allegations, the Court affirmed the lower court’s ruling.

Rogers v. Alabama (1904) involved a black man convicted of murder, who complained that though a majority of the population in his county was black, none was selected for his grand jury as a result of their deliberate exclusion by officials. The Alabama supreme court denied his appeal on the ground that his motion was “unnecessarily prolix,” as provided in the state civil code.

Holmes, speaking for a unanimous Court, wrote that the motion asserting a

¹⁴⁶ 100 U.S. 303, 308. In *Carter v. Texas*, 177 U.S. 442, 449 (1900), the Court held that black defendants must be granted an opportunity to establish jury exclusion.

¹⁴⁷ 118 U.S. 356.

¹⁴⁸ This case is thoroughly discussed in THOMAS J. RUBILLO, TRIAL AND ERROR: THE CASE OF JOHN BROWNFIELD AND RACE RELATIONS IN GEORGETOWN, SOUTH CAROLINA (2005).

¹⁴⁹ *State v. Brownfield*, 39 S.E. 2 (S.C. 1901).

¹⁵⁰ *Brownfield v. South Carolina*, 189 U.S. 426, 428.

“constitutional right . . . cannot be withdrawn for prolixity . . . under the color of local practice.”¹⁵¹ Rogers raised a federal question. The judgment was reversed, and the case remanded.

Rawlins v. Georgia (1906) concerned a black man convicted in Florida of murder, who complained that blacks were excluded from his jury in violation of the Fourteenth Amendment.

Justice Brewer, speaking for a unanimous Court, denied the appeal, writing that “actual discrimination . . . must be proved or admitted,”¹⁵² but all that was offered was an “affidavit of the defendants . . . stating that the facts set up in the motion were true” to their best knowledge, information and belief.¹⁵³ As with *Brownfield*, this was insufficient.

Martin v. Texas (1906) concerned Rufus Martin, a black defendant, who was convicted of murdering a white farmer. Martin maintained that he was a victim of jury discrimination; a quarter of the potential jurors were black, but they were all excluded to guarantee a white jury. Texas responded that only 150 blacks were qualified, in contrast to 12,000 whites, and denied that it had engaged in discrimination.

In a brief opinion, Justice Harlan, speaking for a unanimous Court, ruled for Texas, citing the “absence of such proof [required for] overcoming the denial on the part of the state.”¹⁵⁴ As with *Brownfield* and *Rawlins*, he said there was no evidence to support the charge. Otherwise discrimination could be established simply by the absence of blacks on juries.¹⁵⁵

Thomas v. Texas (1909) concerned Marcellus Thomas, a black defendant, who was convicted of murdering a white man. The defendant pointed to a quarter of the jury pool being black, attributing their total exclusion to discrimination.

Chief Justice Fuller, in a brief opinion for a unanimous Court, observed that Thomas had raised a question of fact, and that “the ordinary rule is that questions of fact will not be reviewed by this Court on writs of error to state courts.”¹⁵⁶ He conceded that the Court might intervene, when “these decisions constitute such abuse as amounted to an infraction of the federal Constitution, which cannot be presumed, and which there is no reason to hold on the record before us.”¹⁵⁷ He pointed out that the grand jury contained a black juror and that “there were negroes on the venire from which the jury which tried the case was drawn, although it happened that none of them were drawn out of the jury box.”¹⁵⁸

Franklin v. South Carolina (1910), a high profile case that saw the NAACP raise issues of criminal peonage laws and self-defense,¹⁵⁹ concerned Pink Franklin, a black farmer convicted of murdering a white constable, who had come to arrest him for a peonage violation. Despite a sizable black population, none had been

¹⁵¹ 192 U.S. 226, 230.

¹⁵² 188 U.S. 519, 520.

¹⁵³ *Id.* at 521.

¹⁵⁴ 200 U.S. 316, 321 (1906).

¹⁵⁵ *Id.*

¹⁵⁶ 212 U.S. 278, 281.

¹⁵⁷ *Id.* at 282.

¹⁵⁸ *Id.* at 283.

¹⁵⁹ W. Lewis Burke, *Pink Franklin v. South Carolina: The NAACP's First Case*, 54 AM. J. LEGAL HIST. 265 (2014).

chosen for the grand or petit juries. The South Carolina supreme court upheld the conviction, noting that nothing in the laws relevant to jury selection mentioned race.

Speaking through Justice Day, the Supreme Court again insisted on proof that officials in charge of jury selection intended to exclude blacks, and upheld the conviction.¹⁶⁰

Brownfield, Rawlins, Martin, Thomas, and Franklin all saw claims of black jury exclusion denied for want of evidence of discriminatory intent. Insisting on intent is perfectly reasonable in ordinary criminal cases. However, insisting on intent in these civil suits is jarring for three reasons. First, it placed a heavy burden on the plaintiffs because it is much easier for the state to disguise discriminatory intent than effect, and the plaintiff for financial and other reasons is much less able to assume heavy burdens. Second, insisting on intent failed to incentivize states to remedy the exclusion of blacks; indeed, burdening plaintiffs actually incentivized states to continue the practice. The contrast with *Yick Wo* is instructive. There, the Court looked past a facially race neutral law to its biased application, ruling that this application, without reference to evidence of intent, was sufficient to demonstrate discrimination. In the jury exclusion cases, it refused to apply this reasoning, though the subject matter – jury selection versus licensing of laundries – would clearly seem to dictate otherwise, for jury selection may involve loss of liberty or death. Third, while courts may understandably be reluctant to reverse practices beyond their purview, jury selection goes to the heart of the criminal justice system, and is very much their business. The Court’s deference thus becomes even harder to justify. The Court might have ruled, for example, that when black exclusion from juries is statistically obvious, a presumption of discriminatory intent would be created, shifting the burden of proof from the plaintiffs to the state and according with simple common sense; if the state were unable to rebut the presumption, unlawful exclusion would be established.¹⁶¹

Holmes’ contribution to jury selection jurisprudence was modest. He wrote only the *Brownfield* and *Rogers* opinions and silently agreed in the four other cases. In *Rogers*, he found for the plaintiff, whose appeal had been denied by the Alabama supreme court on the bizarre ground that it was “unnecessarily prolix”; perhaps, had Alabama relied on the absence of discriminatory intent, it might have prevailed. Apart from this case, Holmes was evidently willing to avert his eyes from the overwhelming arithmetic evidence of discrimination that blanketed the five other cases.

VIII. LYNCHING

Riggins v. United States (1905) concerned Riggins, a white man in Alabama, who was indicted for lynching Maples, a black man accused of murder, because he “was of African descent,”¹⁶² in violation of federal law. Riggins sought a writ of habeas corpus that would release him on the ground that no federal law applied to the lynching.

¹⁶⁰ 218 U.S. 161, 167.

¹⁶¹ The Court adopted this rationale concerning employment discrimination. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

¹⁶² 194 U.S. 547, 548.

Chief Justice Fuller, in a brief opinion for a unanimous Court, quashed the writ on the ground that Riggins had asked the Court “to decide questions in advance of final adjudication, contrary to the settled rule.”¹⁶³

United States v. Shipp (1909) began when a black carpenter in Tennessee, Ed Johnson, was convicted by an all-white jury of raping a white woman, and sought a writ of habeas corpus on the ground that blacks had been excluded from the jury and a change of venue request denied. The Court issued a stay of execution, and ordered him detained in Sheriff Joseph Shipp’s county jail. However, Johnson was lynched by a white mob with the connivance of Shipp. Shipp denied his guilt, and asserted that his sworn denial should be conclusive; if it were false, said, he could be prosecuted for perjury. He also challenged the Court’s jurisdiction, noting that as sheriff he was not a federal officer.

In an opinion for a unanimous Court, Holmes announced that it was absurd to imagine that “a general denial and affidavit should dispose of the case.”¹⁶⁴ Holmes added that Johnson had been detained “to abide the further order of this Court,”¹⁶⁵ and so the sheriff, though a county employee, was acting as a federal officer. The Court, therefore, had jurisdiction to hear this case and to try Shipp for contempt of court. Holmes was clearly outraged that Shipp had characterized the opposing arguments as “frivolous.”

In the contempt trial, the only criminal case ever tried before the Supreme Court, Chief Justice Fuller in an unusually long and detailed opinion concluded for a five-three Court that “Shipp not only made the work of the mob easy, but in effect aided and abetted.”¹⁶⁶ Shipp was held in contempt.

Though lynching was commonplace during this period, its cruelty, bigotry, and denial of the rule of law all suggest that the Court would find it uniquely abhorrent. Holmes, as a young man, had described it as almost an irresistible force that “listens to no argument, for it is very little more than a mere animal movement. One might as well reason with a she-bear from whom he had stolen her cubs.”¹⁶⁷ The opinions in both *Shipp* cases acknowledged its horror. But in *Riggins*, where the Justice Department, influenced by President Theodore Roosevelt’s outrage at lynching, brought the prosecution, Fuller’s opinion made no mention of lynching. As for sheriff Shipp, he was sentenced to ninety days in a federal jail. Upon his release, he returned home and was met by a crowd of ten thousand of his fellow citizens serenading him with *Dixie*.

IX. MISCELLANEOUS

A pair of cases involving race produced unanimous opinions with which Holmes silently joined. *New York ex rel. Bryant v. Zimmerman* (1928)¹⁶⁸ concerned a challenge to a state law requiring oath bound organizations of twenty or more

¹⁶³ 199 U.S. 547, 551.

¹⁶⁴ 203 U.S. 563, 574.

¹⁶⁵ *Id.* at 575.

¹⁶⁶ In dissent, Justice Peckham, while abhorring the lynching, found no evidence that the sheriff had been responsible. 214 U.S. 386, 426.

¹⁶⁷ Oliver Wendell Holmes, Jr., *Crime and Automatism*, 35 ATLANTIC 466 (Apr., 1875).

¹⁶⁸ 278 U.S. 63.

members to file their constitutions, oaths, and membership lists with the state. Zimmerman, a member of the Ku Klux Klan, claimed that this abridged his due process right to freedom of association. Justice Van Devanter held that given the Klan's notoriety, the requirement was reasonable.

Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v. Michaux (1929)¹⁶⁹ involved two Shriner organizations, one for white members and the other for black. The white order sought an injunction preventing the black order from using its name, constitution, emblems, and regalia. The black order rejected the claim that the white order had exclusive use of these, and pointed to its own incorporation under an act of Congress. Van Devanter found no evidence of fraud on the part of the black order, and denied the request for injunctive relief.

X. CONCLUSIONS

It is easy from the moral perch of 2020 to condemn Holmes' record on race compiled a century or more ago. In its general indifference to the claims of African Americans, it is inarguably appalling. One might answer that in those times, whites, North and South, were for the most part indifferent to these claims. One might add that under the Fuller Court (1888-1910), every civil rights case except those involving lynching was decided against blacks, typically on technical grounds, with no reference to the overarching fact of violence, terrorism, and discrimination to which this sizable portion of the population was subject. One might also point to the prevailing judicial rhetoric of rights that tended to favor the interests of the strong against the weak.¹⁷⁰ There is no evidence that the Court ever considered taking judicial notice of the devastating consequences of Jim Crow that were present for all to see. In short, it might be said in Holmes' defense that he was simply a man of his time, and that his actions (or inactions) reflected this fact.

Except that Holmes was not simply a man of his time. Edmund Wilson pointed to Holmes' "unshakable self-confidence, his carapace of impenetrable indifference to current pressures and public opinion, [his] Brahmanism, his high-minded egotism, and his philosophical temper of mind [that] equipped him with impenetrable integument."¹⁷¹ Holmes, a proud iconoclast, delighted in swimming against the flow. A man of his time, for example, might have approved a crabbed commerce clause¹⁷² or liberty of contract.¹⁷³ He did not. Or he might have approved national security rationales for suppressing speech. After an irresolute beginning,¹⁷⁴ he did not.¹⁷⁵ Indeed, in one of these cases, a delegation of three justices, joined by his wife, urged him to withdraw his stinging dissent in support of the speech rights

¹⁶⁹ 279 U.S. 737.

¹⁷⁰ *E.g.*, *Lochner v. New York*, 198 U.S. 45 (1905); *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

¹⁷¹ WILSON, *supra* note 28, at 782, 794-95.

¹⁷² *Hammer*, *supra* note 170, at 277.

¹⁷³ *Lochner*, *supra* note 170, at 74.

¹⁷⁴ *Schenck v. United States*, 249 U.S. 47 (1919).; *Frohwerk v. United States*, 249 U.S. 204 (1919); *Debs v. United States*, 249 U.S. 211 (1919).

¹⁷⁵ *Abrams v. United States*, 250 U.S. 616, 624 (1919); *Gitlow v. New York*, 268 U.S. 652, 672 (1925).

of Russian Jewish communists. He paid no attention to them.¹⁷⁶ While Holmes appears to have been influenced by several young Progressives and their so-called House of Truth,¹⁷⁷ he was emphatically not a cypher blown by prevailing winds. He was stubbornly, if always politely, his own man.

It is difficult, then, to avoid the conclusion that Holmes was genuinely indifferent to the plight of blacks, particularly in the South, though for most of the year he lived in the Southern city of Washington and would have observed their discrimination daily. It was plain that each of the black litigants in the cases he heard were proxies for hundreds or even thousands, who for financial or other reasons were unable to make their pleas known. There is no sign that this troubled him. Similarly, though he often wrote about foreseeable harm,¹⁷⁸ he seemed blind to the obvious and intended consequences of the practices he voted to uphold. In this, he differed radically from his disciple, Frankfurter, whose emotional commitment to policies frequently clashed with his principled commitment to defer to legislatures. Holmes evinced none of Frankfurter's public agonies because he seems to have lacked the policy engagements.¹⁷⁹ In his voluminous correspondence, which often touched on current events, he almost never mentioned race, and one of the very few reform ideas he embraced was eugenics, which was then marinating in racism. If the status of blacks was not resolved as many of the abolitionists might have hoped, it was with few exceptions evidently resolved enough for him.¹⁸⁰

Holmes' response to the race question reflected his general view toward life. In this, society was not an organic whole, but merely the sum of individuals, each struggling to advance his own interests. The place of honor went to honor, that is, to the obligation to do one's duty, to fulfill the expectations inhering in one's position, for example, in the soldier's faith "to throw away his life" without hesitation or doubt at the command of his superior. Honor, in this sense, overlaps with authenticity, the obligation to be true to oneself for one's own sake. The ideal, then, would be an autonomous individual guided by rational deliberation, impervious to efforts at manipulation, and adhering to "an order which is inseparably indexed to a personal vision."¹⁸¹ What of the world around him? Holmes accepted the social order, but in innumerable comments made it clear that he regarded much of it as a façade concealing the ineradicable fact that "we may substitute free struggle for life."¹⁸²

¹⁷⁶ DEAN ACHESON, *MORNING AND NOON: A MEMOIR* 119 (1965).

¹⁷⁷ BRAD SNYDER, *THE HOUSE OF TRUTH* (2017).

¹⁷⁸ Oliver Wendell Holmes, Jr., *Privilege, Malice and Intent*, 8 HARV. L. REV. 1, 11-12; *Elmer v. Fessenden*, 151 Mass. 359 (1890); *Commonwealth v. Peaselee*, 177 Mass. 267 (1901).

¹⁷⁹ Thus, while Frankfurter was ever the Court politician seeking to influence the votes of his colleagues, Holmes maintained a courteous aloofness.

¹⁸⁰ Wilson remarked that Holmes was "as free as was possible for men of their generation from common nineteenth century prejudices." *Supra* note 28, at 782. In an era of widespread anti-Semitism, he corresponded with a number of Jewish acolytes—Harold Laski, Felix Frankfurter, Lewis Einstein. Yet what is striking about the letters is an intellectual repartee untouched by personal concerns. At one point, Laski wrote, asking if they might address each other by their first names. Holmes responded with his usual "Dear Laski." On the other hand, this formalism may have simply been habitual: in his often affectionate letters home during the Civil War, Holmes invariably signed them OWH, Jr.

¹⁸¹ CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* 510 (1989).

¹⁸² *Vegeahn v. Gunter*, 167 Mass. 92, 107 (1896).

In the end, so potent was Holmes' preoccupation with being true to himself that it left little room for caring about others. Had Holmes believed human nature to be essentially cooperative and compassionate, perhaps the self-absorption might have proven more benign. But he dismissed all this as fantasy. It is not surprising, then, that the wounds from the Civil War, physical and emotional, did not sensitize him to the claims of injustice, though they did confirm his belief in evil and pain, not only as metaphysical constructs, but more pressingly, as dominant, supremely important practical facts.

Yet he did not dwell on the past, as Robert Burns wrote, "nursing her wrath to keep it warm."¹⁸³ Holmes understood what he had lost—for example, the innocence, optimism, and idealism that had induced him to enlist in the army—was irretrievably gone, and that he could not return to his old self, in fact, that there was something weak and dishonorable about such nostalgic reveries. At the same time, his broad lack of interest in the personal past also meant that forgiveness, either as a practical accommodation or as a Christian virtue, did not concern him much. Indeed, when he contemplated venality (as he often did), it usually took the form of jaunty one-liners, not gloomy introspection, moral outrage or concrete action.

There was perhaps an element of self-flattery in this pose, for it presumed an elevated position far above the madding crowd. There was also perhaps an element of self-protection here, as if the casual indifference had calcified into a shield safeguarding him from the latent consequences of the trauma he had suffered decades earlier. Holmes' rejection of a tempting preoccupation with the past was thus a sign of both practical adaptation and emotional maturity. No wonder he had no use for reformers, who seemed to deny the omnipresent fact of struggle and, as he said as a young man, "believe in the upward and onward—who talk of uplift, who think that something in particular has happened and that the universe is no longer predatory."¹⁸⁴

It is not surprising, then, that his youthful dalliance with abolitionism failed to remind him a half century later of the sorry plight of Southern blacks. Of course, there was the stentorian voice of his colleague, Harlan, to bring it to his attention. But Holmes did not think much of Harlan, writing that he has a mind like a "powerful vise the jaws of which couldn't be got nearer than two inches to each other."¹⁸⁵ His opinions, often full of moral condemnation, seemed to Holmes to parade virtue like a prize bull. "Certitude," he wrote, "is not test of certainty."¹⁸⁶ For Holmes, truth merely meant "that I cannot help believing it."¹⁸⁷ Thus, was his ever-present arrogance married to a cosmic humility.

These attitudes informed Holmes' vision of law and politics, as well. "The first requirement of a sound body of law," he wrote in *The Common Law*, "is that it should correspond with the actual feelings and demands of the community, whether right or wrong."¹⁸⁸ That is, if the law does not reflect these feelings and demands, it may simply be ignored or, worse, general disorder might erupt, producing seriously bad results and undermining the very rule of law. In this, Holmes is very close

¹⁸³ ROBERT BURNS, TAM O'SHANTER AND SOUTER JENNY 4 (1830).

¹⁸⁴ HOLMES, *supra* note 17, at 25.

¹⁸⁵ HOLMES-POLLOCK, *supra* note 5, at 2:7-8.

¹⁸⁶ OLIVER WENDELL HOLMES, JR., COLLECTED LEGAL PAPERS 311 (1920).

¹⁸⁷ *Id.* at 319.

¹⁸⁸ HOLMES, *supra* note 99, at 41.

to Hobbes' position that a bad ruler must be preferred to no ruler at all because disorder is the ultimate condition to be avoided. Yet the effect of the argument is to present a choice of bad law versus no law, when the real choice is among various laws of various rationales and qualities. For this reason, his stance lends itself to a support of the status quo, almost regardless of how defective the status quo might be.

It also logically leads to the position that courts should declare laws unconstitutional only when they cannot avoid doing so. The law may seem to a judge foolish, unworkable, even immoral, but these are not his proper concerns. These are matters for the lawmakers. The judge should ask only if the law is clearly unconstitutional. If it is not, questions of doubt should be resolved in favor of the lawmakers. For Holmes, for whom duty was of immense importance, this was how judges were obliged to act.

What is most striking is that while we take it for granted that great men seek after power, Holmes seems determined to limit that power. The great monarchs—Henry VIII, Peter the Great, Louis XIV—worked ceaselessly to centralize power in their own hands. Great presidents—Lincoln, Franklin Roosevelt—to a much lesser degree did the same. In ordinary speech, we may in fact conflate “great” with “powerful.” Holmes plainly does not fit the mold, and the explanation does not lie in self-doubt, a predilection to give in to others, or a temperament of overweening modesty, but rather in his sense of duty. On the issue of race, Holmes exhibited a level of deference that seems almost unthinking in its automatic consistency. His demands on lawmakers are virtually nonexistent. Within the Court, too, his role is largely passive, contributing few opinions and even declining to file lone dissents.

It was not difficult for Holmes to fixate on politics as struggle. As a bright son of intellectual Brahmins, as a wounded warrior in the Civil War, as a pathbreaking scholar in *The Common Law*, as a renowned judge on the Supreme Judicial Court of Massachusetts and then the United States Supreme Court, he had always seemed to emerge from struggles triumphant. In his eyes, perhaps, these repeated victories underscored the fundamental social fact of struggle and at least the potential worthiness of the victors. His is the unmistakable voice of one who managed to come out on top—as a popular biography put it, as *The Yankee from Olympus*.¹⁸⁹

From this perspective, as Judge Posner observed, “The democratic political process was merely the civilized, because non-violent, method of regulating the relative strength of the competing forces in society.”¹⁹⁰ Suppose the results favor only the short-term interest of the dominant forces? Suppose the results are indisputably immoral? Suppose the results are anti-democratic? Holmes is not insensible to these possibilities. He never romanticized what he called, as a young man, “the thick fingered clowns we call the people—vulgar, selfish and base.”¹⁹¹ “I look at man through Malthus’ glasses—as like flies,” he wrote Laski, “here swept away by pestilence—there multiplying unduly and paying for it.”¹⁹² Or as he wrote to Pollock, there is “no reason for attributing to man a significant difference in

¹⁸⁹ CATHERINE DRINKER BOWEN, *YANKEE FROM OLYMPUS* (1944). The Magnificent Yankee, a sentimental biography of Holmes, was a popular 1950 movie.

¹⁹⁰ RICHARD A. POSNER, *REFLECTIONS ON JUDGING* 156 (2013).

¹⁹¹ HOLMES, *supra* note 17, at 71.

¹⁹² HOLMES-LASKI, *supra* note 7, at 1: 762.

kind from that which belongs to a baboon or a grain of sand.”¹⁹³ There is hyperbole here, of course, but there is also a deep skepticism as to the wisdom and virtue of his fellow human beings and no illusion that democracy guaranteed good results.

This was hardly a secret to those who knew him. William James thought Holmes a model of “cold-blooded conscious egotism and conceit.”¹⁹⁴ James Bradley Thayer considered him “wanting sadly in the noblest region of human character—selfish, vain, thoughtless of others.”¹⁹⁵ Benjamin Kaplan (who only knew of him) labeled him “a tough old party, quite aware that he was deficient in empathy.”¹⁹⁶ Beneath his daunting charm and politesse, was Holmes unmistakably something of a cold fish?

Yet notwithstanding his evident disdain for ordinary people, Holmes as a judge was known for his reluctance to overturn laws enacted by the representatives of these ordinary people or even widespread unwritten customs. Time and again, he would insist, in Thayer’s words, that he would uphold them unless they constituted “not merely. . . a mistake, but . . . a very clear one – so clear that it is not open to rational question.”¹⁹⁷ In case after case, he deferred to the legislature.¹⁹⁸

“The life of the law,” in his mantra, “is not logic; it is experience.”¹⁹⁹ He ridiculed those formalists, who imagined law “a brooding omnipresence in the sky,”²⁰⁰ emphasizing that it is created by real people to serve their purposes. Would Holmes inquire as to what these purposes were? Or was that none of his—and the Court’s—business? But if he refused to inquire, how is law for him different from commands from thugs? Of course, lawmakers can point to a legitimate authority that thugs cannot. But do lawmakers retain this authority, even when they behave like thugs, for example, when they undermine their own democratic legitimacy by banning blacks from voting? In his classic *Lochner* dissent, Holmes spoke of infringements on due process liberty that abridged “fundamental principles as they have been understood by the traditions of our people and our law.”²⁰¹ Did racial discrimination abridge the “fundamental principle” of equality? Or, because the discriminatory practice had (sadly) been sanctioned “by the traditions of our people and our law,” was it therefore permissible? Faced with this dilemma, what was Holmes to do? He did not worship the past. He thought it “revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV.”²⁰² Yet in general, he respected precedents, which, indeed, comprised the subject matter of the book that first made his reputation, *The Common Law*.

In the continuing tug of war between democracy and liberty on the subject of race, Holmes generally chose not to choose. When possible—and the Court usually

¹⁹³ HOLMES-POLLOCK, *supra* note 5, at 1: 252

¹⁹⁴ HOWE, *supra* note 16.

¹⁹⁵ *Id.* at 268.

¹⁹⁶ Benjamin Kaplan, *Encounter with Oliver Wendell Holmes, Jr.*, 96 HARV. L. REV. 1828, 1840 (1983).

¹⁹⁷ James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893).

¹⁹⁸ E.g., *Lochner*, *supra* note 170; *Adair v. United States*, 208 U.S. 161, 190 (1908); *Coppage v. Kansas*, 236 U.S. 28 (1915).

¹⁹⁹ HOLMES, *supra* note 99, at 1.

²⁰⁰ *Southern. Pac. Co. v. Jensen*, 244 U.S. 205, 217 (1917).

²⁰¹ E.g. *Lochner*, *supra* note 143, at 76.

²⁰² Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

contrived to find it possible—he preferred a decision on some technical ground that forestalled consideration on the merits. What makes this odd is his renunciation of formalism. “No one will ever have a truly philosophical mastery over the law,” he said at his Lowell lecture, “who does not habitually consider the forces outside of it which have made it what it is. . . . the law finds its philosophy . . . in history and the nature of human needs.”²⁰³ If, as Judge Posner has written, “The character of legal formalism can be captured in such slogans as ‘the law made me do it’ or ‘the law is its own thing,’”²⁰⁴ this is precisely what the Court and Holmes himself did in case after case, as they turned back challenges on peonage, educational segregation, transportation segregation, and jury exclusion on narrow grounds. When the topic failed to interest him, Holmes’ opposition to formalism was sometimes nowhere to be found.

Holmes’ habitual self-restraint clearly frees him from the charge of having been cursed by a hunger for power. Yet he was plainly smitten by the claims of vanity, as was evident in his “striking,”²⁰⁵ look-at-me appearance—the old-fashioned shirts and collars, the huge white moustache that nearly covered his mouth. As a former clerk put it, “He cut a dashing . . . figure.”²⁰⁶ Holmes might not have concerned himself with the opinion of the rabble of the *hoi polloi*, but after two decades of unearned relative obscurity on a Massachusetts court, he very much wanted the approval of intellectuals—perhaps, the same kind of intellectuals he had encountered in childhood congregating around his father. As Wilson observed, “It is Holmes’ special distinction . . . that he never dissociates himself from the great world of thought and art,”²⁰⁷ that is, from a realm inhabited not by the lawyers and law professors that normally follow judges, but by the larger intellectual community. Advancing causes well established in these circles, like free speech or government regulation of business, would earn him plaudits for his bold sagacity, and his dissents in these areas have become legendary. As one Progressive wrote, “No judge who has sat upon the bench has been more progressive in his outlook.”²⁰⁸

On the other hand, safeguarding the interests of blacks, whom these same intellectuals had all but forgotten, offered no comparable rewards. Holmes did not want Harlan’s Don Quixote mantle, which offered in place of adulation merely the label of self-righteous troublemaker. “Deep seated preferences,” he wrote, “cannot be argued about,”²⁰⁹ and what preferences seemed more deep seated than racism? Yet if Holmes were unwilling to argue about this preference, he was more than willing to argue about deep seated preferences concerning free speech or government regulation of business. “Congress cannot forbid all efforts to change the mind of the country,” he wrote in his much quoted *Abrams* dissent.²¹⁰ Insisting that anti-

²⁰³ Oliver Wendell Holmes es, Jr., *Review*, in 3 COLLECTED WORKS 103 (Sheldon M. Novick 1994).

²⁰⁴ Posner, *supra* note 190, at 4.

²⁰⁵ JEFFREY & THOMAS E. O’CONNELL, FRIENDSHIPS ACROSS AGES: JOHNSON AND BOSWELL, LASKI AND HOLMES 76 (2008).

²⁰⁶ Paul Freund, *Dark Equanimity*, 59 AM. SCHOL. 303 (1990).

²⁰⁷ WILSON, *supra* note 28, at 781.

²⁰⁸ Charles Carpenter, *Oliver Wendell Holmes, Jurist*, 8 ORE. L. REV. 269, 270 (1929).

²⁰⁹ Oliver Wendell Holmes, Jr., *Natural Law*, 32 HARV. L. REV. 40, 41 (1918).

²¹⁰ ABRAMS, *supra* note 175, at 628.

peonage and jury exclusion legislation be enforced, however, was evidently a step too far. These preferences were left untouched.

Holmes, unsurprisingly, would have an answer to all this. “Belittling arguments,” he once said, “have a force of their own,”²¹¹ which reminds us that all of us (and not merely Holmes) are radically imperfect. “Out of the crooked timber of humanity,” in Kant’s words, “no straight thing was ever made.”²¹² Holmes remains a towering figure in American law: it was Holmes who breathed life into the First Amendment,²¹³ who battled liberty of contract²¹⁴ and a constricted construction of the commerce clause,²¹⁵ who modernized the takings clause,²¹⁶ who gave inspiration²¹⁷ to legal realism – and this impressive list is incomplete. Holmes was truly “a bridge between the old regime and the new order.”²¹⁸ On his retirement, Cardozo called him “the greatest of our age in the domain of jurisprudence; and one of the greatest of the ages.”²¹⁹ Even a modern critic conceded “there is something grand about the man.”²²⁰ Yet Holmes failure to address the question of race with realism and compassion remains, beyond all doubt, a great stain on his reputation.

²¹¹ HOLMES-POLLOCK, *supra* note 5, at 1: 223.

²¹² IMMANUEL KANT, IDEA FOR A GENERAL HISTORY WITH A COSMOPOLITAN PURPOSE, PROP. 6 (1784).

²¹³ SCHENCK, *supra* note 174.

²¹⁴ LOCHNER, *supra* note 170.

²¹⁵ HAMMER, *supra* note 170.

²¹⁶ Penn. Coal Co. v. Mahon, 250 U.S. 393 (1922).

²¹⁷ ²¹⁷Karl N. Llewellyn, *Legal Illusion*, 31 COLUM. L. REV. 82, 84 (1931).

²¹⁸ DAVID L. FAIGMAN, LABORATORY OF JUSTICE: THE SUPREME COURT’S 200 YEAR STRUGGLE TO INTEGRATE SCIENCE AND LAW 82 (2005).

²¹⁹ Benjamin N. Cardozo, *Mr. Justice Holmes*, 44 HARV. L. REV. 682, 684 (1931).

²²⁰ Brenda Wineapple, *Hardened by War: The Contradictions of Oliver Wendell Holmes, JR.* NATION, Aug. 13, 2019.

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