

Canadian Journal of Comparative and Contemporary Law

Vol 7 | No 1 | 2021

**Democratic Decay: Challenges for
Constitutionalism and the Rule of Law**



Canadian Journal of

Comparative and Contemporary Law

Vol 7 | No 1 | 2021

Democratic Decay: Challenges for
Constitutionalism and the Rule of Law

The CJCL is published by
The Canadian Association of Comparative and Contemporary Law
at Thompson Rivers University
Kamloops, BC

Canadian Journal of Comparative and Contemporary Law

Publication

The Canadian Journal of Comparative and Contemporary Law (CJCCL) is an open-access publication that is available online at <http://www.cjcl.ca>. Each volume focuses on a particular theme or area of law. The CJCCL encourages contributors to take a comparative approach in their scholarship.

Copyright & Open-Access Policy

The CJCCL is an open-access journal, the publication of which is governed by a publishing and licensing agreement between the CJCCL and contributors. Any commercial use and any form of re-publication of material in a volume of the CJCCL requires the permission of the Editors-in-Chief.

Contact Information

Canadian Journal of Comparative and Contemporary Law
Thompson Rivers University
Faculty of Law
805 TRU Way
Kamloops, BC, Canada V2C 0C8
E-mail: editor@cjcl.ca
Web: <http://www.cjcl.ca>

Cover Photo

The front cover depicts the main stairwell that leads to the atrium of Thompson Rivers University, Faculty of Law. The back cover depicts the distinct exterior of the Faculty of Law. The curved design of the roof was inspired by the natural beauty of the mountains visible from the building.

© Cover photos & design Laura Tsang. Used by permission.

ISSN 2368-4046 (Online)
ISSN 2368-4038 (Print)
ISBN 978-1-9994425-3-8

© The Canadian Association of Comparative and Contemporary Law.

All rights reserved.

This Issue should be cited as (2021) 7(1) CJCCL.

Canadian Journal of Comparative and Contemporary Law

EDITORS-IN-CHIEF

Robert Diab

Chris DL Hunt

Lorne Neudorf

SPECIAL ADVISOR

Mary Hemmings

EDITORIAL BOARD 2020-21

Managing Editors

Yasamin Abhari

Jolene Sanderson

Editors

Alisha Dhanjal

Delani Buchan

Navdeep Dulai

Andrew Hefford

Heidi Esslinger

Sandy Lun

Shemay Lee

Kiranpreet Mangat

Logan Maddin

Paige Mueller

Ali Mulji

Melissa Perrier

Jeffrey Sandhu

Harsimran Saggú

Chloe Slessor

Monica Salt

Juliet Verbeke

Jeffrey Scheffel

Shi Ying Yan

Canadian Journal of Comparative and Contemporary Law

LIST OF CONTRIBUTORS

RYAN ALFORD, Associate Professor, Bora Laskin Faculty of Law, Lakehead University.

PAUL DALY, University Research Chair in Administrative Law & Governance, University of Ottawa (Faculty of Law, Common Law).

ROSALIND DIXON, Professor of Law, University of New South Wales.

TOM GINSBURG, Leo Spitz Professor of International Law, University of Chicago Law School.

KEIRAN HARDY, Lecturer, School of Criminology and Criminal Justice, Griffith University.

RAN HIRSCHL, Professor of Political Science and Law, University of Toronto.

VICKI C. JACKSON, Laurence H. Tribe Professor of Constitutional Law, Harvard Law School.

TARUNABH KHAITAN, Vice Dean and Professor of Public Law and Legal Theory, Faculty of Law, Oxford.

DAVID LANDAU, Mason Ladd Professor and Associate Dean for International Programs, Florida State University College of Law.

SANFORD LEVINSON, W. St. John Garwood and W. St. John Garwood Jr. Centennial Chair in Law, University of Texas Law School.

JEFFREY B. MEYERS, Associate Teaching Professor, Thompson Rivers University, Faculty of Law.

MARK TUSHNET, William Nelson Cromwell Professor of Law emeritus, Harvard Law School.

ANNE TWOMEY, Professor of Constitutional Law, University of Sydney.

GEORGE WILLIAMS, Deputy Vice-Chancellor, Anthony Mason Professor and a Scientia Professor, University of New South Wales.

Canadian Journal of Comparative and Contemporary Law

VOLUME 7 | NUMBER 1 | 2021

DEMOCRATIC DECAY: CHALLENGES FOR CONSTITUTIONALISM AND THE RULE OF LAW

SYMPOSIUM

Review of Dixon and Landau's <i>Abusive Constitutional Borrowing</i> <i>Tom Ginsburg</i>	1
Abusive Constitutional Borrowing as a Form Politics by Other Means <i>Ran Hirschl</i>	6
Assessing “Abusive Constitutionalism” in a Complex Political Universe <i>Sanford Levinson</i>	15
Review of Dixon and Landau's <i>Abusive Constitutional Borrowing</i> <i>Mark Tushnet</i>	23
<i>Abusive Constitutional Borrowing: A Reply to Commentators</i> <i>Rosalind Dixon & David Landau</i>	49

VOLUME 7 | NUMBER 1 | 2021

**DEMOCRATIC DECAY: CHALLENGES FOR
CONSTITUTIONALISM AND THE RULE OF LAW**

ARTICLES

Balancing Accountability and Effectiveness: A Case for Moderated Parliamentarism <i>Tarunabh Khaitan</i>	81
Knowledge Institutions in Constitutional Democracies: Preliminary Reflections <i>Vicki C. Jackson</i>	156
Press Freedom in Australia's Constitutional System <i>Keiran Hardy & George Williams</i>	222
A Critical Analysis of the Case of Prorogations <i>Paul Daly</i>	256
"Constitutional Risk", Disrespect for the Rule of Law and Democratic Decay <i>Anne Twomey</i>	293
Populism and Democratic Decay: Will Canada's Cure be Worse than the Disease? <i>Ryan Alford</i>	342
What We Talk About When We Talk About the Rule of Law <i>Jeffrey B. Meyers</i>	405

SYMPOSIUM

Rosalind Dixon & David Landau

Abusive Constitutional Borrowing:

Legal Globalization and the Subversion of Liberal Democracy

(Oxford: Oxford University Press, 2021)

Review of Dixon and Landau's *Abusive Constitutional Borrowing*

Tom Ginsburg*

Borrowing has been a central topic of inquiry and debate in comparative law since at least Alan Watson's work on legal transplants.¹ Legal scholars trace the spread of ideas and institutions, debate how much borrowing has occurred, and offer accounts about what might explain it. Social scientists, too, have found the spread of legal institutions and ideas irresistible for analysis, and the large literature on diffusion has focused on both cause and effect.² For the most part, both of these literatures assume that borrowing is, at least some of the time, functional, and thus can be explained in terms of the benefits it provides to the system as a whole. Indeed, a kind of developmentalist flavor pervaded some of the comparative law debates, with deeply embedded assumptions of progress and evolution pushing legal systems towards convergence. Comparative law was a field of high modernism.³

However, our era is one in which democratic backsliding and autocratization has become a central concern. Assumptions of progress have been cast aside. As Dixon and Landau show us in this important new book, the agents of democratic decline are just as capable of borrowing legal ideas and institutions

* University of Chicago Law School. Leo Spitz Professor of International Law.

1 Alan Watson, *Legal Transplants: An Approach to Comparative Law*, 1d (Georgia: University of Georgia Press, 1974).

2 Everett M Rogers, *Diffusion of Innovations*, 1d (New York: Free Press of Glencoe, 1962); Zachary Elkins & Beth Simmons, "On Waves, Clusters, and Diffusion: A Conceptual Framework" (2005) 598:1 The ANNALS of American Academy of Political and Social Science 33.

3 Annelise Riles, ed, *Rethinking the Masters of Comparative Law*, 1d (Oregon: Hart Publishing, 2001).

from abroad as were those who sought democratic entrenchment. The political appeal of the new autocrats is not autochthony, in which a local law should be produced locally as a reflection of romantic nationalism; rather they accept the idiom of universal norms, but insist on local power to interpret and wield them. Indeed, Dixon and Landau show us that many of these regimes use universal norms to leverage their rhetorical attacks at international institutions. In doing so, they utilize the language of liberal constitutional democracy against itself, a kind of legal jiu-jitsu in which democratic rhetoric is used to undermine democracy.

Reading Dixon and Landau's account of the abuse of democratic institutions might drive one to despair or to drink. Judicial review, constitutional rights, the constituent power, human rights law, hate speech laws and gender quotas have all been turned around in the service of authoritarian entrenchment. American scholars have had a long debate about taking the constitution away from the courts to create a more political form of constitutionalism, but Dixon and Landau show us that even the Canadian model that has so enamored scholars can be abused when applied to other contexts. And solutions seem tricky; there is no magic bullet that can address abusive borrowing.

The study turns our attention to a central and enduring issue in the study of institutions. For the most part, scholars have looked at the institutions of constitutional democracy in isolation; we study constitutional courts, judges, legislatures, elections, judicial councils and others. But of course the operation of any of these may be dependent on them all. Interaction effects abound. Furthermore, there is a dynamic quality to assessing constitutional democracy. Assumptions made at one time might not play out in a different era, and certainly not a different context. These points suggest a focus on a single system and its dynamics may provide more analytic leverage than studying a particular institution.⁴

4 See Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford: Oxford University Press, 2019).

Most of all, the study points out that normative constitutional design is everywhere and always built on deep empirical assumptions. For the most part these have not been tested. Our state of constitutional knowledge is deeply limited, notwithstanding lots of ink spilled. We do not even have a sense of what we can and cannot know.⁵

To understand how these issues play out, consider the evolution of constitutional courts over the past three decades, a period in which the institution has expanded dramatically to eclipse systems in which a single apex supreme court has the final power of judicial review. The logic of judicial empowerment had a political rationale, but also a deep empirical assumption built in. That empirical assumption can be summarized as “No purse, no sword; no problem”.⁶ Courts, by their nature, were the “least dangerous branch” of government, and hence their empowerment provided little risk. Indeed, providing an insulated constitutional actor to guard the constitution seemed a prudent thing to do in the era of the distrust of political power. The assumption was that insulation would provide for an apolitical approach to constitutional adjudication. This in turn rested on a further assumption, which was that there was sufficient capacity for such adjudication to operate, both in terms of human capital and the requisite cultural conditions.

There were good theoretical reasons for some of the design decisions that were taken with regard to constitutional courts. The idea to concentrate judicial review was attractive in many contexts, especially when ordinary judges had been tainted by association with the prior regimes. So we can understand the logic of the adoption, which was based on an empirical assumption: giving the power of judicial review to ordinary judges would slow the transition to a democratic constitutional order. Concentrating it in a new institution would insulate judicial review from political influence, at least in the short term, providing for a faster and more complete democratic transition.

5 Tom Ginsburg, “Constitutional Knowledge” (2018) 2:1 KNOW: A Journal on the Formation of Knowledge 15.

6 The reference is to Alexander Hamilton, “Federalist No. 78” in Clinton Rossiter, ed, *The Federalist Papers* (New York: New American Library, 1961).

Whether true insulation is possible or desirable in the abstract, in many countries, constitutional courts became another power center, and highly politicized. There is a somewhat universal logic at play: any institution exercising political power will attract attempts by politicians to control it. It is no surprise that Viktor Orbán's first target after consolidating constitutional power was the constitutional court; in a single act he erased all the celebrated jurisprudence of the prior court and appointed a new one with loyalists. Similarly, under the 1997 Constitution of Thailand, the constitutional court was a kind of lynchpin institution involved in many other appointments. A decade later, the court sided squarely with the military against the elected government of Thaksin Shinawatra. And as Dixon and Landau show us, these courts can easily become agents of backsliding.⁷

The rise, capture, and critique of constitutional courts finds its parallel in many other areas as well. Dixon and Landau do us a service in documenting these abuses. Figuring out how to move forward is more tricky. As a general matter, when engaging in normative constitutional design, what is perhaps needed is a clear statement of empirical assumptions, and then an empirical basis for assessing the probability that the desired results will actually play out. This requires specifying the conditions for institutional success, and tracing the system-level dynamics of reinforcement and resilience. In turn, such an approach would help us identify and critique abusive borrowing, while promoting more constructive borrowing.

Dixon and Landau have provided a wonderful service for our field in identifying and naming the phenomenon of abusive borrowing. The next steps are a more systematic analysis of the *dynamics* that allow such abuses to occur, and a catalogue of strategies to prevent them. Here, however, we are only at the beginning of the inquiry. What is clear to me after reading this superb book is that much of the effort of academic lawyers in the comparative field is not helping us much: the work is, in Dixon and Landau's terms, too formalist and

⁷ Rosalind Dixon & David Landau, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (Oxford: Oxford University Press, 2021) at 6.

not realist enough. Only the broad lens approach of the kind they take can really help us figure out what principles we should be using in constitutional design.

Abusive Constitutional Borrowing as a Form Politics by Other Means

Ran Hirschl*

I would like to think of myself as one of the proverbial groomsmen of this outstanding book. During a meeting in a nice café in Coogee Beach, Sydney, back in 2017, I challenged Rosalind Dixon and David Landau to write a book that would share their unmatched knowledge on the increasingly common phenomenon David Landau had identified in an earlier article — “Abusive Constitutionalism”.¹ A few years later, Dixon and Landau’s *Abusive Constitutional Borrowing* offers probably the most complete account written to date by scholars of comparative constitutional law on what has been termed as “democratic backsliding”, “constitutional capture”, “autocratic legalism”, “stealth authoritarianism”, “abusive constitutionalism” and other such two-word phrases, describing the challenging times for liberal constitutional values and for constitutional democracy more generally in an increasing number of countries worldwide.² Earlier works (including, notably, by Landau himself) on this hot-

* Professor of Political Science and Law at the University of Toronto; Alexander von Humboldt Professor of Comparative Constitutionalism, University of Göttingen; Head, Max Planck Research Fellow Group in Comparative Constitutionalism. This comment was prepared for inclusion in the *Canadian Journal of Comparative and Contemporary Law*’s 2021 special volume on democratic decay.

1 David Landau, “Abusive Constitutionalism” (2013) 47:1 UC Davis Law Review 189–260.

2 See, e.g., Kim Lane Schepppele, “Autocratic Legalism” (2018) 85:2 University of Chicago Law Review 545–583; Mark A Graber, Sanford Levinson & Mark Tushnet, eds, *Constitutional Democracy in Crisis?* (Oxford: Oxford University Press, 2018); Wojciech Sadurski, *Poland’s Constitutional Breakdown* (Oxford: Oxford University Press, 2019); Tom Ginsburg & Aziz Z Huq, *How to Save a Constitutional Democracy* (Chicago: University of Chicago Press, 2019); Rosalind Dixon & David Landau, “1989–2019: From Democratic to Abusive

button topic have already identified this phenomenon: the simultaneous reliance on, yet effective hollowing out of, core concepts of constitutionalism to advance an anti-democratic and often illiberal political platform. However, no other work offers as analytically sharp, comprehensive, and genuinely comparative an account of the various techniques, strategies, and manipulations drawn upon by a-democratic leaders and governments to advance their assault on democracy (and on liberalism more generally) while they continue to adhere to the formal symbols, institutions, and procedures of constitutionalism and the rule of law.

Anyone who reads this book must admire the authors' mastery of the subject matter, their careful treatment of key concepts in constitutional theory and in constitutional jurisprudence, as well as their superb comparative research and writing skills. Capturing the book's full richness in a short commentary of this type is no easy matter. The authors provide a near-dizzying array of examples of abusive constitutional borrowing from literally across the globe, considerably expanding our understanding of the scope of this phenomenon well beyond the now widely documented, possibly even over-studied cases of Poland, Hungary, and Venezuela.³ In a nutshell, Dixon and Landau suggest that "legal globalization" (here understood as an expansion of what has been termed "the migration of constitutional ideas" and "the renaissance of comparative constitutional law")⁴ has offered a wide repertoire of possibilities for cynical, ill-

Constitutional Borrowing" (2019) 17:2 International Journal of Constitutional Law 489–496; Rosalind Dixon & David Landau, "Abusive Judicial Review: Courts Against Democracy" (2020) 53:3 UC Davis Law Review 1313–1387.

3 The array of examples the authors discuss is impressive. A fascinating case that the authors could have perhaps devoted more attention to is Hong Kong, where an uneasy "one country, two systems" principle splits the constitutional authority between mainland China and the government of Hong Kong as a Special Administrative Region (SAR). Over the last decade, China has been advancing an aggressive controlling agenda over the SAR, drawing on a set of legal and constitutional maneuvers that appear very relevant to the authors' discussion.

4 See Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford: Oxford University Press, 2014); Sujit Choudhry,

intentioned borrowing of the *form* of given liberal-democratic concepts and institutions without commitment to the *substance* of these concepts or institutions. So the ease with which various constitutional ideas travel these days is not aiding exclusively the spread of liberal-democratic constitutional values, but may also help facilitate malign practices aimed at limiting these values. The authors show how such abusive constitutional borrowing can take the form of “sham, selective, a-contextual and anti-purposive” borrowing. Deploying these modes of abusive borrowing, regimes and leaders that pursue such form-over-substance strategy aim to maintain legitimacy through apparent compliance with the formal requirements of democratic constitutionalism without letting that compliance restrict their ability to substantively subvert the constitutional system to advance their self-serving, a- or anti-democratic agenda. For example, regimes that are interested in hollowing out the substantive core of, say, apex courts with the power of judicial review, do not disband the judicial system, shut down the constitutional court, or abolish the practice of judicial review altogether. Rather, they “capture” that seemingly liberal-democratic institution and effectively implement measures such as court packing, tightened political control of judicial appointments, newly introduced mandatory retirement age for serving judges, curtailing the jurisdictional wings of courts, threatening harsh reaction to unwelcome acts of judicial activism, and so on. Subservient courts, legislatures, and administrative agencies, too, may (and often do) engage in this abusive borrowing practice, relying on anything from selective or distorted citation of foreign jurisprudence to legitimize rulings that support illiberal, anti-democratic policies, to the expansion of concepts such as libel, public safety, blasphemy, *lèse-majesté*, or treason, to smear, restrict, or silence hitherto legitimate political opposition.

The repertoire of abusive constitutional measures the authors document makes it hard for the reader not to be astonished by the creativity of a new wave of illiberal and a-democratic regimes, parties, and leaders in dozens of countries worldwide. But not all such actors share similar motives, agendas, or the ability

ed, *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press, 2009).

to circumscribe liberal democracy at will. Perhaps some more nuance in differentiating among the various types of political actors that push the current assault on liberal democracy would have been helpful here, possibly coupled with more attention to the concrete worldviews, ideational platforms, or political ambitions that drive these political power-holders. Some appear to be ideology-light autocrats who cling to power; others are opportunistic politicians purporting to represent the political, economic and cultural hinterlands in their respective polities; and yet others are ideologues, ranging from right wing communitarians, or sectarian religionists to all out Schmittian reactionaries who see extreme nationalism as a just weapon against liberal democracy and its supposedly hollow cosmopolitanism.

The book's main aim is illustrative; it tells a timely and disturbing story that will interest experts and non-professionals alike. As a largely descriptive project (in the more prescriptive Chapter 8, which I address briefly below, the authors discuss various means to stop or tame abusive borrowing), there is little to quibble with here on either the explanatory or the normative front. However, as with any other great scholarly work, *Abusive Constitutional Borrowing* does raise some afterthoughts on trends and phenomena closely related to the practices examined in the book.

First is the issue of the novelty or distinctiveness of the phenomenon (and some of its shorter and simpler scholarly precursors) analyzed here. Leaving aside the hard-to-prove extent of actual inter-jurisdictional diffusion / emulation / borrowing (the authors do not purport to establish causality or to “prove” borrowing in any social scientific way), one could plausibly argue that hollowing out — but not an all-out abolition — of symbols and institutions of the rule of law has characterized dozens of semi-authoritarian regimes throughout the 20th century. Likewise, it is readily identifiable in territories occupied by democratic regimes, from French-controlled Algeria to Britain's rule of Northern Ireland in the pre-Good Friday Agreement era, and to Israel's ongoing legal and military domination of the West Bank. In these and other similar settings, a thin, formal understanding of “courts”, “legal process”, “judicial independence”, and “justice” continued to exist for decades even though, substantively, none

resembled the understanding of the same concepts in the occupying country itself. In other settings, a minimalist, Schumpeterian notion of democracy as characterized by the existence of routine, relatively free elections without much attention to other, thicker dimensions of democratic governance has been one of the most widely accepted definitions of democracy long before the rise of contemporary form-over-substance borrowing. Of course, few reasonable observers, certainly not this reviewer, would equate the democratic backsliding in Hungary, Poland, or Turkey to that in the United States. But the fact remains that in the United States — the hallmark of democratic governance for many — there exists systemic disenfranchisement of voters, mostly on racial and socio-economic basis; rampant influence of money in politics consistently backed by legislation and by Supreme Court rulings; and blatant politicization and partisanship in judicial appointment processes despite talk about judicial independence. The question, then, is whether this phenomenon is *qualitatively different* from what we know has taken place elsewhere (and if so, how?) or is it more of a question of degree? Could it even be simply the fact that constitutional borrowers in the many countries the authors consider are just not nearly as good as established democracies are in concealing their preference for formal over substantive democracy?

A second question concerns the apparent mismatch between the “us first” rhetoric and the increasingly common opting out of global constitutionalism practice that accompany it, and constitutional borrowing aimed at formally complying with universal standards of democracy and human rights. Regimes that practice abusive constitutional borrowing do not subscribe to a blatantly defiant North Korea-like practice that eschews the global order or takes the constitutional domain lightly. Given the amount of energy that goes into subverting the constitutional domain, the actors who push for such subversion must assume that constitutional institutions and constitutional practices matter a great deal. At the very least, such actors see the importance of formally adhering to international norms and standards of democratic constitutionalism while advancing a local version of these norms that depletes them of real content in practice. In fact, maintaining a façade of compliance without the substantive

dimension of it is precisely the essence of the exercise. So one must assume that regimes engaging in abusive borrowing think international legitimacy matters.

At the same time, ethno-nationalist parties in Europe — many of which operate in historic bastions of democracy — advance an anti-EU agenda and exclusionary policies that resent diversity, ignore minority rights, and call for restrictive immigration policies. So-called “Euro-skeptic” parties in many European countries from Finland to Greece preach for cutting ties with the EU and for implementation of “us first” policy preferences. Nationalist governments in countries such as India, Israel, and Malaysia have successfully advanced controversial legal changes aimed at privileging one religion or ethnic group (Hindus in India; Jews in Israel; Muslims in Malaysia) over others in bold defiance of acceptable norms of equal citizenship. The government of Hungary and Poland repeatedly emphasize the Christian nature of their respective polities; members of the Visegrád Group (Hungary, Poland, the Czech Republic, and Slovakia) have explicitly rejected EU policies and subsequent ECJ rulings on pan-European immigration and refugee settlement. Russian and Turkish courts defy liberalizing ECtHR rulings, portraying these rulings as running against these respective countries’ constitutional traditions. The Philippines under Duterte withdrew from the International Criminal Court (ICC); Venezuela withdrew from the Inter-American Court of Human Rights; and the United States under Trump pulled out of the ICC, the Trans-Pacific Partnership (TPP), UNESCO, and the Paris Agreement (aka the Paris climate accord).⁵

Even in established democracies, populist voices invoke anti-constitutional convergence rhetoric. On multiple occasions, former British Prime Minister Theresa May expressed her support for the UK opting out of the European Convention on Human Rights (ECHR), and stated that her 2020 electoral campaign would be based on a motto of freeing the UK from the jurisdiction of the ECHR. “The ECHR can bind the hands of parliament, adds nothing to our prosperity, makes us less secure by preventing the deportation of dangerous foreign nationals — and does nothing to change the attitudes of governments

⁵ See Ran Hirschl, “Opting Out of ‘Global Constitutionalism’” (2018) 12:1 Law & Ethics of Human Rights 1–36.

like Russia's when it comes to human rights", May said. "So regardless of the EU referendum [...] if we want to reform human rights laws in this country, it isn't the EU we should leave but the ECHR and the jurisdiction of its court".⁶ In the same spirit, May went on record stating that: "we should do even more to restrict the freedom and the movements of terrorist suspects when we have enough evidence to know they present a threat, but not enough evidence to prosecute them in full in court. And if human rights laws get in the way of doing these things, we will change those laws to make sure we can do them".⁷ Rejectionist discourse against elements of global constitutionalism has taken place in other pertinent contexts, notably in American constitutional discourse. Well before the Trump years, fierce debates took place over the desirability and legitimacy of reference to foreign precedents — often reflecting the supposedly international liberal constitutional rights canon — in constitutional interpretation. In short, alongside abusive constitutional borrowing that pays formal dues to universal constitutional expectations, a parallel discourse of explicit rejection and opting out of global constitutionalism and its norms, institutions, and practices takes place.

This leads to a third question, concerning the prescriptive part of the book. In Chapter 8 ("Can Abusive Borrowing be Stopped?"), Dixon and Landau move to offer a brief account of what they think may be done to tame or even eliminate abusive borrowing. They consider some creative designs to prevent court packing or jurisdictional curbing of court authority, alongside types of entrenched representation quotas, and assertive international monitoring. Interestingly they call for "abuse proofing" of ambivalent concepts such as

-
- 6 Theresa May, "Home Secretary's Speech on the UK, EU and Our Place in the World" (Speech delivered to the Institute of Mechanical Engineers in central London, 25 April 2016), online: <www.gov.uk/government/speeches/home-secretarys-speech-on-the-uk-eu-and-our-place-in-the-world>.
- 7 Christopher Hope & Gordon Rayner, "Theresa May: I'll Tear Up Human Rights Laws so We Can Deport Terrorists", *Daily Telegraph* (6 June 2017), online: <www.telegraph.co.uk/news/2017/06/06/theresa-may-will-not-let-human-rights-act-stop-bringing-new/>.

“constitutional pluralism” (that allows recalcitrant regimes to disregard the EU), bans on “militant/anti-democratic parties” (that may serve to outlaw perfectly legitimate opposition), or the “unconstitutional constitutional amendment doctrine” according to which constitutional courts may nullify constitutional amendments if they appear to run against a core, *sine qua non*, constitutional norm. They consider a constitutional entrenchment of constituent power that include an expansive definition of who the “people” are, and what constitutes their meaningful participation in the political process. The authors are aware of the questionable relevance of scholarly tinkering with concepts of liberal democracy but maintain nonetheless that discussing them is meaningful.

Ultimately, creative as these suggestions are, they cannot escape three core truths that hover over the entire liberal-democratic impotence in dealing with abusive constitutional borrowing. First, it is hard to deter professional constitutional distorters by additional constitutional norms, which are as susceptible to manipulation and intentional hollowing out as the original norms they intend to protect. Second, the greater the spread of global constitutionalism and its discourse, norms, and institutional agencies, the greater the likelihood it will trigger an “us first” impulse of dissent, resistance, and withdrawal. Third, discordant constitutional orders and disharmonic constitutional identities (to borrow Gary Jacobsohn’s terminology) generate recurrent clashes between universal and particular visions of the good society, modern and traditional ways of life, and liberal and conservative worldviews. A disproportionately high number of countries that have experienced stints of democratic backsliding suffer from precisely such systemic tensions that run deeper than any constitutional designs, and are easily exploitable by opportunistic ethno-nationalist politicians and governments.

The hallmark of every outstanding work is its ability to generate further questions and to propel the discourse in a given field to new levels. Dixon and Landau’s *Abusive Constitutional Borrowing* does precisely that. Over the last decade, social scientists, political theorists, and constitutional scholars alike have offered many accounts of the threats to democratic government and to liberal constitutional values posed by populist and autocratic trends worldwide. If one

is limited to reading single treaties detailing the significance of comparative constitutional law in understanding these trends, *Abusive Constitutional Borrowing* is easily that book to read. As Dixon and Landau show, some of the shrewdest governments, parties, and leaders in the world today invest tremendous energy in subverting the constitutional order to suit their anti-democratic interests and illiberal agendas. More than anything else, then, this compelling new book illustrates how any successful attempt to understand one of the most important political phenomena of our time must acknowledge the fluidity of the law/politics distinction, and ultimately accept the conceptualization of constitutional law as a form of politics by other means.

Assessing “Abusive Constitutionalism” in a Complex Political Universe

Sanford Levinson*

Rosalind Dixon and David Landau are two of the ranking experts on comparative constitutional law in the world. They are also, perhaps not coincidentally, worried about the attacks that are taking place throughout the world on what might be termed liberal constitutionalism. “Illiberal constitutionalism” is now a genuine analytical category, meriting an essay of its own in the *Oxford Handbook of Comparative Constitutional Law*.¹ To be sure, it is difficult to define that notion exactly; perhaps we are tempted to quote American Supreme Court Justice Potter Stewart’s famous comment about defining pornography: “we know it when we see it”.² So Dixon and Landau offer a quite minimalist definition, focusing on a process of free elections and, importantly, both the possibility and reality of a peaceful turning over of power by one political party to its opposition if that is the electorate’s wish. Very early on, they express their belief (and fear) that “would-be authoritarians [engage in abusive constitutionalism] by making changes that tilt the electoral playing field

* W. St. John Garwood and W. St. John Garwood Jr. Centennial Chair in Law, University of Texas Law School; Professor of Government, University of Texas at Austin.

1 See Li-Ann Thio, “Constitutionalism in Illiberal Polities” in Michel Rosenfeld and Andras Sajo, eds, *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012) 133–152. No doubt an updated version of this essay would have many new examples to discuss.

2 *Jacobellis v Ohio*, 378 US 184 (1964).

heavily in their favor”.³ They do not build in strong notions of “separation of powers” or even the constitutional guarantee of a variety of liberal rights.

Still, whatever definition one might use of “illiberal constitutionalism”, it is hard to gainsay that the “liberal constitutionalism” has come under attack throughout the world.⁴ Proponents of “illiberal constitutionalism”, sometimes (and controversially) identified as “populists”, seem to be on the rise. Though many examples could be given, Hungary and Poland often lead the list, in large part because each had seemed to be one of the great “success stories” following the collapse of the Soviet empire in 1989; each seemed to embrace liberal constitutionalism and to vindicate the optimistic readings of world events offered by someone like Francis Fukayama. That certainly is no longer the case. And the countries giving cause for concern reach far beyond these two Central European countries with a total population of less than 50,000,000. (Indeed, Hungary is well under 10 million). But consider, say, India under the Modi government or Brazil under Bolsonaro. None of the world’s most populous countries can easily be described as instantiating “liberal constitutionalism”. And one can certainly wonder where one would place the contemporary United States even in the absence of Donald J. Trump in the White House. I have argued for many years that it is a fallacy to view the United States Constitution as “democratic”, and the now widely-recognized dysfunctionality of the American constitutional order is scarcely likely to abate simply because Joseph R. Biden was able to prevail against a notably incompetent and nearly sociopathic Donald Trump.

But Dixon and Landau are not writing a general book about the rise of illiberal forms of constitutionalism, however much that is surely the context of their concern. Instead, they write about a specific technique that is increasingly

3 Rosalind Dixon & David Landau, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (Oxford: Oxford University Press, 2021) at 23 [Dixon & Landau, *Abusive Constitutional Borrowing*].

4 See generally Mark A. Graber, Sanford Levinson & Mark Tushnet, eds, *Constitutional Democracy in Crisis?* (New York: Oxford University Press, 2018).

common on the part of illiberal constitutionalists. That is the “borrowing” from ostensibly liberal democracies of particular aspects of their own system, albeit, in the case of the borrowers, to be used for distinctly illiberal ends. They emphasize, as does Kim Lane Schepppele in her own important work (amply cited by Dixon and Landau) that old-fashioned coups featuring military takeovers and proclamations of dictatorial power are increasingly rare. Modern coups, as in Hungary and Poland, involve the clever use of constitutional powers in order to place an authoritarian party, including, of course, their leaders, into entrenched power, basically impregnable to ordinary electoral accountability even though elections will in fact continue to be held and opposition parties allowed to compete. One often hears, with regard to the behavior of those accused of wrongdoing, that the real problem is not their behavior was illegal, but, instead, the fact that they were taking advantage of what are “perfectly legal” options, at least in the view of lawyers (and, often, judges) sympathetic to their ends.

Recall that Oliver Wendell Holmes invited us to look at law—and to analyze its practical meaning—from the perspective of the egoistic “bad man”, interested only in maximizing his individual welfare and looking at law simply as a mechanism for achieving his particular ends. As the American movie actress Mae West once said, when someone said “Goodness gracious”, in response to a gown that she was wearing, “Goodness had nothing to do with it”. So it is for the bad man. But, and this is the all important point, that doesn’t mean that the bad man is necessarily breaking the law. Indeed, if he can afford to hire “the best lawyers” in town, and to find compliant judges, there is a good chance that he will be vindicated. So it is no small matter to realize that just as the Devil can happily quote scripture when it is useful to the cause, so can the bad men and their lawyers easily make use of parts of liberal constitutions for their own nefarious ends.

One way of reading, and profiting from, the book is to treat it simply as an encyclopedic survey of various techniques of bad-faith borrowing, a set of warnings on why we should not be complimented (or fooled) when an authoritarian makes use of what we might like to believe is our own ostensibly

fine (liberal) constitution. There is, so to speak, a “deconstructionist” edge to the book, whereby we are called upon to realize that what in one context might well be a means of safeguarding our own favorite liberal values can, in a different context, be used for decidedly different ends. What Dixon and Landau promote is a certain kind of “hermeneutics of suspicion”. Things are not always as they are alleged to be, and the lessons taught by “comparative constitutionalism” can, in the wrong hands, become a source of great evil instead of enlightenment based on “best practices”. Techniques make sense, ultimately, only against a background of shared value commitments as to what they are in fact being used to achieve. But, as we know from countless “mad scientist” movies, even the most benevolent techniques can be seized and misused by those who don’t share those commitments.

Much of their book focuses on the role of the judiciary. They are suitably ambivalent, however, about their assessment of given ways of structuring the judiciary. “Judicial independence” from a would-be tyrant is to be cherished. But can judges in fact be “too independent”, free from any genuine accountability to the political system? If, as they demonstrate throughout the book, context is ultimately more important than abstract forms, then Mark Tushnet’s well-known admonition, “it all depends”,⁵ may ring especially true. They devote a chapter to considering the attractions to some authoritarians regimes of so-called “weak-form judicial review”, often based on Canada’s famous Article 33 “notwithstanding clause”⁶ that, at least in theory, offers a method for legislatures to push back against what they view as judicial overreach. A similar process is now the subject of vigorous debate in Israel.

What exactly should one think of this migration of an important concept from Ottawa to Jerusalem? Dixon and Landau offer as one of their criteria for “abuse” the treating of an idea or process “acontextually”, which seems clearly correct. But, of course, to appreciate fully any given context may take deep and

⁵ See, e.g. Mark Tushnet, *Taking the Constitution Away from the Courts* (New Jersey: Princeton University Press, 1999).

⁶ *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 33.

time-consuming study, and even then it is almost certainly the case that differences of opinion (and evaluation) will remain. Nominalists — or specialists in a particular country — will always take the field against generalists, each making good arguments against the other. Each of us must ultimately find our own “Goldilocks” points between the endless rabbit holes of specificity and the dangers of potentially facile generalization drawn from otherwise valuable “large-n” studies. I suspect that most readers will probably agree with the moral of most of the stories that Dixon and Landau tell, drawn from an impressive array of examples from around the world; but most doesn’t mean all, and there will inevitably be good faith disagreement about the identity of potential heroes or villains in given countries.

This may simply be another way of recognizing that the most pervasive challenge in the field of “legal studies” in the degree to which one can genuinely separate positivist “legal analysis” from “politics” and one’s own normative political commitments. As already noted, this book is written from a perspective entirely committed to the importance of liberal constitutionalism, a commitment that I happily share. But I do wonder what the reaction might be from those who are equally committed to alternative regimes not only in Hungary or Poland, but also in Singapore or Israel. One of their chapter titles is “Can Abusive Borrowing Be Stopped?”⁷ From one perspective, the answer is “of course”, if there are no longer incentives on the part of would-be authoritarians to engage in the practice. Otherwise, why would one expect such borrowing to cease, especially if its proponents can point to “successes” in reinforcing their hold on power? Joseph Schumpeter famously defended entrepreneurial capitalism’s propensity to engage in “creative destruction”, leaving in its wake the shattered businesses and dreams of a prior economic reality. So is “abusive borrowing” in its own way a form of the “creative destruction” of liberal institutions that become viewed, perhaps reasonably, as sclerotic? And if we are indeed referring to “populist movements” that rely on forms of ballots instead of bullets to place leaders in power, then we must recognize that millions of

7 Dixon & Landau, *Abusive Constitutional Borrowing*, *supra* note 3, ch 8.

voters can be led to share the disillusionment in a liberal status quo and to prefer instead the disruptions and outright destruction of established institutions and conventions.

For me, the most interesting chapter (among many) was Chapter 6, which addressed “the abuse of constituent power”.⁸ The explanation is simple: my own essay in *Constitutional Democracy in Crisis?* was titled “The Continuing Specter of Popular Sovereignty and National Self-Determination in an Age of Political Uncertainty”.⁹ It suggested that the most truly influential 20th century political figure was not, say, Lenin, but, instead, Woodrow Wilson. It was he who defined World War I as a crusade legitimizing “democracy” and “national self-determination”. To put it mildly, both of those concepts are what political theorists describe as “essentially contested”. Unlike most concepts in political theory, however, arguments are not confined to seminar rooms and academic conferences. Instead, wars can be fought and people killed in the name of “self-determination” by a singular “people”. “We the People” is, to put it mildly, not a self-defining term. Indeed, the Supreme Court of the United States notoriously held, in the *Dred Scott*¹⁰ case, that only white persons were genuinely envisioned as being part of the American polity. That decision was overturned in the Fourteenth Amendment, but it took a war that killed 750,000 people to procure the amendment, and the true meaning of “the American people” remains contested even in 2021. (That is one of the meanings of Trumpism.)

But even if we could agree, with regard to any given piece of territory, who comprised “the people” within it (as against, say, only “residents”), that would scarcely resolve the identity of who could legitimately claim to speak for that people. The idea of constituent power, traceable both to Sieyes during the French Revolution and a number of British revolutionaries of the mid-17th

8 Dixon & Landau, *Abusive Constitutional Borrowing*, *supra* note 3, ch 6.

9 Sanford Levinson, “The Continuing Specter of Popular Sovereignty and National Self-Determination in an Age of Political Uncertainty” in Mark A Graber, Sanford Levinson & Mark Tushnet, eds, *Constitutional Democracy in Crisis?* (New York: Oxford University Press, 2018) 651.

10 *Scott v Sanford*, 60 US (19 How) 393 (1857).

century, was ultimately a claim to sovereignty, the ability to create brand new constitutional forms and, concomitantly, to ignore or brush aside any existing legal constraints. As Carl Schmitt would most notably argue in the 20th century, a truly sovereign people stood above any legal constraints that they might have created at an earlier time to apply to the *constituted powers* of governmental officials. Everything is potentially up for grabs when the constituent power, to borrow from Thomas Hobbes, awakens and reasserts its sovereign authority. Such assertions can be used, as in Venezuela (and other Latin American countries) to engage in drastic constitutional overhauling, where, incidentally, one might agree that the prior constitution had outlived its usefulness. Still, one might have been startled to hear Hugo Chavez, in his initial inaugural address in 1999, state, “I swear in front of my people that over this dying constitution I will push forward the democratic transformations that are necessary so that the new republic will have an adequate Magna Carta for the times”.¹¹ He was, of course, almost completely successful in killing the existing constitution; what is more is that recourse to notions of “constituent power” has remained a constant in Venezuelan politics under his successor Nicolas Maduro. Dixon and Landau assess the recourse to “constituent power” in a variety of countries in Latin America, as well as Fiji.

But one is left to wonder whether *any* recourse to notions of “constituent power” or “popular sovereignty” will be open to charges of abuse. As the great American historian Edmund Morgan argued in his book *Inventing the People*,¹² the notion is not only subject to endless dispute, but also available to be used by political opportunists and demagogues to justify their own rise to power. The problem, of course, is that there may be no neutral definitions of opportunism or even demagoguery. Americans tend to regard “the Founders” in almost reverential terms; from a British perspective, however, they were accurately regarded as demagogic populists encouraging popular secession from the

11 Hugo Chavez, “Presidential Inauguration Speech” (delivered at the Caracas Congressional Hall, 2 February 1999).

12 Edmund S Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (New York: W W Norton & Co, 1988).

completely legitimate British Empire. (The Americans, recall, were not, as were Native Americans, the victims of settler imperialism; they *were* the settler imperialists who, for whatever reason, became alienated from their Monarch and Parliament.) As Dixon and Landau note, one of the most interesting — and controversial — uses of the theory of “constituent power” is to validate the declaration by judiciaries that given constitutional amendments, though formally valid, are nonetheless unconstitutional because they violate the inchoate constitution established by “the people” to control their political agents (who proposed or ratified the amendment in question). Is that “abusive constitutionalism” or its vindication? Are we confident that we can always tell the difference?

This review has touched on only selected aspects of the extraordinarily well-informed and insightful overview offered by Dixon and Landau. It deserves both close reading and extended discussion, both for its analytic acuity and its undoubtedly relevance to what is going on around us at present throughout the world.

Review of Dixon and Landau's *Abusive Constitutional Borrowing*

Mark Tushnet*

This impressive book by two leading members of their generation of scholars of comparative constitutional law offers ample opportunity for reflection upon some of the major issues in the field's scholarship today: questions about populism and constitutionalism, democratic decline, constitutional design, and more. It provides clear analytic categories and identifies important mechanisms by which constitutional provisions borrowed from one system can operate in others.¹ I have no doubt that it will influence innumerable scholars who are interested in democratic decline and related issues.

I'll state my overall perspective on the work provocatively: The arguments Dixon and Landau make sometimes are mistaken or overstated, but in extremely thought-provoking and productive ways.² The great physicist Wolfgang Pauli is

* AB Harvard University, JD, MA Yale University. William Nelson Cromwell Professor of Law emeritus, Harvard Law School. I developed many of the ideas in this Review while writing drafts of portions of a work, *Power to the People: Constitutionalism in the Age of Populism*, co-authored with Bojan Bugaric, to be published in 2021, but I stress that Professor Bugaric and I have not discussed these specific ideas yet, and they cannot be attributed to him (nor can I be sure that they will survive in the final version of the book).

1 See e.g. Rosalind Dixon & David Landau, *Abusive Constitutional Borrowing: Legal Globalism and the Subversion of Liberal Democracy* (Oxford: Oxford University Press, 2021) at 19 (identifying sham, selective or acontextual, and anti-purposive borrowing).

2 Sometimes the problem lies in overreaching, that is, locating an illiberal or otherwise troublesome policy and attempting to jam it into the "abusive borrowing" framework. And sometimes the problem lies in stating in too unequivocal terms conclusions that might be correct but are based upon

said to have disparaged some work in quantum physics as “not even wrong” — implying that sometimes theoretical work that is “merely” wrong can make important contributions to the field. So, in my view, with this book.

Much of this Essay identifies examples offered by Dixon and Landau that don’t work as well as they contend — that are “merely” wrong. Even if these examples were pared away, there’d be a great deal that was right — cases where constitutional reforms were indeed anti-constitutional. I devote little attention to what’s right because for me the most interesting discussions deal with cases that seem to me wrong or ill-fitting within the analytic framework Dixon and Landau develop. My central concern is with the criteria for distinguishing the right from the merely wrong. Dixon and Landau begin with what I believe to be the right criterion, then go astray as they try to apply it. I argue that the central criterion, which focuses on anti-constitutional intent, almost certainly will have to be brought to ground with more particular attention to politics. Sometimes the relevant politics is simple: Constitutional reforms that advance bad substantive agendas are anti-constitutional and the very same or quite similar reforms that advance good substantive agendas are pro-constitutional. Sometimes, and more interestingly, the politics is more complex: Constitutional reforms that occur incrementally are sometimes good but those that are implemented rapidly can’t be.

I begin by observing that Dixon and Landau get the heart of the problem right, and more right than anyone else so far. Their topic is “abusive” constitutional borrowing, which includes abusive constitutional review. The heart of the problem lies in defining “abusive” in a way that doesn’t build in one’s evaluations of the merits of specific constitutional developments. The difficulty arises because we know that almost every specific constitutional development can be a valuable reform in some contexts and something that weakens constitutional democracy in other contexts.³

evidence that those more sympathetic to the regimes in question could fairly find more equivocal.

3 After writing this sentence I tried to come up with examples of constitutional developments that would be unequivocally inconsistent with constitutional

Dixon and Landau solve the problem by making the intent behind the proposal or development crucial: Abuse occurs when “would-be authoritarians knowingly or *intentionally* take aim at the democratic minimum core”,⁴ which they summarize as “tilt[ing] the electoral playing field heavily in their favor”.⁵ As they put it, abuse occurs when constitutional borrowing is done in bad faith.⁶

This seems to me a major conceptual advance in the study of democratic decline and associated topics. The reason, as already noted, is that almost any constitutional change or borrowing can in appropriate circumstances be a good-

democracy. The only candidates I could come up with were a permanent suspension of elections, perhaps accompanied by the designation of a single party hierarchy as the locus for all policy-making, a system whereby all expression was subject to completely discretionary sanction by public authorities, and a system of total surveillance of individuals in public and private spaces. I’m open to the possibility that there are others, but every constitutional reform proposal that’s been on the table in recent years doesn’t approach these — or other — limits. (We now know, for example, that postponing a scheduled election might be a good idea under some now readily imaginable circumstances.)

⁴ Dixon & Landau, *supra* note 1 at 27 [emphasis in original]. See also 3 (“By abusive constitutional borrowing, we mean the appropriation of liberal democratic designs, concepts, and doctrines *in order to* advance authoritarian projects”) [emphasis added].

⁵ *Ibid* at 23. See also 192 (using the phrase “tilted the electoral playing field heavily in favour of incumbents”). Their more complete definition of the minimum core is: “regular, free and fair elections, with some minimum level of competition between political parties, and a set of background conditions that includes respect for those political rights and freedoms necessary for democratic processes as well as some conception of the rule of law and protection for independent institutions necessary to oversee and protect the other elements of a competitive electoral system” (25).

⁶ See *ibid* at 83 (“Implicit in this concept of intent is some notion of bad faith”). Cf. at 19 (referring to an assumption of “a kind of good faith by borrowers”). But cf. at 143 (noting that a human rights commission might not have had “subjectively ‘bad’ motives” in endorsing arguments that a military coup was constitutionally permissible, yet concluding that the arguments were abusive).

faith effort to improve a system's democratic credentials.⁷ To determine whether a proposal is made in good or bad faith, then, we must look to something other than the proposal itself.

I believe that there's only one serious candidate for that "something else" — the non-constitutional policies the government we're looking at has as its substantive agenda or, put another way, what the government's trying to accomplish if its constitutional revisions go through. One telling example suggests that Dixon and Landau accept this candidate. As I'll discuss later one important "case study" in Dixon and Landau involves removal of presidential term limits. Dixon and Landau discuss a Costa Rican decision holding impermissible a constitutional provision limiting an elected president to a single term over an entire lifetime. They write, "The case is not 'abusive' under our definition because ... in part ... Costa Rica ... was not experiencing *other* formal and informal changes that posed a threat to the democratic order".⁸ The remainder of this Review can be understood as presenting a series of arguments against other candidates for determining when a constitutional reform is

7 For example, even a rule authorizing or mandating gerrymandering of election districts can — again, in appropriate circumstances — improve a system's democratic credentials by providing representation for demographically or geographically isolated communities with common interests. That, for example, is the defense offered for drawing election district lines in Japan to favor rural interests. Seen in this way, gerrymandering is a cousin of reserving seats for specific communities of interest (in the Japanese example, farmers).

8 Dixon & Landau, *supra* note 1 at 1 [emphasis added]. See also 201 ("the judicial decision ... was made in a context where the country otherwise remained solidly liberal democratic"). Dixon and Landau supplement this with the observation that the court "removed the stricter constitutional limits ... but reimposed the looser but still meaningful term limit" in the original constitution. The remaining term limit was meaningful because it prevented the kinds of interaction effects that make extended presidential terms problematic, as I discuss below. For another indication that Dixon and Landau determine bad faith by examining other policies, see 147 (discussing Hungary's adoption of a provision dealing with national identity, and observing that "[t]he course of events must also be juxtaposed with the serious human rights violations that have been found in Hungary's treatment of asylum seekers").

intended to weaken the democratic core (tilt the playing field or made in bad faith, which for Dixon and Landau are short-hand formulations of the same idea).

I've already indicated why we can't use any single reform proposal to identify good or bad faith.⁹ Dixon and Landau sometimes seem to entertain the possibility of a related candidate — the entire package of constitutional reforms put on the table. Explaining why that's not a good alternative gets me to the core of my critique of Dixon and Landau. Initially methodological, that critique turns out to be political as well.

Dixon and Landau start *in medias res*: An election has occurred and the winner has put constitutional changes on the table. I believe that analysis should start at an earlier point by asking *why* the winner prevailed. The cases of interest arise when a candidate or party goes to the people with the argument, "Our nation is in serious trouble because for some period the leaders we've elected haven't done a good job. If you elect us we'll get the nation out of trouble and back on course".

The candidate or party offers a program, typically depending upon a diagnosis of why things have gone wrong. There are basically two diagnoses available. One is that the nation's leadership has been weak in many domains, and electing a strong leader will allow the nation to move forward by defeating the forces to which that weak leadership has succumbed. When the people elect a candidate who offers this diagnosis, they are electing someone who explicitly presents himself (or, a possibility not yet realized, herself) as a would-be authoritarian who tells the nation that authoritarianism is the way to get it back on course. Jair Bolsonaro in Brazil and Rodrigo Duterte in the Philippines might be examples. We can assume that any constitutional reforms they propose are intended to promote their authoritarian agenda (which, I emphasize, was the platform they offered to the people).

9 Cf. *ibid* at 175 ("Rather than focusing on tactics themselves, ... there is no substitute for observing the contexts in which arguments are deployed and their effects on the democratic minimum core").

The cases Dixon and Landau examine in most detail involve candidates and parties that offer a different diagnosis. The second diagnosis is that prior governments have adopted substantive policies that have worked badly for the nation, and the remedy is a set of alternative policies — an obviously non-exhaustive list might include wealth redistribution, a national industrial policy that reclaims jobs for our people, or immigration restrictions to make more jobs available to the nation’s citizens. I’ll call this an “ambitious reform agenda”, and emphasize that the agenda can be either radically conservative or radically progressive.

How should we think about constitutional reforms proposed by victorious parties with ambitious reform agendas (ARAs)? Begin with two observations: Enacting and implementing an ARA takes time and political effort even for a party that’s won a large majority in a single election; and a single election rarely determines the composition of every institution that has input into policy adoption and implementation.

The first observation means that there’s a decent chance that the victorious party won’t be able to make enough progress on its ARA before the next round of elections occurs.¹⁰ If it doesn’t, it might lose support from voters who conclude that the party is just the same old same old — people who promise much and deliver little. So, a party with an ARA might in good faith try to accelerate the processes of policy-making and implementation.

The second observation means that some existing institutions — notably, constitutional courts — might remain controlled (from the victorious party’s point of view, captured) by the losing and discredited parties.¹¹ Opposition

¹⁰ Political scientist Stephen Skowronek describes this as a tension between calendar time and political time.

¹¹ This describes a well-known account of the role of constitutional courts, given its most pointed expression for present purposes in Ran Hirschl’s description of how elites anticipating electoral defeat expand the power of constitutional review as a mechanism for “hegemonic self-preservation”. See Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge: Harvard University Press, 2007).

control of these veto points can prevent the victorious party from enacting the ARA that was the basis for its victory.¹² The victorious party might make two additional and related observations. Some of the policy failures that led to its election — that is, some of the failures by the parties it defeated — might have resulted from the existence of veto points that prevented previous governments from implementing substantive policies that would have kept the nation from getting into the pickle from which voters now want rescue. Further, prior policy failures, if attributed to the existence of veto points, show that the status quo number of veto points isn't necessarily optimal. So, a party with an ARA might in good faith try to re-staff or bypass these institutions.

One final preliminary before I take up Dixon and Landau's treatment of specific constitutional reforms. We're primarily interested in situations where the victorious party is in a position realistically to seek constitutional revision, typically because it's won by a large enough electoral margin to make politically feasible the pursuit of constitutional reform. I sketch the three main modes of formal constitutional change.

The victorious party can negotiate with those over whom they prevailed. This is especially attractive where the losers retain significant power, whether political or economic. So, for example, the African National Congress negotiated constitutional changes with representatives of the apartheid regime, who had significant economic power. Many of the transitions in central and eastern Europe from 1989 to 1991, including that in Hungary, were negotiated with the remnants of communist parties that still had significant political support among the nations' voters.

This mode of constitutional reform is available, though, only if the losers are willing to accept their loss and negotiate in good faith. And that's not always the case. It seems reasonably clear, for example, that the elites who were displaced by Hugo Chávez in Venezuela and Evo Morales in Bolivia never accepted the

¹² More recent theorizing characterizes some of these institutions as speed bumps rather than veto points. As speed bumps they slow down the pace of enactment and implementation, and for that reason trigger the concern already discussed about the tension between calendar time and political time.

legitimacy of those who defeated them. When Chávez proposed a referendum on convening a constituent assembly and got approval from the non-Chavista Supreme Court, opposition parties boycotted the referendum and then renewed their boycott for elections to the constituent assembly. A few years later they attempted a coup d'état, which failed miserably. The evidence from Bolivia is harder to come by, but Morales was forced out of office by a process that might reasonably be described as a coup, and I have a strong impression that the elites that Morales and his political movement displaced simply couldn't accept the fact that a boorish representative of the nation's indigenous people was going to exercise power over them.¹³ In these cases good-faith negotiations for constitutional reform weren't realistically available.

The second mode is using existing provisions for constitutional amendment if the party's victory is large enough. That's what happened in Hungary. Hungary's amendment procedures turned out to be badly designed, but it's hard to charge the Fidesz party with bad faith simply because it used entirely lawful procedures for amending the constitution — and remember, we're looking for evidence of changing the constitution for the very purpose of eroding democratic constitutionalism. In itself following the rules for amending the constitution can't give us much evidence of that purpose.

The final mode of constitutional reform is through a constituent assembly convened for the purpose of revising or replacing the existing constitution. This might be a particularly attractive mode for a recently victorious party with an ARA because it can expect to win roughly the same proportion of seats in the

¹³ Morales was forced out of office in this way: Early returns from a presidential election appeared to show that Morales had won just over 40 percent of the votes and just over 10 percent more than his nearest rival, which under Bolivia's election rules would have been just sufficient to avoid a run-off. Some election observers, including international voting monitors, believed that the early returns were suspicious. As the returns were being finalized, opposition leaders supported by military officers approached Morales and told him that he had to relinquish his claim to office. He did so. One later analysis of the early returns supported Morales's claim to victory; a follow-up study contested that analysis. I discuss Morales's fate below.

constituent assembly that it won in the preceding election. As Dixon and Landau explain, the theory of constituent power holds that constitutions are founded upon fundamental choices made by the nation's people speaking through some institutional form — here, the constituent assembly — that can fairly be said to stand as a representative of the people taken as a whole. Constituent assemblies, in short, must be representative. Dixon and Landau argue that Venezuela's constituent assembly in 1999 wasn't adequately representative. But note their description of why it wasn't: "the rules selected by Chávez (along with other key factors, such as an opposition boycott of the election) resulted in a wipeout. Chávez's forces won over 90 percent of the seats with just over 60 percent of the votes, with a handful of independent candidates winning most of the remainder".¹⁴ Relegating the opposition boycott to a parenthetical comment seems to me a mistake: Venezuela's constituent assembly was unrepresentative because the opposition, not Chávez, made it unrepresentative. And, as Dixon and Landau observe, once the constituent assembly set to work, "[t]he process was fairly participatory, with the Assembly receiving input from a range of civil society groups".¹⁵

How should we think about constitutional reforms aimed at easing the path to enactment and implementation of an ARA when we have a constitutional reform process that isn't intrinsically suspicious — for example, a process that expressly conforms to existing constitutional amendment procedures or a constituent assembly that is either broadly representative or unrepresentative through no scheming by the victorious party? Remember that our goal is to identify situations where the reforms are intended to "take aim at the democratic core" or "tilt the electoral playing field". Yet, we are dealing with reforms that proponents of an ARA assert are intended "merely" to make it easier for them

¹⁴ Dixon & Landau, *supra* note 1 at 123.

¹⁵ *Ibid* at 124. Dixon and Landau say that Ecuador's constitutional revision process "followed the same broad approach" (125), but don't provide details on the actual representativeness of the constituent assembly, which is, it seems to me, the key question.

to enact and implement that agenda. How can we tell that the proposed reforms are the former and not the latter?

I think that the key is the cast of mind we bring to the analysis. Specifically, suppose we thought that the ARA either is a good one (we're basically sympathetic to the victors who are trying to change the constitution) or is within the range of reasonable policy choices available in a constitutional democracy. We would then ask about reform proposals, If adopted will they ease the path to adopting and implementing the ARA in the short run but weaken the democratic core in the long run? And, as I will argue next, in many instances the answer to that question will probably be, Hard to know.

Dixon and Landau offer what I call a “global” and a “discrete” analysis of reform proposals. Both analyses try to identify politically neutral criteria for answering the key question. Such criteria make no reference to the substantive content of the ARA promoted by the victorious party. Both the global and the discrete analyses can make some progress toward answers in some cases, but in the end, I argue, neutral criteria won't be sufficient to carry the day. That is, in the end we will decide that a victorious party aims at the democratic core when its ARA, not its constitutional reforms, is politically out of bounds.

The global analysis takes irregularity as an indication of an intent to weaken the democratic core rather than to ease the path to adopting and implementing the ARA. Irregularity can be procedural or substantive.¹⁶

Because we're dealing with actions that fully comply with the procedures set out in law, procedural irregularity is a matter of departing from procedural norms. Dixon and Landau's best example is an action taken by the Supreme Court of Nicaragua to extend Daniel Ortega's presidential term. The Court acted in the middle of the night, with only Ortega's supporters on the court notified that something was about to happen.¹⁷ Dixon and Landau suggest that

16 *Ibid* at 185 (referring to “context, legal reasoning, and procedural irregularities”).

17 *Ibid* at 86. One might worry that by the time the court acted Ortega wasn't a would-be authoritarian but was a full-fledged one.

the use of private bills as the vehicles for major reforms in Hungary was procedurally irregular. Dixon and Landau’s explanation for why this matters is somewhat opaque: Apparently the rules for processing government bills expose the bills to greater scrutiny than the rules dealing with private bills (though that’s counterintuitive to me). More important, I need to know more about Hungarian parliamentary norms dealing with private and government bills to know whether using private bills is a signal of improper intent.

A related difficulty attends the use of substantive irregularity, by which I mean implausible legal defenses of subconstitutional reforms: The government adopts such a reform, the opposition challenges it as unconstitutional, the government — and the courts it has captured — defend the action as constitutionally permissible, and the defense is implausible. To know whether an action is substantively irregular in this sense — and so whether it signals an intent to weaken the democratic core — requires knowledge about the relevant law.¹⁸

Here there’s a serious methodological problem with some of Dixon and Landau’s presentations, indicated by their occasional use of qualifiers like “arguably” to modify claims that the action was unconstitutional.¹⁹ Except with respect to Colombian and perhaps Venezuelan law, neither Dixon nor Landau can represent themselves to be authorities about the law they are discussing — nor, I emphasize, do they purport to do so. They rely as they must upon what experts in the relevant domestic constitutional law have said. Unfortunately, the experts who have discussed that law tend to be opponents of the regime. Dixon and Landau cite Wojciech Sadurski on Poland, Gregor Halmai and Kim Lane

18 Cf. *ibid* at 85 (referring to decisions that “respect[] relatively orthodox processes of legal reasoning”); at 86 (describing courts that “fail[] to live up to [their] own ordinary standards of legal reasoning”).

19 See e.g. *ibid* at 95 (referring to an Ecuadorian process of constitutional amendment “that arguably clashed with a tiered amendment rule”). Cf. at 97 (referring to a decision resting upon a “dubious ground”), and at 100 (referring to “legally dubious decisions”).

Scheppelle on Hungary. With two overlapping exceptions that I could find,²⁰ they don't cite or discuss the arguments put forward by the lawyers defending the government or made by the courts upholding the actions. That means that readers have to take on faith representations about domestic constitutional law made by partisans in serious political conflicts. Of course those representations might be accurate, but I'm uncomfortable in making so much hinge on them.

Here are a few examples to illustrate my concern. Allan-Randolph Brewer-Carias wrote one of the few extended legal accounts of Venezuela's constitutional history under Chávez.²¹ Dixon and Landau necessarily rely on it, but it's worth noting that Brewer-Carias isn't a dispassionate analyst of the developments. The leader of the failed 2002 coup against Chávez sought Brewer-Carias's advice on the lawfulness of a decree the leader issued purporting to dissolve the Chávez government. Venezuelan authorities prosecuted Brewer-Carias for attempting to overthrow the government by force. Brewer-Carias contended that he never actually offered any advice (Venezuelan authorities represented that Brewer-Carias's involvement was far more extensive than he asserted), but the fact that he was brought to military headquarters suggests that the coup leader thought

- 20 The exceptions both involve arguments made by government supporters defending as consistent with popular constitutionalism proposals to allow legislatures to override adverse constitutional court decisions, *ibid* at 156. Dixon and Landau properly observe that these arguments do track those made in the literature on popular constitutionalism but fail to take into account conditions like general respect in the legislature for constitutional values that proponents of popular constitutionalism impose.
- 21 Allan-Randolph Brewer-Carias, *Dismantling Democracy in Venezuela: The Chavez Authoritarian Experiment* (Cambridge: Cambridge University Press: 2010), cited at Dixon & Landau, *supra* note 1 at 34, n 59.

that Brewer-Carías take the legal claim seriously.²² This in turn suggests that his account of Venezuelan constitutional law shouldn't be accepted uncritically.²³

Another example involves one aspect of the means by which the PiS government in Poland came to control the constitutional court. The factual background is complex.²⁴ The constitutional court had 15 members. The terms of three members expired on November 6, 2015, those of two others in December. Elections were scheduled for October 25, 2015, with the victor to take office on November 12. On October 8, the government then in power appointed five judges to the constitutional court – three for the vacancies to occur on November 6, two for the vacancies to occur in December. PiS and its coalition partners defeated the sitting government and contended that all five appointments were void. To an outsider the appointments to the December seats seem quite questionable as an effort to extend the former government's power into the period after it was thrown out of office. What of the three November appointments, which “took effect” in the period between the former government's defeat and PiS's accession to power? Dixon and Landau rely on Sadurski to support the claim that refusing to seat the November appointees was substantively irregular.²⁵

22 For the facts, see *Brewer Carías v Venezuela* (2014), Inter-Am Ct HR (Ser C) No 115, Preliminary Objections (dismissing for failure to exhaust domestic remedies Brewer Carías's claim that prosecuting him for seeking to overthrow the government by violence violated his rights under the Inter-American Convention on Human Rights), at paras 38, 62 (setting out the competing factual claims).

23 A similar reliance on partisan accounts, here of facts, occurs in connection with claims by Burundian judges that they had been forced to leave the country (Dixon & Landau, *supra* note 1 at 88).

24 Dixon and Landau's account is barebones (and relies on Sadurski's interpretation of the relevant court decisions), *ibid* at 90.

25 *Ibid* at 34 (referring to the “capture of key judicial institutions … to validate these laws, many of which are pretty clearly violations of the existing constitutional text”, and citing to Sadurski).

That might be right, but it's not difficult to come up with an argument supporting the PiS position on those appointees: The “clearly” improper December appointments taint the entire package of appointments made in October. I have no idea whether that argument has support in Polish constitutional law, but I do know, because Dixon and Landau and Sadurski tell us, that the constitutional court held that the December appointments were indeed invalid—and presumably offered some sort of argument to support that holding. I'd like to know what the argument was, so that I can figure out whether throwing the three judges off the court was substantively irregular.²⁶

A final example is much more consequential because it involves the predicate for much in the book: efforts by governments with ARAs to gain control of constitutional courts that might stand in the way of implementing their agendas, by changing the court's membership or jurisdiction.²⁷ Dixon and Landau observe that all such efforts compromise the value of judicial independence, as they do. Does that mean that they are always substantively irregular? Do they always rest on legally implausible grounds? Here I think the answer is unequivocally No. Sometimes, though of course not always, there are plausible legal arguments for changing a court's composition or jurisdiction.

The reason is that judicial independence isn't the only value in the premises. We want judges to be accountable as well. Accountability has two components – accountability to law and accountability to politics.

26 Again relying upon Sadurski, Dixon and Landau refer to a Polish law on demonstrations that “effectively prioritiz[ed] pro-government rallies over other assemblies”, and assert that it poses “an *obvious* clash with freedoms of expression and association” (*ibid* at 95) [emphasis added]. The law was one that employed a facially neutral standard for the purpose of accomplishing a disparate effect upon demonstrations. The free-expression analysis of such statutes is complicated, and they probably are generally inconsistent with free expression principles (when I used the statute in an examination, almost all of my students concluded that it was unconstitutional under the U.S. First Amendment), but the argument supporting that conclusion isn't an obvious one.

27 The question is dealt with at *ibid* at 87–93.

We want judges to be accountable to law, which means (to short circuit a complex argument) we want them to make decisions that are visibly connected to all the available legal materials. As good lawyers know, though, the legal materials can support results that point in quite different directions. Specifically, the legal materials can support the conclusion that some parts of an ARA are constitutionally impermissible *and* the conclusion that those same parts are constitutionally permissible. When a government changes the court's composition or jurisdiction to make it more likely that the court will reach the latter conclusion, is it weakening the democratic core value of judicial independence? Or is it promoting judicial accountability to law rather than politics?

The “rather than” implicit in the preceding sentences is misleading, though. We also want constitutional court judges to be accountable politically in a broad sense, which is why almost everywhere political actors have a significant role in naming judges to the constitutional court. When a significant political transition occurs, a court that was adequately politically accountable to the prior regime might get out of sync with — become insufficiently politically accountable to — the new regime. Changing the composition of the court might then be a good faith attempt to bring the court into closer balance with the elected government.²⁸ It might not be, of course, but once again we can't look only to the government's effort to change the court's composition or jurisdiction to come up with the answer.

I conclude that we can't come up with politically neutral criteria that support a global analysis of constitutional reform proposals by distinguishing between good-faith reforms, which are in the global analysis supported by plausible legal

²⁸ Dixon and Landau mention a White Paper produced by the PiS government in Poland defending its “judicial reforms”, which “stated that even more than 25 years after the transition to democracy, too many judges on Polish courts had been involved in the Communist regime” (*ibid* at 149). If true, that fact has some bearing upon the question of achieving a desirable degree of accountability to both law and politics by reforming the courts.

arguments, and bad-faith efforts to weaken the democratic core, which in the global analysis are supported by only implausible ones.

That leaves us with discrete analyses, those that seek to determine good- and bad-faith with respect to individual constitutional reforms. Here too I think an important distinction needs to be drawn between what I'll call substantive policies, some of which might be components of an ARA (which will provide my primary examples of this category), and policies that affect the electoral playing field reasonably directly (some aspects of free expression law and presidential term limits, which will be my primary example).

Dixon and Landau offer many examples of substantive policies that might well be intended to tilt the electoral playing field in favor of the incumbent party. The problem here is that in some sense they don't offer enough examples. And if they did, we'd see that substantive policies quite often have this intent but can't readily be described as intended to weaken the democratic core. My conclusion is that we have to have to be quite careful in equating policies that tilt the playing field with policies that are intended to weaken the democratic core — and I'm tempted to think that the right solution is simply to exclude from the field of concern substantive policies intended to tilt the playing field.

All this is rather abstract, so I move on to examples, first of substantive policies that Dixon and Landau classify as abusive because they are intended to weaken the democratic core and then of substantive policies that are intended to tilt the electoral playing field.

Dixon and Landau point to some expansions of rights as abusive because they are deceptive, meaning, I think, that governing parties that expand these rights do so to attract votes without actually intending to implement the rights. For example, Ecuador's constitution contains an expansive list of rights associated with the environment and with indigenous communities. To use the term I've introduced, protecting the environment and indigenous communities was part of an ARA.

By including these rights in the constitution, Correa and his party drew votes from environmentalists and indigenous communities (and from their supporters outside Ecuador). Dixon and Landau point out that after the

constitution went into effect Correa's government sacrificed environmental protection and protection of the rights of indigenous communities to economic development, with a notable case in which the government promoted environmentally damaging resource exploitation in an area important to sustaining the viability of an indigenous community — sacrificing both the environment and the indigenous community on the altar of economic development.²⁹ They conclude that the Correa government wasn't really committed to the expansive list of rights.

There's an alternative account of these events, though. Correa's constitution had a now standard list of first-generation rights and second-generation rights as well as the newer environmental and indigenous rights. Implementing second-generation rights — that is, making material resources more widely available to the poor — is easier when the nation has more resources at hand. In particular, exploiting natural resources is a way of generating the revenue to be used to implement second-generation rights.³⁰ A government sincerely

29 *Ibid* at 77–78. They also point to the adoption of legislation, apparently general, that increased the government's ability to shut down NGOs, which was then used against “a prominent environmental NGO”, and cite “two political scientists [who] cite a 2010 memo allegedly circulated among judges by the National Judicial Secretary, in which Correa explicitly warned that any judge finding public works projects (including mining) unconstitutional would be *personally* liable to the state for ‘damage and harm’ caused by the lost opportunity to pursue the project” (78). These matters do bolster the argument that the initial inclusion of environmental rights was a sham, but only a bit: If, as their presentation suggests, the NGO statute was general, it doesn't tell us much about the initial inclusion of environmental rights that it was used against an environmental NGO (if it was used against other NGOs as well, which Dixon and Landau don't say). And the phrase “allegedly circulated” is a red flag to me; who alleged it, and why weren't the political scientists able to say simply “circulated”?

30 Cf. *ibid* at 78 (noting that the Correa government defended a mining law criticized as anti-environmental “as necessary to promote a program of pro-poor development”). Dixon and Landau acknowledge these points, but conclude that “the weight of the evidence in the Ecuadorian case supports a ‘sham-like’ intent, with Correa using constitutional rights that he had no intention of implementing, as a currency to advance an anti-democratic agenda” (80).

committed to protecting second- and third-generation rights faces significant trade-off issues. Sometimes it might decide to protect the environment, forgoing the revenue that natural resource exploitation would generate, but it then has fewer resources to devote to education and medical care for those in need. Sometimes it might trade things off in the opposite way, increasing funding for schools and medical care from revenues generated by activities that damage the environment. In a world of tradeoffs, it's a mistake to say that any specific tradeoff demonstrates that the promise of the rights that gets the short end of the deal was illusory, deceptive, or abusive in Dixon and Landau's sense.

A second example of rights-expansion is Rwanda's guarantee of equal representation of women in its decision-making structures.³¹ Dixon and Landau point out that this guarantee was fastidiously honored in a purely descriptive sense but didn't result in the adoption of policies that advanced the interests of women on the ground.³² For them, then, the promise of gender equality was abusive: It attracted the votes of women (and, again important in the story, approval from the international community) for a governing party that wanted those votes and that approval simply to perpetuate its rule.³³

Again, though, there's an alternative account. Dixon and Landau argue that providing equal descriptive representation isn't providing "real" gender equality

Readers can decide for themselves whether they agree; for myself, I think that the evidence is more equivocal.

31 *Ibid* at 71–74.

32 *Ibid* at 72–73.

33 The attention Dixon and Landau pay to the many "audiences" for constitutional reform is another important and valuable feature of their work. The audiences include domestic voters, "close, sophisticated observers" (*ibid* at 17), and international NGOs, including human rights NGOs. See e.g. *ibid* at 47 (discussing sham borrowing to "deceive international and domestic audiences"). The role of audiences is especially important in connection with regimes' efforts to take advantage of the presumptive legitimacy of judicial review. See e.g. *ibid* at 112–113. My only reservation is that Dixon and Landau might underestimate the ability of ordinary voters to discern what "close, sophisticated observers" (like them) do.

— or, put another way, a theory defending as a form of equality “mere” equality in descriptive representation is not as good as a theory defending substantive equality. That might well be right, but it’s also true that on standard accounts mere descriptively equal representation does something good for gender equality. To take a U.S. example: Nikki Haley and Kamala Harris have quite different views about what policies are best for women whose forebears came from South Asia, but their prominence in national politics advances the interests of such women anyway: Descriptively equal representation matters to some extent. So, for all we know from the material Dixon and Landau present, Kenya’s leaders had a good-faith view that providing descriptively equal representation was simultaneously a genuine advance for gender equality (though perhaps not as substantial an advance as would have occurred by a commitment to other theories of gender equality), a public-relations benefit, and — because of the mechanisms used to select the female members of parliament — a way of increasing the governing party’s already substantial grip on power. Of course, Rwanda’s leader Paul Kagame was an authoritarian straight-out, which we know from matters other than the gender-equality provision, but only the electoral effect, and not the claim that descriptive representation didn’t lead to substantive advances in equality, supports the argument that the gender quotas were a sham.

The problem here, I think, arises from the following circumstances. We agree that some value — environmental protection, material equality, gender equality — should be promoted. A political party will gain votes by putting forth policies that it says promote that value. In addition, we have available to us reasonable but different normative specifications of those values (descriptive representation versus substantive equality). And, finally, we as people with our own normative views think that one specification is (clearly) better than others. This combination leads us to conclude that those who chose a different specification must not really be committed to the underlying value: Their commitments are shams, deceptions, abuses, adopted simply to get votes (to tilt the playing field). It’s clear to me that that conclusion simply doesn’t follow. Our critique really is that we disagree with the choice among reasonable alternative specifications that the government we’re criticizing has made.

There's a further problem with a "tilt the electoral playing field" story about substantive policies: It licenses critics to describe as abusive a far too large set of substantive policies.³⁴ A crude version: *Every* substantive policy a government adopts is intended to tilt the electoral playing field by leading voters to conclude that re-electing the government that did this good thing for them will continue to do good things for them.

Consider direct monetary or in-kind payments to families. The Brazilian *bolsa familia*, a system of payments to poor families, was pioneered in the mid-1990s by the Workers Party (PT) governor of Brasilia, then expanded and made national in scope by president Fernando Henrique Cardoso, who led a centrist coalition. Luiz Inácio Lula da Silva of the Workers Party succeeded Cardoso, and dramatically expanded the size and scope of the program. He did so because in his view it was good policy *and* good politics, and the program did indeed enhance PT's electoral chances. The PiS in Poland has similarly bolstered its electoral position by providing significant payments to Polish families. It can't be, though, that these policies, adopted by parties that some see as led by would be authoritarians, are abusive even though they do indeed tilt the electoral playing field.

I conclude that we have no obvious criteria to identify as intended to weaken the democratic core substantive policies that tilt the electoral playing field, independent of a political evaluation of the policies. So, for example, we might argue that the *bolsa familia* or Polish subsidies have grown so large as to be unsustainable in the long run, which means that they are substantively bad policies and in their current form must be understood as intended only to perpetuate the sitting government's power.³⁵ Or, we might say that mere

³⁴ I put this as an additional problem, but I think that it actually is just an extension to another area of the arguments already made.

³⁵ That argument of course is fundamentally an empirical one, and supporters of the programs would surely contest its factual predicate, of unsustainability (for example, by arguing that children who benefit from the subsidy programs will grow up to be more productive citizens whose work will continue to generate the revenues needed to support the programs).

descriptively equal representation is a bad theory of equality. Or, finally, we might think that some components of an ARA are such bad ideas that the only explanation we can give for their inclusion is an intent to weaken the democratic core. It's clear to me, though, that at this point we're having a simple political argument about the merits of the ARA.

I turn now to policies dealing more or less directly with the democratic core, focusing on presidential term limits. My argument is that here too there's a problem of inferring improper intent from policies that do adversely affect the prospect that the opposition will be able to displace the sitting government, because sometimes there are decent arguments that the policies are appropriate, sometimes possibly necessary, to ensure the success of an ARA.³⁶

There are lots of reasons to worry about elimination of presidential term limits, but the case for doing so for the purpose of implementing an ARA is stronger than the literature acknowledges. And, further, we actually have some evidence supporting the proposition that sometimes the purpose of eliminating

36 I confine to this note the observation that not all laws that adversely and unjustifiably affect free expression weaken the democratic core. Dixon and Landau devote some attention to “memory” laws modeled on Holocaust denial laws (Dixon & Landau, *supra* note 1 at 59–66). There’s no doubt that some such laws define as violations of national honor claims that are prominent in national politics and that therefore do weaken the democratic core. The Polish memory law, which makes it offense to imply that Poles collaborated with the Nazi regime during World War II, doesn’t seem to me one of them, despite Dixon and Landau’s inclusion of it in their analysis (64–65). The reason is that they don’t show that any anti-PiS party makes allegations of Polish collaboration an important part of its platform (nor, it seems to me, would doing so be a sensible political tactic). The Polish memory law might well violate general principles of free expression, but that in itself doesn’t mean that it’s abusive in Dixon and Landau’s sense (otherwise every violation of free expression principles would be abusive, which they clearly don’t contend). Their express conclusion is that the Polish memory law is “illiberal” (true) and its “antidemocratic impact … is largely latent” (66) (which is, I think, true of all illiberal legislation). Including the case in a study of abusive borrowings that threaten the democratic core seems to me an overreach.

presidential terms limits is in fact not to weaken the democratic core but rather to implement an ARA.

There appears to be something approaching an international consensus that nations with presidential systems should limit elected presidents to two terms of somewhere between four and seven years. The reason is that presidents who serve longer than that are too likely to gain control of all or nearly all of the other institutions that provide collateral protection for the democratic system, such as the constitutional court, the election management body, and the ombuds office.³⁷ It's also clear that there's some tension between this consensus and the principle, stated by Alexander Hamilton in connection with elections to the legislature, that "the people should choose whom they please to govern them".³⁸ The international consensus expresses a judgment about the right balance between these considerations.

Now consider something else that might be placed in the balance. The people elect a president because he or she has an ARA. Enacting and implementing the ARA will always take time precisely because it is ambitious. And, as discussed earlier, the time it takes might be extended by vigorous opposition mounted by the losing side. Meanwhile the clock is ticking. The

37 Citing Kim Lane Schepppele, Dixon and Landau observe that in Hungary and Poland "a number of institutions were curbed and/or captured simultaneously" – the constitutional court, ombuds offices, media regulators, and electoral commissions (Dixon & Landau, *supra* note 1 at 166). Neither nation is presidential, which suggests to me that we need some arguments that explain why presidents are properly placed under term limits but prime ministers aren't. Perhaps for some reason prime ministers are unable to gain control of these collateral institutions no matter how long they serve, though the Hungarian and Polish cases would remain a puzzle.

38 Quoted in *United States Term Limits v Thornton*, 514 US 779 (1995) at para 793. Dixon and Landau refer to this as "the (dubious) claim of a human right to reelection" (Dixon & Landau, *supra* note 1 at 116), and more strongly, "the argument that term limits violate international human rights law is baseless" (140). That's right as presented (in terms of a "right"), but overstated when we consider the people's interest as a consideration relevant to assessing the question of term limits' consistency with the democratic core.

president might believe in good faith that the scope of the ARA and the degree of continuing opposition it faces will make it impossible to enact and implement important components of the ARA before his or her term comes to its constitutionally mandated conclusion. So, the president seeks the people's approval of a constitutional amendment removing the term limit from the constitution.

Should these matters affect the balance that determines how long a president can serve? Consider that the consensus gives presidents *two* terms, and that neither Dixon and Landau nor other scholars of whose work I am aware criticize the Colombian Supreme Court for allowing a referendum changing a one-term limit to a two-term one. And the reason is clear: The consensus accepts the view that one term might not be long enough to allow a president to enact and implement the policies in the platform on which he or she ran. A president's ability to enact and implement policy agenda does indeed go into the balance.

But, proponents of term limits might say, why *you* in particular? That is, the president is the head of a party and has allies within the party one of whom might take the office and carry out the remaining parts of the ARA. So, for example, in Bolivia when Evo Morales was prevented from continuing in office, a few months later his former finance minister Luis Arce was elected president on a platform of policy continuity.

The president might respond — again without intending to weaken the democratic core — that the potential successors on the horizon lack the political skills needed to sustain the coalition supporting the ARA. As against Arce, we might cite Lenin Moreno, Correa's vice-president and successor as president who split the governing party and abandoned Correa's program.³⁹

The cases of Ecuador and Bolivia are interesting in another way: Both Correa and Morales succeeded in their efforts to eliminate presidential term limits but neither benefited from their victories. To secure adoption of the amendment

39 Dixon and Landau observe that Nicolas Maduro, Chávez's designated successor, was both less charismatic and less skilled as a politician than Chávez (*ibid* at 99).

eliminating term limits Correa had to accept a provision whose effect was to bar him from running for a third successive term,⁴⁰ though he reserved the right to run after an intervening presidential term.⁴¹ This suggests, though of course it doesn't establish, that Correa had principled reasons for his support for unlimited presidential terms; alternatively he might have believed that he could leave office for one term then return (a misjudgment, as it turned out). Morales did run for a third term but as described earlier was prevented from taking office. He went into a brief exile, then returned to Bolivia after Arce's election, and stated that (at least for the moment) he was returning to his role as a labor organizer rather than re-entering high-level national politics.

Taking everything into account, I believe that the international consensus favoring a two-term limit strikes the right balance. At the same time, though, I can't conclude that the argument I've laid out for removing term limits when a president has an ARA is insubstantial, and so can't conclude that those who advocate for removing presidential terms limits by that act alone show that they are would be authoritarians. They might be, as the case of Daniel Ortega shows, but we can come to that conclusion only by looking at *other* things they are doing.

With all the preceding in hand, I come to my final point: A great deal that is presented as criticism of abusive constitutionalism or, in Dixon and Landau's version, abusive constitutional borrowing, is criticism either of specific ARAs or, more interestingly, of the very idea that pursuing an ARA is a good idea.

I use Dixon and Landau's discussion of the potential intellectual imperialism of arguments about abusive constitutional borrowing as the entry point for my argument. They frame the concern about intellectual imperialism with reference to hypocrisy: Those said to abusively borrow things (structure or doctrines) from other systems respond either with the *tu quoque* of "whataboutism" or by

40 Correa's popularity had already eroded substantially, because of deteriorating economic conditions, and the referendum campaign occasioned "large-scale street protests" against the government (*ibid* at 136).

41 In the event even that possibility was foreclosed when Moreno sponsored an amendment reimposing presidential term limits.

saying, “You’re just jealous that we’ve tweaked your thing to make it better both for us and, we think, for you if only you’d acknowledge that fact that subalterns actually have good ideas”.⁴²

Dixon and Landau acknowledge that there’s something to each of these responses, but argue that in the end they can’t carry the day against arguments that really do identify some abuses — and I agree with both their acknowledgement and their conclusion that the charge of hypocrisy doesn’t undermine their core argument. In my view the charge of imperialism rests on different grounds, though.

I’ve argued in some detail that Dixon and Landau’s approach, which identifies abusive practices with those intended to weaken the democratic core or tilt the electoral playing field, is correct. I’ve also argued that the only way we can reliably determine that an actor has that abusive intent is by looking not at the constitutional reforms the actor sponsors but at what I’ve called the substantive policies the actor seeks to implement. Again, a crude version: A president who takes over the courts by a procedurally regular constitutional amendment *and* throws political opponents in jail is a would be authoritarian; a president who takes over the courts and doesn’t throw opponents in jail isn’t necessarily a would be authoritarian. In the course of this Essay I’ve offered what I hope are less crude versions of that argument.

If I’m right, the claim about intellectual imperialism comes down to this. The critic of abusive constitutionalism disagrees with some or many of the policies in the regime’s ARA, and that disagreement is the foundation for the critic’s inference of bad intent. Or, much more interesting, the critic might have process-based concerns. ARAs should be implemented through a dialogue with the opposition, apparently without regard to whether the opposition itself is willing to engage in a good-faith dialogue. Or, ARAs are in principle abusive because ambitious reforms should be implemented incrementally rather than quickly. This is not sheer status quo-ism because the critic is open to reforms,

42 Dixon & Landau, *supra* note 1 at 190–191.

even ambitious ones.⁴³ It is a political position nonetheless: that dialogue and incrementalism are the proper forms of political action. As should be clear, many of those who vote for candidates proposing ARAs disagree and, just to be crystal clear, I'm not going to say them nay.

43 There is a hint of status quo-ism in Dixon and Landau's reference to "those elements of liberalism that deal with the limitation of government power and the protection of individual liberty, dignity, and equality" (*ibid* at 28), a standard formulation that fails to take into account the possibility — associated with many ARAs — that exercising government power can sometimes be an effective method of protecting individual liberty, dignity, and equality.

Abusive Constitutional Borrowing: A Reply to Commentators

Rosalind Dixon*

David Landau**

-
- I. WHAT IS ABUSIVE BORROWING?
 - II. WHEN AND WHY IT OCCURS
 - III. CAN ABUSIVE BORROWING BE STOPPED?
 - IV. DEFINING AND IDENTIFYING ABUSE
 - V. RESEARCH METHODS
 - VI. QUESTIONS FOR FURTHER RESEARCH
-

We are extremely grateful to Tom Ginsburg, Ran Hirschl, Sandy Levinson and Mark Tushnet (“commentators”) for their generous engagement with our new book, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy*. Any author of a monograph would be delighted to have readers willing to engage with their work in such detail, and with such acuity and generosity. But we feel especially fortunate to have such brilliant and distinguished commentators as interlocutors.

We also owe thanks to each commentator for earlier feedback on and encouragement of the project. As Hirschl alludes to in his comment, he played a critical role in prompting us to develop our ideas in book form.¹ And Tushnet and Ginsburg both commented on multiple drafts, and along with Levinson,

* Professor of Law, University of New South Wales, Sydney, Australia.

** Mason Ladd Professor and Associate Dean for International Programs, Florida State University College of Law, Tallahassee, FL, USA.

1 Ran Hirschl, “Abusive Constitutional Borrowing as a Form Politics by Other Means” (2021) 7:1 Canadian Journal of Comparative & Contemporary Law 6.

joined us in many panel discussions on the themes we traverse in the book. Indeed, all the commentators have been important teachers and mentors to us as comparative constitutional scholars over the last decade.

We are grateful to each of the commentators for their willingness to support and respond to our work in this way, and to the *Canadian Journal of Comparative and Contemporary Law* for curating this wonderful discussion.

Parts I, II, and III of this response briefly summarize and respond to reviewers' comments on the major claims of our book. Part IV deals with the thrust of several reviewers' comments about our criteria for identifying abuse and the ways in which we classify cases, while Part V treats methodological concerns. Part VI concludes by highlighting some of the reviewers' important suggestions for future research.

I. What is Abusive Borrowing?

The starting point for the book is the broadly shared understanding that we are living in a moment of democratic “decline”, “erosion”, “backsliding”, “rot” or “decay” — or seeing the rise of new forms of “stealth authoritarianism”, “autocratic legalism” or what Landau previously labelled “abusive constitutionalism”.²

These trends are not universal, or one-way. There are signs in some countries of new forms of democratic renewal and resistance. Indeed, the election of President Joe Biden, and successful transition of power from Donald Trump to Biden, have given many in the US a new sense of optimism about the possibilities of democratic renewal, or what might be called a form of “restorative” as opposed to abusive constitutionalism.³

2 See *ibid* at 6 (and cites therein).

3 Levinson, of course, sees the causes of democratic erosion in the US more in structural terms. As he pithily notes in his comment, “the widely-recognized dysfunctionality of the American constitutional order is scarcely likely to abate simply because Joseph R. Biden was able to prevail against a notably incompetent and nearly sociopathic Trump”: Sanford Levinson, “Assessing

Other countries have seen relative stability in their constitutional democratic arrangements. Countries such as Australia are a case in point.⁴ But a large number of countries have seen a notable erosion in liberal democratic norms. In Europe, the best-known examples are the changes that have occurred in Hungary and Poland over the last decade.⁵ There are signs of similar if not yet as significant forms of erosion occurring in the Czech Republic, Romania, Belarus, and Slovakia.⁶ In the Asia-Pacific, constitutional democracy has been stressed, and often under attack, in Cambodia, Thailand, and Fiji. In Africa, elected presidents have stayed on past the initial constitutionally appointed time to leave office in Chad, Gabon, Guinea, Namibia, Togo, Uganda, Cameroon, Djibouti, Rwanda and Burundi.⁷ And in Latin America, there have been threats to democracy in Venezuela, Honduras, Nicaragua, Brazil and we also argue in Bolivia and Ecuador.

⁴ ‘Abusive Constitutionalism’ in a Complex Political Universe” (2021) 7:1 Canadian Journal of Comparative & Contemporary Law 15, 16.

- ⁵ See e.g. Rosalind Dixon & Anika Gauja, “Australia’s Non-Populist Democracy? The Role of Structure and Policy” in Mark A Graber, Sanford Levinson & Mark Tushnet, eds, *Constitutional Democracy in Crisis?* (Oxford: Oxford University Press, 2018) 395.
- ⁶ See e.g. Rosalind Dixon & David Landau, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (Oxford: Oxford University Press, 2021) at 13ff, 53ff [Dixon & Landau, *Abusive Constitutional Borrowing*].
- ⁷ See e.g., *ibid*; Petra Guasti, “Populism in Power and Democracy: Democratic Decay and Resilience in the Czech Republic (2013-2020)” (2020) 8:4 Politics & Governance 473; Aris Trantidis, “Building an Authoritarian Regime: Strategies for Autocratisation and Resistance in Belarus and Slovakia” (2021) British Journal of Politics and International Relations [Forthcoming]; Nicole Wells, “Political Corruption: The Threat of Democratic Erosion in Romania” (22 April 2018), online: *Democratic Erosion* <www.democratic-erosion.com/2018/04/22/political-corruption-the-threat-of-democratic-erosion-in-romania-by-nicole-wells-american-university/>.
- ⁷ See Rosalind Dixon & David Landau, “Constitutional End Games: Making Presidential Term Limits Stick” (2020) 71:2 Hastings Law Journal 359 [Dixon & Landau, “Constitutional End Games”].

Of course, this phenomenon has received considerable attention and generated a massive literature in both law and political science.⁸ The aim of the book is to focus on one aspect, which we argue has received insufficient attention: the role of legal globalization — and specifically the borrowing of liberal democratic constitutional norms (as well as related fields like international human rights) — in advancing many recent authoritarian projects.

Our basic claim is straightforward. Rather than experiencing them as a constraint, many would-be authoritarians are turning to liberal democratic norms as a source of inspiration and/or justification for anti-democratic or abusive forms of constitutional change. Levinson puts the point this way:

[t]hings are not always as they are alleged to be, and the lessons taught by “comparative constitutionalism” can, in the wrong hands, become a source of great evil instead of enlightenment based on “best practices.” Techniques make sense, ultimately, only against a background of shared value commitments as to what they are in fact being used to achieve. But, as we know from countless “mad scientist” movies, even the most benevolent techniques can be seized and misused by those who don’t share those commitments.⁹

As his useful summary suggests, our definition of abusive borrowing has two key components: first, we identify constitutional changes that, either taken alone or in combination with other parallel or subsequent changes, have a material adverse effect on the “minimum core” of constitutional democracy; and second, we focus on the ways in which liberal democratic concepts or norms are used as either the inspiration or justification for these changes.

All forms of comparative “borrowing” involve a process of comparative adaptation, whereby foreign or international norms are adapted to fit a new and

⁸ For recent general accounts, see e.g. Tom Ginsburg & Aziz Z Huq, *How to Save Your Constitutional Democracy* (Chicago: University of Chicago Press, 2018) [Ginsburg & Huq, *How to Save*]; Steven Levitsky & Daniel Ziblatt, *How Democracies Die* (New York: Crown, 2018).

⁹ Levinson, *supra* note 3 at 18.

distinctive context.¹⁰ But abusive forms of borrowing go beyond this necessary adaptation and involve forms of borrowing that are radically *superficial, selective, acontextual or anti-purposive* in nature and that adversely impact the democratic minimum core. In this sense, as Hirschl notes, we understand abusive borrowing as the “simultaneous reliance on, yet effective hollowing out of, core concepts of constitutionalism to advance an anti-democratic and often illiberal political platform”.¹¹

We further identify both weak and strong notions of “abuse”. The weakest notion of abusive borrowing will simply involve borrowing or comparative justification that has a material adverse *impact* on the stability of the democratic minimum core. But a stronger notion of abuse involves would-be authoritarians knowingly or intentionally engaging in forms of borrowing that are antidemocratic in effect. It is, in this sense, a form of borrowing or comparative justification engaged in in bad faith.¹² And as Tushnet notes, this is the primary notion of “abuse” that we adopt throughout the book.

As Hirschl rightly notes, our focus is on the impact of abusive borrowing on the minimum core of democracy. And our definition of democracy is relatively thin or minimalist in nature.¹³ It is not purely procedural, but rather includes the idea of regular, free and fair multi-party elections, political rights and

10 Dixon & Landau, *Abusive Constitutional Borrowing*, *supra* note 5 at 40ff. See Rosalind Dixon & Amelia Loughland, “Comparative Constitutional Adaptation: Democracy and Distrust in the High Court of Australia” (2021) International Journal of Constitutional Law [Forthcoming]; John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980).

11 Hirschl, *supra* note 1 at 7.

12 See Rosalind Dixon & David Landau, “1989-2019: From Democratic to Abusive Constitutional Borrowing” (2019) 17:2 International Journal of Constitutional Law 489 [Dixon & Landau, “1989-2019”]. See discussion in Mark Tushnet, “Review of Dixon & Landau’s *Abusive Constitutional Borrowing*” (2021) 7:1 Canadian Journal of Comparative & Contemporary Law 23, 25ff [Tushnet, “Review”]. Compare also David E Pozen, “Constitutional Bad Faith” (2016) 129:4 Harvard Law Review 885.

13 See Levinson, *supra* note 3 at 15.

freedoms for all citizens, and a set of institutional checks and balances necessary to ensure the protection of the first two elements of democracy.

The advantage of this definition is that it draws on extant practices within constitutional democracies worldwide and the degree of overlap or overlapping consensus among them.¹⁴ As well, it draws on areas of overlap or agreement among constitutional and political theorists about the requirements of democracy, so that our definition is capable of attracting agreement from a wide range of scholars and practitioners, in ways that provide a relatively objective and non-contestable definition of democratic “abuse”.

We do not focus primarily on the erosion of liberalism itself, and the rule of law and individual rights to freedom, dignity and equality beyond the political sphere, though we suggest that attacks on democracy and liberalism frequently go together, and would-be autocrats frequently borrow from both liberal and democratic ideas in order to erode the democratic minimum core.

Abusive borrowing has targeted a wide range of hallowed norms and institutions in the liberal democratic canon, as well as international human rights law. Recent waves of legal globalization have greatly expanded the scope and breadth of this liberal democratic constitutional canon. Indeed, as Ginsburg notes, it now arguably extends to “judicial review, constitutional rights, the constituent power, human rights law, hate speech laws and gender quotas”.¹⁵

In the book, we draw on a large number of examples of interest to both constitutional scholars and international lawyers. We look at several different invocations of rights, including the use of hate speech norms and memory laws in Rwanda, Russia, and Poland, the “expansion” of the right to vote in Fiji and Hungary, gender quotas as a tool to consolidate regime power in Rwanda, and

¹⁴ Compare Rosalind Dixon & David Landau, “Competitive Democracy and the Constitutional Minimum Core” in Tom Ginsburg & Aziz Z Huq, eds, *Assessing Constitutional Performance* (New York, Cambridge University Press, 2016) 268; Dixon & Landau, *Abusive Constitutional Borrowing*, *supra* note 5.

¹⁵ Tom Ginsburg, “Review of Dixon and Landau’s *Abusive Constitutional Borrowing*” (2021) 7:1 Canadian Journal of Comparative & Contemporary Law 1, 2.

“sham” environmental rights in Ecuador. We also consider the use of courts and judicial review as an authoritarian tool, using as our main examples the deployment of the Venezuelan Supreme Court to shut down the opposition-controlled legislature after 2015, and the use of courts to ban parties with anti-democratic effect in Cambodia and (more ambiguously) in Thailand. We consider the abuse of the discourse of constituent power, including two successive anti-democratic constituent assemblies in Venezuela (1999 and 2017), as well as the wielding of the “unconstitutional constitutional amendment” doctrine and its relatives to excise term limits in Latin America, using the (bogus) argument that there is a fundamental human right to unlimited re-election. Finally, we look at the ways in which theories of “dialogic” constitutionalism or weak-form judicial review, such as “legislative constitutionalism” (in conjunction with the EU principles of “constitutional identity” and “constitutional pluralism”¹⁶) and the Canadian model of legislative override, have been used to advance authoritarian goals in Poland, Hungary, and Israel.

Hirschl rightly questions whether the phenomenon we identify is in fact a new one, or rather an old problem that seems simply to have become more severe with time. The question, as he poses it is, “whether this phenomenon is qualitatively different from what we know has taken place [elsewhere and before]” or whether it is “a question of degree”.¹⁷

Hirschl correctly points out that the phenomenon is not completely new, but instead has a number of precursors.¹⁸ However, its breadth and scope today does seem substantially broader than in the past. This is in part because the available material for borrowing has expanded so greatly and become so much

¹⁶ R Daniel Kelemen & Laurent Pech, “The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland” (2019) 21 Cambridge Yearbook of European Legal Studies 59.

¹⁷ Hirschl, *supra* note 1 at 10.

¹⁸ See David Landau, “Abusive Constitutionalism” (2013) 47:1 UC Davis Law Review 189.

more globally accessible via online resources, translations and legal and political interactions across borders. Moreover, while a number of older efforts to use law to legitimize autocracy traded off a relatively thin conception of the rule of law, the more recent efforts seem to be more drawn off of a thicker set of liberal democratic norms. Ironically, this is in part a product of the rhetorical success of liberal democratic constitutionalism and the corresponding thickening of the “canon”. Furthermore, the pay-off to abusive borrowing has increased, along with the rise in the costs or penalties for open or outright forms of constitutional coup or authoritarian take-over.¹⁹

II. When and Why It Occurs

Indeed, one of the explanations for abusive borrowing is that the price of open attacks on democracy have gone up over time — as other democracies and regional organizations have moved to imposed sanctions or other forms of penalty on openly authoritarian governments, and citizens in many new democracies have become accustomed to their rights as voters and democratic rights holders.²⁰

As Hirschl notes, this does not mean that abusive borrowing of liberal democratic norms is the only tactic deployed by would-be authoritarian actors.²¹ Instead, they simultaneously engage in abusive engagement with liberal democracy and, at the same time, utilize explicitly illiberal forms of discourse, which attack the desirability of liberal democratic ideas and norms. Leaders such as Orban and Kaczynski are perhaps the best examples: they have sought to draw comparisons between their own practices and those of countries such as Germany and the US, long considered established constitutional democracies, while simultaneously embracing the idea of “illiberal democracy” and Russia, China, Turkey and Singapore as models.²² The persistence of both forms of

19 See Dixon & Landau, *Abusive Constitutional Borrowing*, *supra* note 5.

20 See *ibid.*

21 Hirschl, *supra* note 1.

22 *Ibid*; Dixon & Landau, “1989-2019”, *supra* note 12.

discourse by the same anti-democratic actors, often simultaneously, is an interesting phenomenon — it may suggest an attempt to reach different kinds of audiences, as well as constituting a form of “gaslighting”, disorienting and upending the normative foundations of the public.²³

But abusive constitutional borrowing does seem to be an increasingly prevalent phenomenon, and one that is offering would-be authoritarians increasing benefits. As we emphasize in the book, we are living in what many might call the age of comparative constitutionalism, or an era of legal globalization. This is an era in which the transfer, migration or borrowing of legal and constitutional ideas is pervasive, and there are increasingly dense networks of interaction between lawyers, judges, and scholars across the world. For the most part, these networks and forms of engagement have been positive for liberal democracy. They have led to the spread of ideas that can inform and enhance constitutional democratic performance. But that story also overlooks a real and growing dark side to these networks of ideas and personal connections: the capacity for would-be authoritarians to draw on these networks for their own ends.²⁴

One question, raised by Hirschl, is how and why tactics of this kind succeed. Abusive borrowing can have both domestic and international audiences.²⁵ International audiences, are often quite important: In an age of globalization, governments have a strong interest in maintaining the appearance of liberal democratic legitimacy. And too often, the international community seems willing to accept that things *are* as they seem, or to focus on the form over substance of claims by would-be authoritarians that they are advancing or conforming to liberal democratic norms.

23 See Dixon & Landau, “1989-2019”, *supra* note 12.

24 Cf David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton: Princeton University Press, 2004).

25 See Dixon & Landau, *Abusive Constitutional Borrowing*, *supra* note 5 at ch 3. See also discussion in Tushnet, “Review”, *supra* note 12 at 40 n 33.

Examples we give in the book include the attempts by Hungarian and Polish leaders to justify their actions to the EU, and by President Kagame to retain the support of the international community. As Sadurski and others have noted, the EU has been quite slow to criticize Hungarian and Polish government officials for their attacks on liberal democracy, and especially to impose sanctions for breaches of shared European commitments to these norms. And the international community has actively embraced Kagame, including by appointing him Chair of the Secretary-General's advisory group on the Millennium Development Goals,²⁶ despite his authoritarian tendencies.²⁷

The same could also be said of some domestic audiences. Domestic audiences have readier access than international ones to information about social facts and conditions “on the ground”. They may also be more motivated to acquire this information, given its direct impact on their own current and future life. But they too may be too quick to focus on form over substance, or to accept the hope or promise of liberal democratic change – compared to the likelihood of superficial or even anti-purposive borrowing.

III. Can Abusive Borrowing be Stopped?

In Chapter 8 of the book, we explore a number of potential tools of constitutional design that may help reduce the risk of abusive borrowing, or tools and techniques of constitutional “abuse-proofing”. We also suggest, however, that design responses of this kind have limited promise as a response to what is fundamentally a discursive or rhetorical legitimization strategy.

One key to stopping abuse will be for relevant audiences to become more *sceptical* of this kind of discursive or rhetorical strategy.²⁸ And part of our hope in writing the book is that by noticing and calling out abusive borrowing as a

26 See Dixon & Landau, *Abusive Constitutional Borrowing*, *supra* note 5 at 183–184. See also “Paul Kagame”, online: *World Bank Live* <live.worldbank.org/experts/paul-kagame>.

27 Tushnet, “Review”, *supra* note 12 at 41–42 acknowledges this.

28 As Levinson, *supra* note 3 at 18 notes, part of what we are calling for is a new “hermeneutics of suspicion”.

phenomenon, we may in fact be starting on the path of stopping it. To recognize borrowing as abusive is effectively to deprive it of its legitimating power.

Achieving this will often require a form of global legal “realism” that is often lacking in comparative constitutional scholarly commentary and engagement, and a willingness to face up to charges of hypocrisy or imperialism. Few constitutional democracies fully live up to their own ideals, and thus when those ideals are implemented elsewhere in superficial or selective ways, there is a natural tendency to suggest that the two contexts are similar. Would-be authoritarians may also be especially keen to exploit this form of similarity as part of their broader abusive tactics, including engaging in a form of abusive borrowing of the discourse of post-colonialism or anti-imperialism. We suggest in the book, however, that it is possible to respond to encourage this more realist approach, and one that takes concerns about imperialism seriously, without succumbing to a form of political paralysis.²⁹

IV. Defining and Identifying Abuse

The main critique of several of the commentators is that we adopt a definition of abusive borrowing that sweeps too broadly in its treatment of legitimate attempts at political change — or what Tushnet calls an “ambitious reform agenda”.³⁰ Both Levinson and Tushnet in particular raise this concern. Levinson, for example, worries that “*any* recourse to notions of ‘constituent power’ or ‘popular sovereignty’ will be open to charges of abuse”.³¹ The problem, as he sees it, is “that there may be no neutral definitions of opportunism or even demagoguery”. And Tushnet worries that — by including a range of measures that tilt the electoral playing field, without directly undermining the democratic minimum core — our definition of abuse “licenses critics to describe as abusive a far too large set of substantive policies”.³²

29 Dixon & Landau, *Abusive Constitutional Borrowing*, *supra* note 5 at ch 8.

30 Tushnet, “Review”, *supra* note 12 at 28.

31 Levinson, *supra* note 3 at 21 [emphasis in original].

32 Tushnet, “Review”, *supra* note 12 at 42.

Let us take the two points in order, as they are related but slightly different. Levinson's argument may be that there is no way to make meaningful distinctions between abusive and democratic invocations of constituent power. At the outset, we emphasize that an action is not abusive just because it may be illegal or extra-legal. That is, invocations of the constituent power are *not* abusive under our definition because they mark a "revolutionary" break with the prior legal order. Indeed, we emphasize in the book the regional example of Colombia, which in 1991 used constituent power theory to replace its existing constitution, and did so in a way that had clearly pro-democratic effects. The model of constituent power as exercised in Colombia — a body representing popular will that works around existing institutions and has power to wield other powers (such as shutting down existing institutions or influencing legislation) in addition to constitution-making — is one with attractiveness in some contexts, but one that is also fairly easy to abuse for authoritarian ends. Elsewhere in the Andes, this is exactly what happened.

There are ultimately two ways to distinguish abusive from legitimate invocations of constituent power. One is process: Procedural considerations can often, as we note in the book, be key indicators of abusive intent.³³ One should ask, for example, whether the claim to wield constituent power is grounded in widespread political participation or mobilization, or instead whether this claim is an empty or fraudulent one.³⁴ The second, perhaps more important test is about outcome: whether the relevant invocation of constituent power is made to support a truly democratic constitution, or instead one that fails to protect the democratic minimum core.

33 See Dixon & Landau, *Abusive Constitutional Borrowing*, *supra* note 5 at 86.

34 See Kim Lane Schepppele, "Unconstitutional Constituent Power" in Rogers M Smith & Richard R Beeman, eds, *Modern Constitutions* (Philadelphia: University of Pennsylvania Press, 2020) 154; Chaihark Hahn & Sung Ho Kim, "To make "We the People": Constitutional founding in postwar Japan and South Korea" (2010) 8:4 International Journal of Constitutional Law 800; David Landau & Rosalind Dixon, "Constraining Constitutional Change" (2015) 50:4 Wake Forest Law Review 859.

One can usefully apply these tests to the Venezuelan constituent assemblies of 1999 and 2017, examined in detail in the book. The first, as we note, shows some indicia of abusiveness, although it is a case with some ambivalence. Hugo Chavez's invocation of constituent power to scrap the existing Venezuelan constitution was grounded in an authentic, widely-held desire for institutional change, as well as a sense that the existing order was exhausted. But he also wrote electoral rules that allowed his supporters to dominate the Assembly almost completely.³⁵ The Assembly then wielded its powers in a problematic way — what in Colombia had been collateral and supportive powers to reorganize other institutions and play a legislative role became perhaps the central function of the Assembly. The 1999 Assembly shut down or reorganized other institutions of state, and also monopolized lawmaking functions for an extended period of time.³⁶ The result is that Chavez emerged from the constitution-making process dominating all other state institutions, rather than facing opposition-controlled institutions as he did when he won the 1998 election. And indeed, the outcome of the 1999 constitution-making process was anti-democratic: it paved the way for the construction of a competitive authoritarian regime.

The 2017 process, by Chavez's successor Nicolas Maduro, was thoroughly abusive, indeed it made a farce of the concept of constituent power.³⁷ Unlike in 1999, there was little genuine popular support for constitution-making in 2017, and the regime's popular support was extremely low. Unlike Chavez, Maduro called the Assembly without even holding a popular referendum testing support

35 Aided, as we note in the book and as Tushnet points out in his review, by the problematic decision of opposition parties to boycott the Assembly elections. See David Landau, "Constitution-Making and Authoritarianism in Venezuela: The First Time as Tragedy, the Second as Farce" in Mark A Graber, Sanford Levinson & Mark Tushnet, eds, *Constitutional Democracy in Crisis?* (Oxford: Oxford University Press, 2018) 161 [Landau, "Constitution-Making and Authoritarianism"].

36 See Joshua Braver, "Hannah Arendt in Venezuela: The Supreme Court Battles Hugo Chávez Over the Creation of the 1999 Constitution" (2016) 14:3 International Journal of Constitutional Law 555.

37 See Landau, "Constitution-Making and Authoritarianism", *supra* note 35.

for one, arguing (controversially) that he was allowed to do this under the 1999 Constitution. Vote totals in the elections for the Assembly were apparently goosed by fraud, because the true numbers were embarrassingly low.³⁸ The electoral rules were bizarre, including egregious malapportionment and substantial representation for a number of corporatist communities like “farmers and fishermen and fisherwomen” that were dominated by regime loyalists.³⁹ The Assembly never even bothered to enact a new constitution or new constitutional reforms before it wrapped up in December 2020.⁴⁰ It used all of its time (over three years of life) passing new legislation, reorganizing the electoral calendar, and removing or punishing any pockets of opposition. Basically, it wielded a fraudulent conception of “the people” to further entrench what has become an authoritarian state.

These examples are reminders of points we emphasize in the book: there will inevitably be clearer and more borderline cases of abusiveness, and in some cases, it will only be clear whether a change is abusive after the fact, by evaluating contextual or procedural indicia of abusiveness in the context of their impact on the democratic minimum core. It also suggests, as we discuss in our concluding

38 See Miguel Ángel Martínez Meucci, ”Symposium on ‘Venezuela’s 2017 (Authoritarian) National Constituent Assembly’ – Maduro’s National Constituent Assembly: Constituent Power to Build an Undemocratic Regime” (29 August 2017), online (blog): *Blog of the International Journal of Constitutional Law* <www.iconnectblog.com/2017/08/symposium-on-venezuelas-2017-authoritarian-national-constituent-assemblymiguel-angel-martinez-meucci/>.

39 Juan Alberto Berrios Ortigoza, ”Symposium on ‘Venezuela’s 2017 (Authoritarian) National Constituent Assembly’ – (Mis)representing the People: Notes about the Electoral Bases of the 2017 National Constituent Assembly in Venezuela” (31 August 2017), online (blog): *Blog of the International Journal of Constitutional Law* <www.iconnectblog.com/2017/08/symposium-on-venezuelas-2017-authoritarian-national-constituent-assemblyjuan-alberto-berrios-ortigoza/>.

40 See “Venezuela to shut all-powerful National Constituent Assembly”, *Al Jazeera* (19 December 2020), online: <www.aljazeera.com/news/2020/12/19/venezuela-to-shut-all-powerful-legislative-assembly>.

chapter, that some constructions of normative ideas might be more susceptible to abuse than others, and therefore the ways in which scholars, judges, and others construct and discuss concepts matters. In the case of constituent power, for instance, it may make sense to emphasize the constitution-making function of Assemblies, while downplaying or even prohibiting them from exercising ordinary legislative or coercive powers over other state institutions.⁴¹ Experience in Venezuela and elsewhere has shown that the latter power is highly susceptible to abuse.

There is another way of understanding Levinson's concern: that opponents of democratic reform may seek to impede its progress by calling out the *legitimate* exercise of constituent power as abusive in nature. As Oren Tamir has noted, this is in effect the abuse of the discourse of abusive constitutionalism itself—or the abusive borrowing of the idea of abusive constitutional change.⁴² At base, it also the abuse of the idea of reasonable disagreement: it is the invocation of the idea that an exercise of constituent power is contestable, when it is not in fact so, in ways that trade off the legitimacy associated with ideas about reasonable democratic disagreement.

This also seems to underpin at least part of Tushnet's concern that the idea of abusive borrowing may itself license critics to undermine the perceived legitimacy of attempts to adopt an ambitious reform agenda, or new model of “transformative” constitutionalism.⁴³ Tushnet's objection, however, is broader than this concern about the abuse of the discourse of abusive borrowing. He argues that there is no objective way to distinguish between abusive forms of change and forms of constitutional “hardball” that advance an ambitious and

41 See Andrew Arato, *The Adventures of the Constituent Power: Beyond Revolutions?* (Cambridge: Cambridge University Press, 2017); Joel Colón-Ríos, *Constituent Power and the Law* (Oxford: Oxford University Press, 2020).

42 Compare Oren Tamir, “Abusive ‘Abusive Constitutionalism’” (2021) Working Paper.

43 See *ibid*. On transformative constitutionalism, see Karl E Klare, “Legal Culture and Transformative Constitutionalism” (1998) 14:1 South African Journal on Human Rights 146.

legitimate reform agenda. Would-be reformers, Tushnet argues, may often have good reason for resorting to what elsewhere he calls “hardball” tactics⁴⁴ — for example, attempts to circumvent constitutional constraints by complying with their form, while largely denying them any substantive operation. The political opposition, for example, may be uncooperative or itself engage in bad faith attempts to obstruct an ambitious reform agenda.⁴⁵ Or existing constitutional limitations may reflect the interests of a prior regime in ways that impose unreasonable obstacles to the achievement of that agenda.⁴⁶ It is therefore almost impossible to determine what is abusive constitutional change, and what is legitimate democratic hardball, without focusing on the broad set of policies and changes that a political actor is seeking to achieve. And that, Tushnet argues, requires making an inevitably ideological judgment about the bounds of legitimate and desirable political change.⁴⁷

We suggest in the book, and elsewhere, that there are in fact a greater number of “objective” guideposts for making judgments of this kind. Attention to substantive political changes and policies is surely part of how we ascertain abusive motives, or the impact of certain changes on the democratic minimum core. But this is not the only way.

When it comes to ascertaining the motives of relevant actors, we can look at what they say and what they do — both before and after enacting relevant changes. Sometimes, what people say *before* adopting relevant changes may not be controlling: they may have good reason for changing their position in response to changing circumstances, or new arguments. And sometimes their subsequent record on implementation may not be controlling. As Tushnet notes, circumstances may change in ways that make it more difficult to live up

44 See Mark Tushnet, “Constitutional Hardball” (2003) 37:2 *John Marshall Law Review* 523.

45 See Tushnet, “Review”, *supra* note 12 at 28–30.

46 See *ibid* at 28–29.

47 See *ibid* at 29–30.

to earlier ideals, and thus that point to good faith but unsuccessful efforts at social or political change.

In many cases, however, what leaders say and do will be an important indication of their motives: if they have no prior history of supporting the norms they rely on, this will raise a question about their good faith commitment to these norms. And if they immediately abandon prior promises, without any apparent reason linked to an exogenous shock or change in circumstances, we may again question the good faith of their earlier commitments. This is even more true if they are quite vicious in turning against anyone who continues to pursue these prior shared goals.

This is one reason we are reasonably confident in our view that the adoption of environmental rights in Ecuador had abusive motives: Correa never expressed support for environmental rights before 2008⁴⁸ and made no effort to implement them after 2008, despite healthy increases in oil and gas prices, and a strong state budgetary position. He also launched multiple public attacks against environmental protesters and supported their imprisonment.⁴⁹ Most strikingly, there is compelling evidence that Correa directly threatened the personal economic security of any judge willing to uphold the Constitution's environmental guarantees.⁵⁰

To ascertain intent, we can also look for indications of procedural irregularity. For instance, if political leaders depart from existing norms of public debate, deliberation and engagement with the political opposition, this may be an indication that they know that the changes they are pursuing are democratically illegitimate and would not withstand this form of scrutiny. Similarly, if they ignore 'secondary' legal norms about how certain primary legal

⁴⁸ See Dixon & Landau, *Abusive Constitutional Borrowing*, *supra* note 5 at 76.

⁴⁹ See *ibid.*

⁵⁰ Tushnet, "Review", *supra* note 12 puts weight on the fact that it is only "arguable" that these threats were communicated to judges. The evidence, however, seems fairly strong, and hard to imagine it could be stronger without endangering individual judges who would need to go on the record for these allegations to be reported in a more definitive form.

changes are to occur, this may suggest they know that those changes are *prima facie* legally irregular.

In Nicaragua, for example, we point to the exclusion of opposition-appointed judges from the Supreme Court panel that heard a case about the constitutionality of presidential term limits as *prima facie* evidence of abusive motives on the part of the regime, and Court President. And in Hungary, we suggest that reliance on a private members bill, rather than ordinary government bill, in a way that reduced the role of the opposition was sometimes indicative of an abusive intent on the part of relevant legislators.

Not every form of procedural irregularity will indicate abusive aims: sometimes, for example, there may be such extreme political polarization or dysfunction that the opposition is itself unwilling to engage, and thus no choice but to circumvent norms of consultation or bipartisanship in order to achieve legitimate political change, and especially ambitious political reform. Justifications of this kind, however, would need to exist before procedural irregularity was ruled out as a *prima facie* indicator of abusive intent.

Third, we can look at the broader context for a particular constitutional change. Constitutional changes are often adopted as a package, and it is often possible to assess the aims of certain individual changes by looking at how they interact with that broader package.⁵¹ This was a point first made by Kim Lane Schepppele.⁵² Constitutional democracy is often eroded by a package of changes, which considered alone may look far more benign; and hence one way we can understand the aims of a particular change is to look at the relationship between it and other proposed changes, whether pursued in parallel, beforehand, or afterwards.⁵³

51 Tushnet, *ibid* at 27, acknowledges this.

52 See Kim Lane Schepppele, “The Rule of Law and the Frankenstate: Why Governance Checklists do not Work” (2013) 26:4 Governance 559.

53 See also Tarunabh Khaitan, “Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-State Fusion in India” (2020) 14:1 Law & Ethics of Human Rights 49.

Finally, there are at least some objective guideposts for determining when a particular change is likely to have an adverse impact on the democratic minimum core. Perhaps most important, we suggest in the book that a process of constitutional comparison — or in effect resort to the resources offered by legal globalization itself — may offer some solutions.⁵⁴ Some norms, we argue, are sufficiently common to constitutional democracies worldwide that they should be regarded as part of the democratic minimum core; whereas other norms are ones that are specified in vastly different ways across different countries. Attention to this form of overlapping consensus, or lack of it, about the “essential” character of a democratic constitutional norm can also guide decision-makers as they attempt to determine what is or is not abusive in character. In the book, and earlier work, we call this a process of “transnational anchoring”.⁵⁵

Take for example presidential term limits: there is considerable variation among systems as to whether one or two terms should be permitted, and whether bars on re-election are permanent or consecutive. But virtually no well-functioning presidential or semi-presidential system permits indefinite presidential election.⁵⁶ Attempts to alter a constitution to allow a president to be re-elected once, or even twice, would therefore be unlikely to count as abusive on our definition, but attempts to interpret or amend term limits to allow for further, and certainly indefinite, presidential re-election would often meet the definition of abusive constitutional change.⁵⁷

54 Dixon & Landau, *Abusive Constitutional Borrowing*, *supra* note 5 at ch 8.

55 See Rosalind Dixon & David Landau, “Transnational constitutionalism and a limited doctrine of unconstitutional constitutional amendment” (2015) 13:3 International Journal of Constitutional Law 606.

56 See Dixon & Landau, *Abusive Constitutional Borrowing*, *supra* note 5; Dixon & Landau, “Constitutional End Games”, *supra* note 7.

57 Tushnet, “Review”, *supra* note 12 at 44 suggests some sympathy for this analysis, noting that a two-term presidential limit seems to be more or less the globally accepted norm, but he expresses a concern that there might be greater room for reasonable disagreement on this question. We agree, but suggest that the scope for such disagreement does not extend to indefinite re-election, or

Most often, of course, identifying abuse will require consideration of a mix of these factors. Take gender rights in Rwanda. The book notes that the expansion of gender rights occurred simultaneously with the expansion of executive power and single party dominance (by the RPF).⁵⁸ We also note the degree to which Kagame had little prior history of support for gender rights, and the relevant quotas led to little real substantive, as opposed descriptive, change. The more important point, however, is the impact of or way in which the relevant quotas were implemented: reserved gender seats were appointed seats, and appointment power was given solely to the President and the RPF. This suggests that Kagame and the RPF had abusive motives for pursuing their adoption, and certainly shows that they had an abusive effect by further entrenching authoritarianism in Rwanda.

Further, consider attempts to exert pressure on constitutional judges to be more democratically accountable. As Tushnet rightly notes, there is a tension between commitments to judicial independence and accountability within a constitutional democracy; and many attempts to rebalance a court's trajectory toward greater accountability — or what Dixon has called “responsiveness” — will be democratically legitimate.⁵⁹ Many changes to judicial procedure or to the internal functioning of the judiciary will have no significant impact on the democratic minimum core. This was likely the case, for instance, with Franklin Delano Roosevelt's court-packing plan in the United States, which constituted a significant attack on the US Supreme Court but did so because of disagreements on legislative policy rather than because of an agenda to

longer than (say) 10-12 years without persuasive justification. Compare Dixon & Landau, “Constitutional End Games”, *supra* note 7.

- 58 Dixon & Landau, *Abusive Constitutional Borrowing*, *supra* note 5 at 71ff. Compare also Rosalind Dixon, “Constitutional Rights as Bribes” (2018) 50:3 Connecticut Law Review 767.
- 59 Compare Rosalind Dixon, “Democracy and Dysfunction: Towards Responsive Judicial Review” (2021) [unpublished].

undermine electoral democracy itself, or to take aim at vulnerable minority groups.⁶⁰

Take in contrast the ways in which “political constitutionalism” concepts have been used to legitimate attacks on courts in Poland and Hungary, as we discuss in the book. The Polish and Hungarian regimes have argued at times that they are just pursuing a *different* conception of constitutionalism, where the main checks on power are legislative rather than judicial.⁶¹ But as we note in the book, the claim ignores the political context, where majoritarian parties seem to ram through even the most sweeping legislative or constitutional changes without the kind of deliberation or internal institutional checks that are characteristic of the theory and practice of legislative constitutionalism.

The claim might be reframed to say that the Hungarian and Polish regimes are privileging a majoritarian (and potentially illiberal) vision of democracy over liberal democracy. This is not — to be clear — “political constitutionalism”; it is raw majoritarianism. But even this claim is deeply problematic, because the many changes carried out by the ruling parties (not just to the Courts, but also to other institutions) have not only undermined checks on majority power and protections for minority rights, which are hallmarks of liberalism, but have also helped to tilt the playing field heavily in favor of incumbents. The purpose in Hungary of consolidating power over the media, of selectively adding a large number of new expatriate voters outside Hungary that are known to support Fidesz, and of using new electoral rules to gerrymander districts is, of course,

60 Transnational anchoring may sometimes be useful to distinguish changes that are harmless or even pro-democratic. Where changes have analogues in other systems, such as the Indian attempt to end the “collegium” system, there may be less reason for concern. At the same time, returning to Scheppelle’s point, the anti-democratic impact of judicial reforms can be constituted by their interactions, rather than by any one change considered in isolation. This is, in large part, the story of judicial changes in both Poland and Hungary, which are cobbled together from designs that have some analogue elsewhere in Europe, but are thrown together in a more distinctively problematic way.

61 See Gábor Halmai, “Is There Such a Thing as ‘Populist Constitutionalism’? The Case of Hungary” (2018) *Fudan Journal of the Humanities & Social Sciences* 323.

precisely to make it far more difficult for the opposition to win subsequent elections.

Thus, despite Tushnet's resistance to some of our examples, we remain confident that we have identified genuine instances of abuse. Of course, we do not suggest that "abusive" forms of borrowing are always easy to identify, or that there is always a bright line between abusive and legitimate uses of liberal democratic norms. As we have already noted, the idea of abuse is one of degree, and this is a point we emphasize repeatedly.

Where our analysis suggests that a case is borderline, we highlight that point rather than shying away from it. One class of cases sometimes touched upon in the book is where there is a clear impact on "liberalism", but less of an impact on the minimum core of democracy. This may be the case with the migration (or distortion) of memory laws into Poland and Russia, where they are repurposed from being about the dignity of minority groups and remembrance of the Holocaust, and instead reconstructed as tools of nationalism.⁶² The laws restrict freedom of speech even on matters that may be true (for example, they prohibit claims of state or national collaboration with the Nazi regime even where they may have occurred), and are aimed in part at chilling certain kinds of academic inquiry. But their practical applications — particularly in Poland — have been limited. They thus have not to date become major tools to repress the political opposition, unlike the much more dramatic use of hate speech laws to imprison Kagame's political opponents in Rwanda.⁶³ Still, the Rwandan example suggests that these kinds of laws at least have the potential to become significant anti-democratic tools.

A second class of borderline cases is one where there is some question whether the appropriation actually carries out an intentional attack on the democratic minimum core. While we think most of our examples unambiguously fit the definition, we do include a few more ambivalent cases. Consider the use of "militant democracy" doctrines in Cambodia and Thailand,

62 Dixon & Landau, *Abusive Constitutional Borrowing*, *supra* note 5 at 59ff.

63 *Ibid.*

as discussed in our chapter on abusive judicial review. In Cambodia, the ruling party, which had long governed an authoritarian regime, simply turned to the high court to ban a rival that had unexpectedly won a large number of seats in the prior election. The party was banned on dubious grounds — including its alleged links to foreign actors and the supposed threat it posed to “multiparty liberal democracy” — and the result was that the ruling party, with no rivals left, won every single seat in the next election.⁶⁴ The classification of the case as “abusive” is straightforward.

In contrast, in Thailand the Constitutional Court at times banned the parties and allies of Thaksin Shinawatra, helping to create a political vacuum that led to two military coups, the last of which was durable. While the effect of these series of decisions are clearly an undermining of the democratic minimum core, it is far harder to judge intent in this case because Thaksin himself posed a plausible populist threat to the democratic order. Some judges may have thought, especially initially, that the threat posed by Thaksin justified the Court’s hostile response to his electoral victories and political agenda. Over time, though, we think the actions of the judiciary became more plausibly abusive in nature, as the nature of the threat posed by the military to Thai democracy also became clearer.

Let us conclude this section by discussing two important issues raised by Tushnet’s reply. The first is his suggestion that “tilt the electoral playing field” theories of democracy are themselves analytically problematic.⁶⁵ This is an intriguing point because it takes aim not just at parts of our analysis, but also at much of the modern strain of political science that sees a heavily tilted electoral playing field as the core of a definition of a competitive authoritarian regime.⁶⁶ One way to frame the objection is to note that tilting the playing field is

⁶⁴ See Supreme Court of Cambodia, Plenary of Trial Chamber, 16 November 2017, *Ministry of Interior v National Rescue Party* (2017), Verdict No 340 (Cambodia).

⁶⁵ Tushnet, “Review”, *supra* note 12 at 42.

⁶⁶ See Steven Levitsky & Lucan A Way, *Competitive Authoritarianism: Hybrid Regimes After the Cold War* (Cambridge: Cambridge University Press, 2010).

ubiquitous in democratic politics — to this point the response is straightforward, and reiterates our point about the importance of degree, context, and interaction.⁶⁷ Not every effort to tilt the electoral playing field will change the character or the regime, but alarm bells should ring when it has been tilted quite substantially in favour of an incumbent regime.

The potentially richer framing is to argue that many actions that tilt the playing field are legitimate politics, and therefore there must be unstated background factors distinguishing between legitimate and illegitimate tilting. Tushnet gives the example of regimes that create popular new subsidy programs to build up political support, and then win elections in part on that basis.⁶⁸ The example is far from hypothetical, given its centrality to regimes in places like Hungary, Poland, Venezuela, and Ecuador, although it is not one on which we rely to make our arguments in this book.

A full answer to this point — which we think is ripe for future research in both political science and law — is beyond the scope of this brief response, and doubtful to hinge on any one factor. A big part of it may lie in distinguishing the (admittedly sometimes hard to discern) line between persuading voters to vote for your party and rigging the rules such that you tend to win irrespective of shifts in sentiment. Another, related line may be between ordinary political programs — which can be the object of contestation between competing parties — and structural changes to entrench power more durably. Political programs can be the object of contestation by opposition parties, but then a key question is whether the opposition can contest these programs, for example in the media, in a reasonably fair way. A third set of factors may evaluate the way in which programs are constructed and executed. Subsidy programs are normal instruments of politics, but when policies seem clearly targeted to build patterns of support while punishing political enemies, this may raise red flags.⁶⁹ Similarly,

67 See Jonathan S Gould and David E Pozen, “Structural Biases in Structural Constitutional Law” (forthcoming) *New York University Law Review*.

68 See Tushnet, “Review”, *supra* note 12 at 42–43.

69 See Kirk A Hawkins, *Venezuela’s Chavismo and Populism in Comparative Perspective* (Cambridge: Cambridge University Press, 2010).

some subsidy programs may be expensive but still sustainable with the right tax base, while others may be patently unsustainable efforts to build short-term political support at the expense of long-term economic stability and prosperity.⁷⁰

Finally, Tushnet at times suggests (alongside a venerable strain of political theory and political economy) that the value of democracy itself may be open to contestation, and that a sacrifice in the democratic minimum core may in fact be needed in some contexts to advance an ambitious reform agenda or to advance a longer-term vision of democracy itself. Our own view, however, is that there is little empirical basis to support a belief of this kind. It is hard to point to any society that has “temporarily” suspended its commitment to the democratic minimum core in ways that have positively contributed to long-term democratic and social-and economic progress. We are also not persuaded that it is justifiable to sacrifice commitments to democracy in the pursuit of economic development, or other ambitious reform goals. There is certainly an argument that competitive authoritarian or authoritarian regimes, such as Singapore, have achieved an enviable economic record, but we are not persuaded that this record justifies departure from democratic constitutional commitments, or that citizens would be better off if more countries took such a route.

As we note in the book’s conclusion, we are quite open about the potential for broad and transparent experimentation. We emphasize this point because we think authentic experimentation is necessary to reinfuse democratic constitutionalism with greater popular support and legitimacy, rather than having it emerge as a kind of victor by default or only in form. Our red line is preservation of the democratic minimum core.

V. Research Methods

Another concern raised by Tushnet concerns methodology. Few comparative constitutional scholars, Tushnet suggests, have the skills and knowledge of

⁷⁰ Tushnet alludes to this criterion of sustainability in his comment: see Tushnet, “Review”, *supra* note 12 at 42; Rudiger Dornbusch and Sebastian Edwards, “Macroeconomic Populism” (1990) 32: 2 Journal of Development Economics 247.

individual countries directly to engage in a study of abusive constitutional developments. He includes himself in this category of “generalist” comparative constitutional scholars; and suggests that it applies to most scholars whose work is truly comparative. And the implication of this is that as a field we tend to rely heavily on the accounts of certain country “specialists”.

Tushnet worries that this has the potential to create a systemic structural bias in the conclusions we draw as a field: as comparative scholars, we often tend to focus on the works of scholars writing in English, and whose work we have come to know and respect through shared membership in the transnational scholarly community.⁷¹ But English-language abilities and cosmopolitan academic citizenship are also highly correlated with a set of intellectual and ideological attitudes that are broadly liberal democratic, and not shared by scholars who are more nationalistic and conservative, or radical left, in orientation.⁷² This, in effect, means that the field tends to marginalize the views of the nationalistic right and socialist left. And because of this, Tushnet says, it may tend too readily to label practices as “abusive” that either the nationalistic right or socialist left would view as a legitimate part of an ambitious reform agenda.⁷³

One response to this argument is to note, as Tushnet points out, that we do have deep “area” expertise with some of the cases explored in the volume, which ameliorated the need to rely on secondary sources or translations and allowed us to tap into local scholarly networks. This is the case, for instance, in Latin American jurisdictions like Colombia, Venezuela, and Ecuador, where one of us (Landau) has extensive experience. In Venezuela, for instance, Tushnet suggests that our work was heavily dependent on a scholar who was in opposition to the

71 Tushnet, “Review”, *supra* note 12; Mark V Tushnet, “Writing While Quarantined: A Personal Interpretation of Contemporary Comparative Constitutional Law” (2020) Harvard Public Law Working Paper No 20-19.

72 Tushnet, “Review”, *supra* note 12.

73 Levinson likewise points out that “the most pervasive challenge in the field of ‘legal studies’ in the degree to which one can genuinely separate positivist ‘legal analysis’ from ‘politics’ and one’s own normative political commitments”: Levinson, *supra* note 3 at 19.

regime, Allan R. Brewer-Carias.⁷⁴ While Brewer-Carias is an important Venezuelan public law academic, our account of Venezuelan legal developments rests on a far broader foundation, including court decisions, legislation, the records of the constituent assemblies, and discussions and readings of a wide range of scholars with expertise on Venezuelan law.⁷⁵

A more general response is that was one that was previously suggested to Tushnet by Dixon: comparative scholars who are also skilled constitutional scholars, trained in and deeply schooled in the constitutional arguments and “moves” made in a single (often home) jurisdiction, can anticipate that there are a range of legal and political moves or arguments that can be made in any given case.⁷⁶ They can further understand that some views are more likely to be surfaced than others in different institutional contexts — *e.g.* the academy, the courts or the press. And they will be mindful of the need to achieve some degree of ideological balance, and cross-cutting engagement, in the sources they rely on with this knowledge in mind. This, Dixon suggested, is one way in which comparative scholars can lessen the risks that Tushnet alludes to. Indeed, it is a standard tool of solid comparative work, particularly as a way to lessen the tension between methodological country “specialists” and “generalists” within the field.⁷⁷

This is also a methodological approach that we were conscious of adopting in the book. In the Thai context, for example, we explicitly suggest that there is room for reasonable disagreement as to if and when the Thai Constitutional Court’s actions became abusive in nature; and we cite both defenders of the court (Bishop) and its critics of the Court (Merieau, Dressel, and

74 Tushnet, “Review”, *supra* note 12 at 34–35.

75 For more comprehensive accounts of Venezuelan legal developments than could be included in the book, see David Landau, “Constitution-Making Gone Wrong” (2013) 64:5 Alabama Law Review 923; Landau, “Constitution-Making and Authoritarianism”, *supra* note 35.

76 Tushnet, “Review”, *supra* note 12 at 32.

77 See Levinson, *supra* note 3 at 19.

Tonsakulrungruang).⁷⁸ We were also careful to talk to scholars and practitioners who identified as both “red” and “yellow” in orientation — the two major cleavages in Thai politics.

In Fiji, we read and spoke with scholars and lawyers identified with the opposition, but also a leading lawyer with close ties to the Bainimarama regime, who sought actively to defend the legality of its actions.⁷⁹

In Poland, we likewise engaged with the work of Wojciech Sadurski and Adam Czarnota.⁸⁰ Sadurski and Czarnota are colleagues living and working

78 See Sarah Bishop, “Balancing the Judicial Coup Myth: The Constitutional Court and the 2014 Coup” (2017) [unpublished, archived with author]; Eugénie Mérieau, “Thailand’s Deep State, Royal Power and the Constitutional Court (1997-2015)” (2016) 46:3 *Journal of Contemporary Asia* 445; Björn Dressel, “Thailand’s Elusive Quest for a Workable Constitution, 1997-2007” (2009) 31:2 *Contemporary Southeast Asia* 296; Björn Dressel, “Judicialization of politics or politicization of the judiciary? Considerations from recent events in Thailand” (2010) 23:5 *The Pacific Review* 671; Björn Dressel & Khemthong Tonsakulrungruang, “Coloured Judgments? The Work of the Thai Constitutional Court, 1998-2016” (2018) 49:1 *Journal of Contemporary Asia* 1; Khemthong Tonsakulrungruang, “Thailand: An Abuse of Judicial Review” in Po Jen Yap, ed, *Judicial Review of Elections in Asia* (New York: Routledge, 2016) 173; Khemthong Tonsakulrungruang, “The Constitutional Court of Thailand: From Activism to Arbitrariness” in Albert HY Chen & Andrew Harding, eds, *Constitutional Courts in Asia: A Comparative Perspective* (Cambridge: Cambridge University Press, 2018) 184; Khemthong Tonsakulrungruang, “Entrenching the Minority: The Constitutional Court in Thailand’s Political Conflict” (2017) 26:2 *Washington International Law Journal* 247.

79 Interview with Shaista Shameem, on her background and role, see e.g., “Lawyer who wrote Fiji coup report gets Massey role” (25 February 2014), online: *Stuff* <www.stuff.co.nz/world/9758466/Lawyer-who-wrote-Fiji-coup-report-gets-Massey-role>.

80 See Dixon & Landau, *Abusive Constitutional Borrowing*, *supra* note 5 at 93, 97–98, 161. See also Wojciech Sadurski, *Poland’s Constitutional Breakdown* (Oxford: Oxford University Press 2019); Ginsburg & Huq, *How to Save*, *supra* note 8; Adam Czarnota, “The Constitutional Tribunal” (3 June 2017), online (blog) *Verfassungsblog* <verfassungsblog.de/the-constitutional-tribunal/>; Adam Czarnota, “Constitutional Correction as a Third Democratic Revolutionary

(mostly) in Sydney, and in some sense, classic cosmopolitans. But they have taken very different views of the reasonableness of the PiS regime's actions and provide a useful counterpoint in understanding the (il)legitimacy of their actions.

In some cases, there will only be one side to the story — but if we have followed the right research method, that is a sure sign of abusive constitutional change, not its absence. In Rwanda and Burundi, for example, there is so little protection for freedom of speech, or academic freedom, that it is almost impossible to imagine someone writing something critical of the regime — without living outside the country or fleeing it. Indeed, research on questions like gender quotas in Rwanda can only legally be conducted with the express, prior personal consent of the President.⁸¹ It is therefore inevitable that we are required to rely on the work of “cosmopolitan” authors in assessing the abusive nature of relevant changes; though as Tushnet himself notes, the broader context itself provides pretty compelling objective support for the conclusions these authors draw, and which we draw in reliance on their work.

The best understanding of Tushnet’s critique, therefore, is not that it is impossible to engage in reliable comparative constitutional inquiry — either generally or in the specific context of a study of abusive borrowing. It is that in engaging in this kind of secondary-source-based analysis, we should as a community be more sensitive to the possibility that particular viewpoints will tend to be privileged in the national constitutional scholarship we rely on as informing our work; and seek to ensure that we hear all, not just one, sides of a legal and political debate.

Moment in Central Eastern Europe” (2019) 11:2/3 Hague Journal on the Rule of Law 397.

81 See Lindiwe D Makhunga, “Elite Patriarchal Bargaining in Post-Genocide Rwanda and Post-Apartheid South Africa: Women Political Elites and Post-Transition African Parliaments” (PhD Thesis, University of the Witwatersrand, 2015).

VI. Questions for Further Research

The final contribution made by the commentators is to identify a range of questions not answered by the book, and that call for future work by us and ideally other scholars in the field. Hirschl suggests that there may well be important variation between different types of would-be autocrats. Some, he suggests:

appear to be ideology-light autocrats who cling to power; others are opportunistic politicians purporting to represent the political, economic and cultural hinterlands in their respective polities; and yet others are ideologues, ranging from right-wing communitarians, or sectarian religionists to all out Schmittian reactionaries who see extreme nationalism as a just weapon against liberal democracy and its supposedly hollow cosmopolitanism.⁸²

Tushnet likewise suggests there are important differences between would-be authoritarians that openly announce their strongman ambitions, and those that focus on their agenda for political reform and treat structural changes as simply a means to facilitate those reforms, not the focus of their political appeal or efforts.⁸³

This is a fruitful hypothesis for further investigation. Understanding the different motives, backgrounds, and political strategies of would-be authoritarians could potentially help us do better identifying the potential risks they pose, or even in identifying whether their actions have abusive aims or tendencies. While there is a venerable literature on varieties of authoritarianism,⁸⁴ some of that work could use updating, and it seems

⁸² Hirschl, *supra* note 1 at 9.

⁸³ See Tushnet, “Review”, *supra* note 12 at 28.

⁸⁴ See Juan J Linz, *Totalitarian and Authoritarian Regimes* (Boulder: Lynne Rienner, 2000).

important to better link variations in regime type with strategies of constitutional change and reliance on liberal democratic norms.⁸⁵

Ginsburg draws attention to aspects of our work that reveal the degree to which successful constitutional design depends on often unstated empirical assumptions. What he suggests is required to develop more effective answers to the challenge of “constitutional abuse proofing”,⁸⁶ therefore, is a clearer statement of the empirical assumptions behind various theories and the “the empirical basis for assessing the probability that such a thing will actually play out”.⁸⁷ Of course, answering these questions will be difficult. It will also necessarily require a truly interdisciplinary approach to comparative constitutional studies, or one that draws on the tools and insights of a range of other disciplines — including psychology, politics and sociology.⁸⁸ Ginsburg is surely correct that we have a long way to go in identifying effective strategies of constitutional and conceptual design to prevent abuse, and in linking those strategies to other, background factors such as political and legal culture, as well as politics itself. Designing and disseminating liberal democratic norms that are more robust against the challenges posed by autocratic misappropriation is no easy task.

In writing this book, we aim mainly to frame the problem of abusive constitutional borrowing, in the process hoping to show the comparative constitutional law community — scholars, judges, and policymakers — that so many ideas they had constructed and imagined as building blocks of liberal

85 Tom Ginsburg & Alberto Simpser, eds, *Constitutions in Authoritarian Regimes* (Cambridge: Cambridge University Press, 2013); Mark Tushnet, “Authoritarian Constitutionalism” (2015) 100:2 Cornell Law Review 391.

86 See Dixon & Landau, *Abusive Constitutional Borrowing*, *supra* note 5 at 193ff. See also Hirschl, *supra* note 1 at 12–13.

87 Ginsburg, *supra* note 15 at 4.

88 See Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford: Oxford University Press, 2014). See also Erin Delaney, “More Than Words: Constitutionalism Between Law and Politics” (Keynote Speech delivered at The Global Summit: The International Forum on the Future of Constitutionalism, 13 January 2021).

democracy could readily be redeployed for autocratic ends. We hope, in other words, that this work serves as a wake-up call for the fields of comparative constitutional law and international human rights, or at least a reminder of their (perhaps inevitable) dark sides. We are heartened that our interlocutors in this exchange, and hopefully many others, will join us in trying to meet this challenge.

ARTICLES

Balancing Accountability and Effectiveness: A Case for *Moderated Parliamentarism*

Tarunabh Khaitan*

*In this article, I bring two key issues in constitutional studies — institutional regime type and electoral system choice — in conversation with each other, and examine their interaction through a normative framework concerning the role that constitutions ought to play in shaping their party systems. The main goal is to offer a theoretical defense (*ceteris paribus*) of moderated parliamentarism — as superior to its alternatives such as presidentialism, semi-presidentialism, and other forms of parliamentarism.*

Moderated parliamentarism entails a strong bicameral legislature in which the two chambers are symmetric (i.e. they have equal legislative powers) and incongruent (i.e. they are likely to have different partisan compositions). It has a centrist chamber whose main function is to supply confidence to the government, and a diversified chamber whose main function is to check this government. The confidence and opposition chamber is elected on a moderated majoritarian electoral system (such as approval vote or ranked-choice/preferential vote system, but not first-past-the-post); the diversified chamber — a fully independent checking and appointing chamber — is constituted on a proportional representation model (moderated by a reasonably high threshold requirement for translating votes into seats). The confidence and opposition chamber is elected wholesale for shorter terms. It alone has the power to appoint and fire a unified political executive headed by a prime minister. The checking and

* Tarunabh Khaitan is the Vice Dean and Professor of Public Law and Legal Theory at Faculty of Law, Oxford, and a Professor of Law and Future Fellow at Melbourne Law School. I am extremely grateful to Stephen Gardbaum, Colm O'Cinneide, Ros Dixon, Joel Colon-Rios, Aziz Huq, Kate O'Regan, George Tsebelis, Mark Tushnet, Tracy Lightcap, Vicki Jackson, Paul Yowell, Maria Cahill, Ngoc Son Bui, Elizabeth Hicks, Tom Daly, Cora Chan, Eoin Carolan and other colleagues for extremely helpful comments. Barnard Andary assisted with research, and Ken Kiat with references, for which I am very thankful. Mistakes remain mine.

appointing chamber is independent of the confidence and opposition chamber as well as of the political executive; its members have longer and staggered terms.

Moderated parliamentarism combines the benefits of different regime types and electoral systems in a way that optimizes four key constitutional principles in relation to political parties: it protects the purposive autonomy of parties and enables their ability to keep the four democratic costs low; it serves the party system optimality principle by making it more likely that every salient voter type will have a party to represent it, but also distinguishes between governance parties (which are likely to dominate the confidence and opposition chamber) and influence parties (which will have a space in the checking and appointing chamber); it aids the party-state separation principle by giving significant (and over-weighted) checking powers to smaller parties in the checking chamber; and it promotes the anti-faction principle by distinguishing between smaller influence parties that are polarizing factions from those that are not factional (and punishing the latter a lot less severely than the former).

The traditional debates between presidentialism and parliamentarism, and between majoritarian and proportional electoral systems have endured for as long as they have because each system brings something attractive to the table. Moderated parliamentarism seeks to combine the most attractive elements of each — checks and balance from presidentialism, continuous precariousness of the political executive from parliamentarism, anti-factionalism of majoritarian electoral systems, and political pluralism of proportional representation systems. Because these virtues are in tension, no system can maximize each of them without incurring a cost for another. Moderated parliamentarism is one way to optimize the virtues of each system and yet yield a stable and effective regime type.

- I. INTRODUCTION
 - II. PARTIES: AN (IDEALISED) FUNCTIONAL ACCOUNT
 - A. Parties as Intermediaries
 - 1. Bidirectionality of Parties
 - 2. Plenary Character of Parties
 - B. Key Costs Reduced by Parties
 - III. CONSTITUTIONAL PRINCIPLES IN RELATION TO POLITICAL PARTIES
 - A. The Purposive Autonomy Principle
 - B. The Party System Optimality Principle
 - C. The Party-State Separation Principle
 - D. The Anti-Faction Principle
 - IV. THE CONTOURS OF MODERATED PARLIAMENTARISM
 - A. Mapping Regime Type and Electoral Systems
 - B. Moderated Parliamentarism
 - 1. Semi-Parliamentarism
 - 2. Weighted Multipartisanship
 - 3. Mixed Bicameralism
 - 4. Moderated Electoral Systems
 - 5. Asynchronous Electoral Schedules
 - 6. Deadlock-Resolving Conference Committees
 - V. IN DEFENCE OF MODERATED PARLIAMENTARISM
 - A. Purposive Autonomy Principle
 - B. The Party System Optimality Principle
 - C. The Party-State Separation Principle
 - D. The Anti-Faction Principle
 - VI. CONCLUSION
-

I. Introduction

Constitutional law scholars have long debated institutional separation of powers in search of a government that is simultaneously effective and accountable. Of the two basic regime types, parliamentary systems are thought to prioritise governmental effectiveness and regime stability, whereas presidential systems are seen as more accountable, albeit at the cost of governmental paralysis

or regime instability.¹ On the other hand, political scientists have long argued over whether an electoral system should seek to maximise governmental stability or its democratic representativeness. Majoritarian electoral systems seem to produce stable governments and a party system with two or three broad-church political parties. Proportional electoral systems tend to value democratic representation more, and create multipartisan systems with several smaller parties, often serving narrow or factional interests. Bipartisan systems with catch-all parties tend to exert a centripetal force on the system, moving politics towards the centre. Multipartisan systems with multiple small parties tend to exert centrifugal pressures on a politics, although legislative outcomes in a diversified, multipartisan, legislature can still be consensual. Even though it is clear that electoral systems and party systems significantly scramble the key expectations of any institutional separation of powers, constitutional law scholars have been slow to engage with the relevant political science scholarship — instead, they have often chosen to turn to other institutional solutions outside politics, such as accountability to courts, to ‘fix’ the deficiencies of their preferred model. It remains rare in political science literature,² and rarer still in

1 See generally Tom Ginsburg & Aziz Huq, *How to Save a Constitutional Democracy* (Chicago: University of Chicago Press, 2018) at 176–86.

2 For examples of influential political science studies that consider only two of these factors, see David J Samuels & Matthew Shugart, *Presidents, Parties, and Prime Ministers: How the Separation of Powers Affect Party Organization and Behavior* (Cambridge: Cambridge University Press, 2010); Juan J Linz, “The Perils of Presidentialism” (1990) 1:1 *Journal of Democracy* 51; Juan J Linz, “Presidential or Parliamentary Democracy: Does It Make a Difference?” in Juan J Linz & Arturo Valenzuela, eds, *The Failure of Presidential Democracy: Comparative Perspectives* (Baltimore: Johns Hopkins University Press, 1994) 3; Jose Antonio Cheibub, *Presidentialism, Parliamentarism, and Democracy* (Cambridge: Cambridge University Press, 2006) at 20. Exceptions that consider all three factors include George Tsebelis, *Veto Players: How Political Institutions Work* (Princeton: Princeton University Press, 2002) [Tsebelis, *Veto Players*]; Adrian Vatter, “Lijphart Expanded: Three Dimensions of Democracy in Advanced OECD Countries?” (2009) 1:1 *European Political Science Review* 125; Michael G Breen, “Federal and Political Party Reforms in Asia: Is There a

constitutional studies literature,³ to study the three interlocking variables — party systems,⁴ executive-legislative relations, and electoral systems — simultaneously.

In this article, I will bring two key issues in constitutional studies — institutional regime type and electoral system choice — in conversation with each other, and examine their interaction through a normative framework concerning the role that constitutions ought to play in shaping their party systems. It assumes that a democratic government needs to be stable/effective *and* representative/accountable at the same time. Recognising the inherent tension in the simultaneous pursuit of these goals, I offer yet another attempt to find that Goldilockean sweet-spot that satisfactorily optimises these competing objectives. This article provides a theoretical defence of *moderated parliamentarism* — as superior to its alternatives such as presidentialism, semi-presidentialism, and other forms of parliamentarism. As an acontextual, ahistorical, analytic, inquiry I do not — and cannot — make an all-things-considered case for the adoption of moderated parliamentarism everywhere. That kind of judgment will require a deep contextual appreciation of the histories, path dependencies, vested interests, extant power relations,

New Model of Federal Democracy Emerging in Ethnically Diverse Countries in Asia?" (2020) Government and Opposition 1.

- 3 For examples of constitutional studies that consider only two of these factors, see Bruce Ackerman, "The New Separation of Powers" (2000) 113:3 Harvard Law Review 633; Daryl J Levinson & Richard H Pildes, "Separation of Parties Not Powers" (2006) 119:8 Harvard Law Review 2311 at 2312. Exceptions that consider the interaction of all three factors include Stephen Gardbaum, "Political Parties, Voting Systems, and the Separation of Powers" (2017) 65:2 American Journal of Comparative Law 229.
- 4 For Sartori, "a party system is precisely the system of interactions resulting from inter-party competition. That is, the system in question bears on the relatedness of parties to each other, on how each party is a function (in the mathematical sense) of the other parties and reacts, competitively or otherwise, to the other parties". Giovanni Sartori, *Parties and Party Systems: A Framework for Analysis*, vol 1 (Cambridge: Cambridge University Press, 1976) at 39 [emphasis in the original].

institutional legacies and much more in a given polity.⁵ Not only is this not a fine-grained contextual study, it isn't a big-N empirical analysis of different regime types either. The main purpose of this article is theoretical rather than practical: more than an appeal for its actual adoption by constitution makers, moderated parliamentarism should be seen as a yardstick to judge extant systems to assess their strengths and shortcomings holistically.

Moderated parliamentarism entails a strong bicameral legislature in which the two chambers are symmetric (*i.e.* they have equal legislative powers) and incongruent (*i.e.* they are likely to have different partisan compositions). In the pantheon of liberal democratic institutions, bicameralism is seen as a lesser, dispensable, god. A second legislative chamber can often be seen as a pointless luxury, or worse, a sinecure for retired politicians. Recent conceptualisation of the 'semi-parliamentary' form of government will, one hopes, move it higher up on at least the scholarly agenda. Ganghof conceptualises semi-parliamentary systems as the mirror image of the more familiar semi-presidential systems: semi-presidential systems split the political executive into two offices (a President who appoints, and shares power with, a Prime Minister), but only one of them — the Prime Minister — may be fired by the legislature;⁶ semi-parliamentary systems split the legislature into two chambers, only one of which has the power

5 Colomer, for example, argues that the choice of electoral system in particular depends on the existing party system: dominant or two party systems tend to choose majoritarian systems, while multipartisan systems favour proportional systems: Josep Colomer, "The Strategy and History of Electoral System Choice" in Josep M Colomer, ed, *The Handbook of Electoral System Choice* (London: Palgrave Macmillan, 2004) 3.

6 That said, Sedelius and Linde have highlighted a key sub-division between semi-presidential systems in which the President *as well as* the legislature may fire the Premier and those in which the legislature alone may do so: Thomas Sedelius & Jonas Linde, "Unravelling Semi-Presidentialism: Democracy and Government Performance in Four Distinct Regime Types" (2018) 25:1 Democratization 136 at 138. Their key argument is that the latter sub-type (where the legislature alone can fire a Prime Minister appointed by the President) behaves similar to a parliamentary regime, and — in general — performs much better than the former sub-type (where the President not only appoints, but can also fire the Prime Minister).

to fire the (unified) political executive.⁷ I propose *moderated parliamentarism* as a sub-type of semi-parliamentarism, with a centrist chamber whose main function is to supply confidence to the government, and a diversified chamber whose main function is to check this government. The centrist *confidence and opposition chamber* is elected on a moderated majoritarian electoral system (such as approval vote or ranked-choice/preferential vote system, but not first-past-the-post); the other diversified chamber — a fully independent *checking and appointing chamber* — is constituted on a proportional representation model (moderated by a reasonably high threshold requirement for translating votes into seats). The confidence and opposition chamber is elected wholesale for shorter terms. It alone has the power to appoint and fire a unified political executive headed by a prime minister. The checking and appointing chamber is independent of the confidence and opposition chamber as well as the political executive; its members have longer and staggered terms. Moderated parliamentarism therefore shares with semi-parliamentarism the feature that both chambers have *direct* democratic legitimacy; however, it avoids a legitimacy tie between them by ensuring that the confidence and opposition chamber — as a chamber — always has a temporally more recent mandate.

I make a case for moderated parliamentarism by examining democratic regime-types through the lens of the democratic function of political parties. This lens is particularly apt because the recent wave of democratic deconsolidation in several established democracies has been accompanied by the collapse, authoritarian takeover, or external capture of mainstream political parties, the partisan capture of state institutions, and a rise in hyper-nationalistic and exclusionary partisan rhetoric.⁸ While political parties have long been a

7 Steffen Ganghof, “A New Political System Model: Semi-Parliamentary Government” (2018) 57:2 European Journal of Political Research 261 at 261.

8 Richard S Katz & Peter Mair, *Democracy and Cartelization of Political Parties* (Oxford: Oxford University Press, 2018) at ch 7; Tarunabh Khaitan, “Executive Aggrandizement in Established Democracies: A Crisis of Liberal Democratic Constitutionalism” (2018) 17:1 International Journal of Constitutional Law 736; Peter Mair, *Ruling the Void: The Hollowing of Western Democracy* (New York: Verso, 2009); Tarunabh Khaitan, “Killing a

central object of study in political science, constitutional theory scholars have, by and large, ignored this key democratic institution.⁹ In part, this has been due to the influence of the American and the British constitutional traditions which, unlike their European continental counterparts, are largely silent on political parties. This silence is largely a feature of big-C constitutional codes in the anglophone world.¹⁰ Small-c constitutional statutes, conventions, and judicial precedents in these states do, admittedly, engage extensively with political parties.¹¹

But the large-C textual silence is nonetheless indicative of the level of salience this key constitutional institution has been given, both in constitutional practice and constitutional scholarship. More substantively, big-C codes largely design key state institutions in a democracy. Parcelling off considerations about political parties to small-c statutes and conventions has the effect that the party system has to take the design of key state institutions as a given. As this article argues, however, bringing parties to the forefront of the constitutional imagination has very important implications for how we ought to think of fundamental institutions and offices of the state. Furthermore, big-C constitutional change tends to require the buy-in of opposition parties, whereas small-c changes can usually be made by the ruling party/coalition alone. It is simply bad design to

Constitution with a Thousand Cuts: Executive Aggrandizement Party-State Fusion in India” (2020) 14:1 *The Law & Ethics of Human Rights* 49; Mark A Gruber, Sanford Levinson & Mark V Tushnet, eds, *Constitutional Democracy in Crisis?* (Oxford: Oxford University Press, 2018) 1.

- 9 Honourable exceptions, most of them cited in this article, do exist (although many of these works focus on particular jurisdictions rather than general constitutional theory).
- 10 On the post-war constitutionalization of political parties in continental Europe, see Ingrid Van Biezen, “Constitutionalizing Party Democracy: The Constitutive Codification of Political Parties in Post-war Europe” (2012) 42:1 *British Journal of Political Science* 187. See also Sujit Choudry, “Resisting Democratic Backsliding: An Essay on Weimar, Self-Enforcing Constitutions, and the Frankfurt School” (2018) 7:1 *Global Constitutionalism* 54.
- 11 On the big-C and small-c aspects of a constitution, see Anthony King, *The British Constitution* (Oxford: Oxford University Press, 2007) at 3.

let one of the competing players unilaterally change the rules of the game. It is no surprise that continental big-C codes, led by Germany after the Second World War, are far more explicit in their attention to parties and their relationship with democracy. To be clear, I am not arguing that all arrangements concerning political parties and electoral systems must be included in the big-C constitution. What I am suggesting, however, is that normative considerations that go into institutional design of key state institutions should be factored *at the same time as* (rather than prior to) assessments concerning the type of party systems and electoral systems a state *should* have. There may well be good reasons to include the design of the electoral system in a small-c constitutional statute rather than in the big-C constitution, as long as the system ensures that the small-c constitutional statute cannot be amended for partisan gain by the ruling party acting alone. The key points, therefore, are these: (i) constitution makers must recognise that institutional arrangements, party systems, and electoral systems impact each other in complex ways, and no single one of them can be crafted in isolation, and (ii) these three features *together* determine the foundations of a political democracy and, therefore, warrant broad political consensus between key parties when they are being framed or changed.

The big-C Anglophone constitutional silence is mimicked in comparative constitutional studies scholarship, dominated as it is by American constitutional discourses. It is almost impossible to properly understand the functioning of different institutional arrangements without a close attention to the party system in which they operate.¹² To be sure, a case for an institutional arrangement that looks similar to moderated parliamentarism can be made, and has been made,¹³ without considering party systems or electoral systems. Ackerman's *constrained parliamentarism* model might have been less hostile to symmetric bicameralism

12 See generally, Cindy Skach, "Political Parties and the Constitution" in Michel Rosenfeld & Andras Sajo, eds, *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012) 874 at 874.

13 Bruce Ackerman's advocacy of constrained parliamentarism in an influential and excellent paper is sensitive to party systems and electoral systems. Yet, it relies on traditional *institutional* premises deriving from separation of powers alone, and is deficient to that extent: Ackerman, *supra* note 3.

in federal states,¹⁴ and incongruent bicameralism in unitary ones,¹⁵ had it paid more attention to party systems and electoral systems alongside institutional separation of powers. These additional considerations reveal the attractions of symmetric and incongruent (*i.e.* strong) bicameralism, as long as they are suitably moderated, without the pitfalls that Ackerman identifies. Constitutional scholarship that confines itself to normative institutional analysis alone, without simultaneously considering party systems and electoral systems normatively, is looking at a seriously distorted picture of constitutional practice.

This article brings three distinct dimensions of constitutional studies in conversation with each other: (i) a debate on the appropriate regime type for a democracy (discussed from a normative perspective informed by the ‘separation of powers’ principle by constitutional lawyers,¹⁶ and a more instrumental, impact-based, analysis by political scientists),¹⁷ (ii) a debate on appropriate electoral systems (mostly engaged in by political scientists),¹⁸ and (iii) the non-debate on the *constitutional* regulation of political parties (except doctrinally, in particular jurisdictional settings). The article starts with the non-debate in item (iii) of this list. Borrowing extensively from a recent paper on political parties in

14 *Ibid* at 672.

15 *Ibid* at 684. On the possibility that bicameral incongruence actually *decreases* the time taken to form a coalition government, see Daniela Giannetti, Andrea Pedrazzani & Luca Pinto, “Bicameralism and Government Formation: Does Bicameral Incongruence Affect Bargaining Delays?” (2020) 12:4 European Political Science Review 469.

16 Jeremy Waldron, *Political Political Theory* (Cambridge: Harvard University Press, 2016); Ackerman, *supra* note 3; Nick W Barber, *The Principles of Constitutionalism* (Oxford: Oxford University Press, 2018); Aileen Kavanagh, “The Constitutional Separation of Powers” in David Dyzenhaus & Malcolm Thornburn, eds, *Philosophical Foundations of Constitutional Law* (Oxford: Oxford University Press, 2016) 221.

17 Linz, *supra* note 2; Cheibub, *supra* note 2; Tsebelis, *Veto Players*, *supra* note 2.

18 Erik S Herron, Robert J Pekkanen & Matthew S Shugart, eds, *The Oxford Handbook of Electoral Systems* (Oxford: Oxford University Press, 2018); Bartłomiej Michalak, “Mixed Electoral Systems: A Hybrid or a New Family of Electoral Systems?” (2016) 12:1 World Political Science 87.

constitutional theory,¹⁹ Part II will first provide an idealized functional account of political parties and party systems. The idealised (and, therefore, normative) account presented in Part II clarifies what parties do when they function as they *should* function in a healthy party system of a representative democracy. Here, I will acknowledge that parties are difficult to regulate constitutionally because of their Janus-faced public-private character. The key function they perform, when functioning as they ought to function, is to facilitate a mutually responsive relationship between public policy and popular opinion by acting as an intermediary between a state and its people. When they perform this function effectively, political parties significantly reduce four key information and transaction costs which would otherwise make democratic governance impossible: political participation costs, voters' information costs, policy packaging costs, and ally prediction costs. In Part III, which also borrows from the aforementioned previous paper, I will use this idealised account to ground four principles that constitutions should seek to optimise in relation to political parties with a view to avoiding, curing, or mitigating these pathologies. These four distinct, and sometimes conflicting, constitutional principles in relation to political parties are that:

1. Constitutions should guarantee maximum autonomy for the formation, organisation, and operation of political parties, moderated by the restrictions necessitated by their purpose of winning (a share in) state power (for fixed terms) in competitive elections by acting as intermediaries between the state and its people (the 'purposive autonomy principle');
2. Constitutions should try to optimise the party system such that the total number of serious political parties is large enough to broadly represent every major 'voter type', but not so large that the information costs on judicious voters are too high (the 'party system optimality principle');

19 Tarunabh Khaitan, "Political Parties in Constitutional Theory" (2020) 73 Current Legal Problems 89 [Khaitan, "Political Parties"].

3. Constitutions should ensure a separation of parties and the state (the ‘party-state separation principle’); and
4. Constitutions should discourage the factionalization of political parties (the ‘anti-faction principle’).

These political principles are drawn from the value of democracy itself. If effectively realized, they could bring real world political parties and party systems closer to their idealised form as described in Part II, thereby improving and deepening democratic governance. As such, they should — alongside other relevant political and constitutional norms — inform fundamental constitutional design choices. Retrofitting the regulation of parties through the small-c constitution after key design choices have already been made in the big-C code is, therefore, a mistake. Big-C constitutional silence on parties is as much a regulatory choice as any other, and carries significant risks of unintended consequences. In other words, big-C constitutions — as the chief organizational tool for public power in democracies — simply do not have the option of remaining agnostic about the nature and functioning of political parties. The question is not so much whether to regulate parties, but why and how.

Part IV first explains why it is preferable, where feasible, for constitutions to respect and optimize these principles through second-order regulation which seeks to organise the political architecture in a manner that incentivise voluntary conformity with these principles, rather than by command-and-control first order regulation (usually enforced through courts). It then outlines the broad contours of moderated parliamentarism. It does so by locating moderated parliamentarism in an overlapping matrix comprising regime type and electoral systems. A system’s regime type depends on three key factors:

1. whether the political executive and/or the legislature are unified/unicameral or divided/multicameral;
2. what is relationship between the president and the premier in a divided executive, and between the several chambers in a multicameral legislature; and

3. what is the relationship between the political executive (or a part thereof, if divided) and the legislature (or a part thereof, if multicameral).

Its electoral system, on the other hand, depends on several factors, of which four fundamental ones are:

1. the district magnitude (single-member, multi-member, or at large);
2. the object(s) of voter choice (candidate, party, or both);
3. the ballot structure (categorical or individual, cardinal or preferential); and
4. the electoral schedule (simultaneous or asynchronous, staggered or wholesale).

These features can be combined in innumerable permutations and combinations. Political scientists have recognised,²⁰ but lawyers still haven't, that it is more or less pointless to discuss regime type without *simultaneously* examining the system's electoral system. Part IV teases out the details of the way in which moderated parliamentarism combines various features of executive-legislative relations and electoral systems.

Part V then argues that moderated parliamentarism combines the benefits of different regime types and electoral systems in a way that optimizes the proposed constitutional principles, and — context permitting — can be a good theoretical model for representative democracies. Moderated parliamentarism protects the autonomy of parties and enables their ability to keep the four democratic costs low. It serves the party system optimality principle by making it more likely that every salient voter type will have a party to represent it, but also distinguishes between governance parties (which are likely to dominate the confidence and opposition chamber) and influence parties (which will have a space in the checking and appointing chamber). Moderated parliamentarism aids the party-state separation principle by giving significant checking powers to smaller parties in the checking chamber. It also protects the unelected state from

²⁰ Robert Elgie, "From Linz to Tsebelis: Three Waves of Presidential/Parliamentary Studies?" (2005) 12:1 Democratization 106.

capture by the ruling party by over-weighing the say of the larger small parties in the checking and appointing chamber in constitutional appointments (“weighted multipartisanship”). Finally, it checks factionalism by making it more difficult for factions (i.e. ‘parties’ whose policies are not justifiable to *all* the people, as explained later in this article) to win big in the confidence and opposition chamber. At the same time, the moderated majoritarian electoral system of this chamber incentivises factions to become broad church parties if they wish to become parties of governance.

Ultimately, the principle informing moderated parliamentarism is that the traditional debates between presidentialism and parliamentarism, and between majoritarian and proportional electoral systems have endured for as long as they have because each system brings something attractive to the table. Moderated parliamentarism seeks to combine the most attractive elements of each — checks and balance from presidentialism, continuous precariousness of the political executive from parliamentarism, anti-factionalism of majoritarian electoral systems, and political pluralism of proportional representation systems. Because these virtues are in tension, no system can maximise each of them without incurring a cost for another. Moderated parliamentarism is one way to optimize the virtues of each system and yet yield a stable regime type. Part VI concludes.

II. Parties: An (Idealised) Functional Account²¹

In a previous paper, I had argued that political parties, when they function as political parties ought to function, perform the key democratic function of acting as an intermediary between the state and its people in a representative democracy. Two particular features make this intermediary function of parties unique: the bidirectionality of their intermediation and the plenary character of political parties. A party system with healthy functional parties incurs lower levels of four key information and transaction costs: political participation costs, voters’ information costs, policy packaging costs, and ally prediction costs. Keeping these costs low makes a representative democracy viable as a mode of

21 This part provides a summary of the arguments made in more detail in:
Khaitan, “Political Parties”, *supra* note 19, section 2.

governance. In this part, I will briefly summarise these previous claims to lay the foundations for the argument in this article.

A. Parties as Intermediaries

The chief function of political parties is to act as intermediaries between the state and its people. This claim does not presuppose a specific type of party organisation: I use the term ‘intermediary’ in a loose sense here to be compatible with a varying range of intensity in the relationship between the party and the people.²² What matters is that parties have a threshold level of communicative relationship with the people. State officers and institutions are typically too removed from the people to access popular opinions directly, and ordinary civil society organizations are usually too removed from the state to influence state policies. Exceptions no doubt exist: in systems where individual legislators represent sufficiently small constituencies, they can have a direct relationship with their constituents; similarly, many policy influencers, such as lobbyists, thinktanks, and powerful media houses, can often have significant influence on state policy. Yet, political parties are a very special type of intermediary between the state and its people for two reasons: the *bidirectionality* and the *plenary character* of their intermediary function.

22 Thus, cadre-based parties, mass-parties, and parties that act as ‘brokers’ between the state and the people are all capable of acting as intermediaries. On these categories, see generally Richard S Katz & Peter Mair, “Changing Models of Party Organization and Party Democracy: The Emergence of the Cartel Party” (1995) 1:1 *Party Politics* 5. Katz and Mair’s thesis concerning “cartel parties”, on the other hand, concerns the relationship between political parties and the state: as we will see later while discussing the party-state separation principle, cartelization is an indication of a pathological party system. See also, Jan-Werner Müller, “Democracy’s Critical Infrastructure: Rethinking Intermediary Powers” (2021) 47:3 *Philosophy & Social Criticism* 269, who highlights the importance of the intermediary role that political parties play, alongside the media. Müller’s paper was published after this article was finalised, so its insights could not be used to inform the main text of this article.

1. Bidirectionality of Parties

Mediation by parties is bidirectional, in as much as they simultaneously perform both functions of accessing popular opinion and shaping state policy. They are embedded in the structures and institutions of the state, but also (at least ideally) have direct access to the people. This simultaneity is essential to the democratic legitimization that parties alone can provide to rule-making state institutions and offices. In general, the state functions through offices and institutions: these are modes of corporate action that are defined by a measure of formalization of their processes, purposes, and modes of operation. This formalization is typically necessary for satisfying various virtues associated with the state: impartiality, rationality, fairness, legality, and so on. But formalization imposes a cost — it reduces the ability of offices and institutions to connect with the people affectively, and build authentic interpersonal relationships of mutual understanding and dialogue. Parties, on the other hand, despite their internal institutionalized structures, retain the potential for flexibility and informality of civil society organizations — at least at their local units. This measure of informality allows them to perform their key coordinating function: to imbibe and influence popular opinion on the one hand and to formulate and justify their proposed policy package on the other. The relationship between popular opinions and policy packages is mutually responsive — in a well-functioning democracy, they respond to each other and form a feedback loop. The central task of political parties is to facilitate this responsive relationship between popular opinion and policy.²³ Sometimes, they absorb popular opinions and translate them into policy proposals. At other times, they articulate policy proposals and mould public opinion to get behind them.

2. Plenary Character of Parties

The second special feature of the mediation role that well-functioning parties play between the state and its people is their *plenary character*. In heterogenous

²³ See generally Nancy L Rosenblum, “Political Parties as Membership Groups” (2000) 100:3 Columbia Law Review 813 at 825–26; Barber, *supra* note 16 at 170–71.

societies, the values as well as the interests of the people are likely to be diverse. Value pluralism as well as interest pluralism pose a huge challenge to the ability of the state to frame public policy that would be broadly acceptable to its people. The ways in which different values and interests may combine are so staggeringly large that any complex society faces the potential problem of being left with most of its population being perennially disgruntled. Parties (when they function well) perform a significant legitimisation function for the state by coalescing around distinct families of values — often described as ideology — and aggregate the diverse interests of (all) the people of a state into a coherent policy package more-or-less compatible with their ideology. The policy package need not be internally coherent — it often involves the weighing of various interests, preferences, and values. It may entail a multitude of compromises that seek to bridge the gap between the ideal and the feasible, and must frequently cater to logically opposed interests, values, and preferences.

The internal contradictions of the policy package of a well-functioning political party notwithstanding, the party can claim that its mediation has a plenary character in three distinct senses: first, it mimics the plenary nature of governance, which is at least potentially concerned with all issues affecting human flourishing (as well as with interests of non-human animals). No state can decide to have a policy only on healthcare, for example. Even its silence or inaction on all other matters will amount to a policy decision, which it would be well-advised to adopt deliberately rather than inadvertently. As the drivers of governments-in-waiting, governance parties come up with policies on a wide range of issues, drawing upon their interaction with the people, and then seek to sell them politically to the people *as a package*. In doing so, they persuade their supporters to accede to certain compromises made with their own values, interests, and preferences so long as the overall policy package remains attractive to them. These policy platforms also make the opportunity costs of their policy packages transparent to voters, who are better able to prioritise their preferences in a context of resource constraint.

The policy package of a party is also plenary in a second sense: it is one that is designed by putting the interests of *all the people* on the scales. I will shed

further light on this feature when discussing the anti-faction principle. For now, it will suffice to note that parties should *consider* the well-being of all the people: any political group that *a priori* dismisses the interests of any section of the population as either irrelevant to its policy considerations or worse, meriting its hostility, is no longer committed to the rule of *all* the people, and is basically a faction rather than a party.

Third, parties have a plenary character inasmuch as they are more likely than most other political actors in electoral democracies to have long-term horizons, and therefore are likely to care more about the interests of the future people. As Rosenbluth and Shapiro correctly state, “parties have reputations that outlive those of individual politicians, and to the extent that they must represent a wide view of societal interests, they are more capable of delivering desired outcomes than any amount of direct democracy, and more trustworthy than even the most appealing individual politician”.²⁴ This feature adds a temporal dimension to the inclusive plenary character of parties.

B. Key Costs Reduced by Parties

In providing this uniquely bidirectional and plenary mediation between the state and its people, political parties (in efficient multipartisan systems)²⁵ reduce key information and transaction costs for both, making representative democracy possible.²⁶ Parties are able to reduce the costs I am about to discuss mainly in well-functioning party systems. Multipartisan systems — defined by the number of parties they have and the nature of the interaction between them — may be more or less efficient at reducing these costs. Other things being

24 Frances McCall Rosenbluth & Ian Shapiro, *Responsible Parties: Saving Democracy from Itself* (New Haven: Yale University Press, 2018) at 230.

25 A single party, in a one-party system, cannot reduce these costs. But then, many of these costs usually only matter in multiparty systems with competitive elections.

26 It should be obvious that I am assuming the normative desirability of “substantive” over merely “formal”, “symbolic”, or “descriptive” representation: see generally Hanna Fenichel Pitkin, *The Concept of Representation* (Los Angeles: University of California Press, 1967).

equal, constitutions will deepen democracy if they make their party systems and parties more efficient at reducing the following costs.

First, healthy parties in efficient party systems reduce the transaction costs of political participation for citizens (*political participation costs*). Even in a smallish party-less direct democracy, an ordinary citizen acting on her own would almost certainly need to take up political engagement as a full-time occupation to have any hope of making a modicum of difference to state policy. A sortition-based democracy may well facilitate significant political participation for many people, but not necessarily with respect to specific political concerns a particular citizen *wants* to engage with. Sooner or later, a politician will have to invent something that looks like a political party to enable some political engagement by citizens who do not wish to become full-time politicians. Parties also reduce the transaction costs of political participation for citizens — not only for partisans, but also for non-partisan citizens — who, in a well-functioning pluralistic democracy, are likely to find some party that reflects their values and priorities most closely and could therefore be their first port of call when raising a matter of political concern.²⁷ The mere existence of any person or group that is permanently excluded from the political process because their participation cost is too high changes the very character of the regime.

Secondly, parties reduce information costs. In constituencies whose large size is typical of contemporary states, voters tend to lack personal knowledge of electoral candidates. Given modern population levels, it is usually not feasible to have constituencies so small that most voters are personally sufficiently acquainted with all candidates. Parties reduce the information costs for voters because party affiliations of different candidates provide them with significant amount of broadly accurate proxy information about their political views and agendas, thereby reducing their *voters' information costs*.

Third, parties also reduce information costs for democratic state institutions by revealing to them what combination of policies will be acceptable to what

27 Matteo Bonotti, *Partisanship and Political Liberalism in Diverse Societies* (Oxford: Oxford University Press, 2017) at 33–34.

proportion of the people. All parties that campaign on policy packages provide this information to state institutions, whether they win or lose.²⁸ And winning parties, in addition, inform state institutions about the particular policy packaging that a large proportion of — if not a majority of — the people are willing to at least tolerate. This information can be generated and revealed, and state policy be legitimised, only through the bidirectional and plenary character of the mediating function that parties perform. Let us label these information and transaction costs the *policy packaging costs*.

Finally, parties reduce information costs for other political parties as well as for state officers and institutions by indicating to them which office-holders are likely to be persuadable political allies, whose support can be taken for granted, and who are likely to oppose certain policy proposals. Moreover, when they are reasonably disciplined, parties permit the identification of key leaders whose support will likely translate into the support of a predictable number of legislators and what it might take to secure their support. By aggregating and publicising political leanings, parties reduce the information costs associated with discovering whether another political actor is a political friend or foe, and the consequent transaction costs in making political decisions (*ally prediction costs*).

A democracy cannot function without these costs remaining low.²⁹ Parties reduce these costs by acting as intermediaries between the state and its people, on the one hand transmitting popular opinion to state institutions that typically lack the ability to gauge it directly, and on the other hand formulating state policies and justifying them to the people. This dual role gives them a Janus-faced public-private character — they need to operate as a private association

28 Almond identifies the political party as the distinctive modern political structure for “interest aggregation”, as distinct from “interest articulation” that can be done by special interest groups. See Gabriel Almond, “Introduction: A Functional Approach to Comparative Politics” in Gabriel Almond & James Coleman, eds, *The Politics of the Developing Areas* (Princeton: Princeton University Press, 1960) 3 at 38–39.

29 See Khaitan, “Political Parties”, *supra* note 19 at 98f to understand why.

proximate to the people in order to access popular opinions and justify state policies. They also simultaneously need to be embedded in (but not fused with) the institutional structures of the state to transmit popular opinions back to them and to help them formulate policies, which in turn they will help justify to the people. Although my account is an *idealised* one, keeping these costs low does not make a representative democracy utopian in any sense. Lowering these democratic costs are best seen as key aspirations, alongside several others, that democracies should constantly strive to realize.

III. Constitutional Principles in Relation to Political Parties³⁰

The previous part offered an idealised account of what parties do in a well-functioning democratic system. This idealised account is helpful in distinguishing parties and party systems that function well from those that are pathological. Parties that fail to perform their intermediary function appropriately and effectively are bad for democracy. A healthy party system can tolerate a few malfunctioning parties, so long as most of the key players are sound. In this part, I will summarise certain constitutional principles I have defended elsewhere — principles that constitutions ought to adopt in relation to parties in order to make it more likely that parties and party systems are healthy; or that — if there are diseased parties in the system — the system can still tolerate or mitigate their ill effects.

These are the four principles that constitutions should respect and optimize in relation to parties:

1. They should guarantee maximum autonomy for the formation, organisation, and operation of political parties, moderated by the restrictions necessitated by their purpose of winning (a share in) state power (for fixed terms) in competitive elections by acting as intermediaries between the state and its people (the ‘purposive autonomy principle’);

30 This part is a summary of Khaitan, *ibid*, section 3.

2. They should try to optimise the party system such that the total number of serious political parties is large enough to broadly represent every major ‘voter type’, but not so large that the information costs on judicious voters are too high (the ‘party system optimality principle’);
3. They should ensure a separation of parties and the state (the ‘party-state separation principle’); and,
4. They should discourage the factionalization of political parties (the ‘anti-faction principle’).

I hasten to add two caveats to this proposal: first, I do not take constitutionalization to necessarily entail judicialization.³¹ In fact, sometimes it may be neither necessary nor desirable to express a constitutional principle as a constitutional norm directly regulating constitutional actors, let alone as a legal norm. Instead, establishing an institutional arrangement that is most likely to uphold that principle — what may be termed ‘second order’ regulation — may well be the most optimal design solution.

Second, a norm can be ‘constitutionalised’ in multiple ways, its inclusion in a big-C constitutional code being only one of them. Other modes of constitutionalization include judicial interpretation, quasi-constitutional statutes, and constitutional conventions. The principles to be discussed should ideally inform — at least at a broad level — the big-C constitutional code so that the institutional arrangements of the state are framed alongside its party system, rather than *ex ante*. The finer details will, obviously, need to be left to the small-c statutes, conventions, and caselaw. The key determinant in a given context should, in the main, be feasibility and effectiveness. The following subsections will briefly explain each of these principles in turn.

³¹ Waldron, *supra* note 16; Tarunabh Khaitan, “Constitutional Directives: Morally-Committed Political Constitutionalism” (2019) 82:4 Modern Law Review 603 [Khaitan, “Constitutional Directives”].

A. The Purposive Autonomy Principle

Constitutional law continues, on the whole, to adhere to a sharp public-private divide, vesting private actors with constitutional rights and burdening public actors with constitutional duties.³² This structural limitation is an important hurdle that must be overcome if constitutions are to properly regulate political parties without destroying their public-private duality. While constitutions must be careful about over-regulating political parties lest they destroy their private character, they should also worry about constitutional silences and under-regulation that fails to acknowledge their publicness. A fit-for-purpose constitutional scheme for political parties will pay attention to three dimensions: (i) subject to the principles discussed in this article, it will grant them maximum autonomy, (ii) it will vest in them the necessary rights, powers, and entitlements which will enable them to better discharge their functions, and (iii) it will impose only those duties on parties that are necessary to preserve their public character. Is there such a happy regulatory middle which would preserve their privateness while demanding that they be sufficiently public at the same time?

To locate that regulatory middle, we need to point out with greater precision what precisely makes parties *public*. The private dimension of parties demands maximum autonomy for the formation and operation of political parties. But their public character demands a recognition of their *purposive* dimension: unlike natural individuals, political parties in a representative democracy cannot be allowed to choose their purpose with complete freedom. What makes them a political party in a democratic party system is their public *purpose* of participating in competitive elections — with other parties — in order to secure (significant) control of the levers of state power for fixed periods of time, and to do so by acting as intermediaries between the state and the people. This purpose is definitional of what a political party in a democracy *is*. It is specified at a high level of generality, being compatible with an extremely wide range of more

³² *British Human Rights Act 1998* (UK), s 6 is a notable exception. So is the horizontal application of certain fundamental rights in some jurisdictions, such as South Africa.

specific purposes that parties may have. But it is incompatible with certain purposes: such as instituting a single party state, making elections insufficiently competitive, barring or making it difficult for (other) parties to connect or communicate with the people, and so on.

It follows then that constitutions should guarantee maximum autonomy for the formation (from scratch or by splitting an existing party), organisation, and operation of political parties, moderated by the restrictions necessitated by their purpose of winning (a share in) state power (for fixed terms) in competitive elections by acting as intermediaries between the state and its people. Hence the *purposive autonomy principle*. Simply put, the principle permits significant autonomy to parties (and partisans), but seeks to ensure that there are committed to the purpose of being but one player in a multiparty democracy. The principle requires that parties should be relatively easy to form and disband, and to enter or leave. The main barriers to their success should be political, not legal or financial. New parties or opposition parties must not be locked out of political competition through high entry barriers.³³ In general, parties may need the whole suite of civil and political rights that citizens ordinarily have access to in a liberal democracy; sometimes they may even need special protections of their autonomy over and above what citizens are guaranteed. Without these freedoms, a political party may be woefully inept at reducing key democratic costs.

While their privateness demands a protection of their autonomy, their public purpose may entitle them to special privileges and powers, as well as fit for bearing special duties that are inapplicable to natural individuals. Public entitlements, such as (limited) state funding for political campaigns or immunity from defamation laws for speeches made in legislatures, can help

³³ For a catalogue of such barriers enacted against third parties in the United States, see Samuel Issacharoff & Richard H Pildes, “Politics as Markets: Partisan Lockups of the Democratic Process” (1998) 50:3 Stanford Law Review 643 at 683.

secure a level playing field between political parties and enable many of them to discharge their democratic functions effectively.³⁴

Finally, the public purpose of parties invites not only special entitlements but also some public duties. For example, parties are likely to lower the political participation costs only if there is a fair measure of transparency surrounding their core value commitments, internal institutional structures, decision-making processes, financial affairs, and credible — even if internal — enforcement mechanisms of their institutional commitments. Likewise, parties are likely to lower the policy packaging costs (as well as the other three democratic costs) only if they offer a more-or-less comprehensive policy package in their election manifestos.

Thus, the purposive autonomy principle seeks to preserve the public-private duality of political parties that is essential to their role in facilitating democratic governance. If we consider Article 21(1) of the German Basic Law, for example, it is broadly a recognition of the purposive autonomy principle:

The political parties participate in the formation of the political will of the people. They may be freely established. Their internal organisation must conform to democratic principles. They must publicly account for their assets and of the sources and use of their funds as well as assets.³⁵

‘Broadly’, because it is doubtful that inner-party democracy — mandated by the third clause above — can be justified by the purposive autonomy principle. It is by no means obvious that internally democratic parties are better at reducing the key democratic costs, not to mention the pragmatic difficulties in determining what suffices as an internally democratic party at an age of relatively loose and myriad ways of associating with a party.³⁶ Constitutions should also

³⁴ Article 40 of the Constitution of Portugal, for example, guarantees broadcasting time in public media to political parties.

³⁵ See also Article 51 *ibid.*

³⁶ See generally Kate O'Regan, “Political Parties: The Missing Link in Our Constitution?” (28 August 2015), online: *Corruption Watch*

be slow to mandate inner-party democracy or regulate how parties discipline their members. Many courts have enforced fundamental rights claims by ordinary voters and party members against political parties.³⁷ Doing so has clear, and often adverse, consequences for the purposive autonomy of political parties.

The purposive autonomy principle is a meta-principle that dictates how constitutions should approach political party regulation. The three following principles may be understood as facets of the purposive autonomy principle — principles that highlight the publicness of parties that justify regulation. They merit separate discussion because of the important bearing they have for the constitutional regulation of parties.

B. The Party System Optimality Principle

Parties tend to have *ideologies*: a relatively wide-ranging *belief system*, which is relevant to political behaviour.³⁸ A belief system, in turn, is “a configuration of ideas and attitudes in which the elements are bound together by some form of constraint or functional interdependence”.³⁹ The *centrality* of an element in a belief system is a measure of the likelihood that a voter will change her party preference if her party’s stance regarding that element changes, rather than change her view on the element itself.⁴⁰ She may tolerate a party’s change of position on less central elements in a belief system, but give up on her partisan loyalty if the party reneges on a more central element. For Gerring, the quality of being ‘bound together’ (which he calls ‘coherence’) has two corollaries: *contrast* (‘implying coherence vis-à-vis competing ideologies’) and *stability*

<www.corruptionwatch.org.za/political-parties-the-missing-link-in-our-constitution/>.

37 *Ramakatsa v Magashule*, [2012] ZACC 31 (SA, Constitutional Court); *Bhutta v Pakistan*, [1998] PLD 370 (Supreme Court (PAK)).

38 Philip E Converse, “The Nature of Belief Systems in Mass Publics (1964)” (2006) 18:1–3 Critical Review 1 at 4–5.

39 *Ibid* at 3.

40 *Ibid* at 4.

(‘implying coherence through time’).⁴¹ Thus, competing political ideologies straddle the same ideological axis and are relatively stable over time. While much penumbral content of political ideologies is malleable, their most central elements are likely to be most relevant to contrasting them with other ideologies and to determine their stability over time. Not all ideologies matter politically: they ought to be politically *salient*.⁴²

Sartori’s classical account analysed party systems through a single-axis lens of left and right-wing parties.⁴³ As Scheppelle has argued, politics is no longer organized on a single left-right ideological axis in contemporary Western democracies. In the very least, a nativism-cosmopolitanism divide has strongly emerged as an additional, cross-cutting, axis for political alignment.⁴⁴ When two major ideological axes are salient to voters, there are at least four stable party types (and concomitant ‘voter types’) that can broadly capture the worldviews and political preferences of most voters in such systems: on Scheppelle’s classification, for example, one should expect left-nativist parties,⁴⁵ right-nativist parties,⁴⁶ left-cosmopolitan parties,⁴⁷ and right-cosmopolitan parties.⁴⁸ With each new salient axis, new permutations give rise to the possibility of an even a larger number of voter types in search of distinctive political representation.

In any system that has more than one salient political axis, a two-party system simply cannot approximate to the broad political worldviews of major

41 John Gerring, “Ideology: A Definitional Analysis” (1997) 50:4 Political Research Quarterly 957 at 980.

42 Pradeep K Chhibber & Rahul Verma, *Ideology and Identity: The Changing Party Systems of India* (Oxford: Oxford University Press, 2018) at 15.

43 Sartori, *supra* note 4.

44 Kim Lane Scheppelle, “The Party’s Over” in Mark Gruber, Sanford Levinson & Mark V Tushnet, eds, *Constitutional Democracy in Crisis?* (Oxford: Oxford University Press, 2018) 495 at 513.

45 Such as the Spanish Podemos Party.

46 Such as the American Republican Party under Donald Trump’s leadership.

47 Such as the Indian Congress Party under Sonia Gandhi’s leadership.

48 Such as the British Conservative Party under David Cameron’s leadership.

voter types. A regime will establish ‘the rule of the people’ only if it facilitates the representation of the preferences of every major voter type in its party system, with two caveats: first, as I will argue later in this article, it is legitimate — albeit sometimes unwise — to restrict the likelihood of political representation — or, at least, the likelihood of political success — of factional voters who do not accept that a democracy is the rule of all the people, even if a factional-inclusivist axis has become salient in that polity. Just as I cannot rely on my autonomy to sell my children or my (future) self into slavery, rule of all the people cannot be relied upon to transform a democracy into the rule of some of the people. Neither autonomy nor democracy are fully transparent values in this sense.⁴⁹

The second caveat is that there is a feasibility limit to the total number of serious parties that a democracy can accommodate. A *serious* political party is a party that is, well, serious about seeking power or influence in a polity. Joke parties that contest elections for other motives or simply to cock a snook at ‘the system’, those that are likely to be themselves surprised if they end up winning, are not ‘serious’. It is true that larger the number of distinctive parties in a system, smaller the political participation costs are likely to be for a voter. In fact, if there is a party that mirrors every voter’s customized set of political preferences, political participation costs will be non-existent for every voter. Needless to say, such single-member ‘parties’ won’t be parties in any meaningful sense. Furthermore, even as they reduce political participation costs, a large number of parties significantly increases voters’ information costs. A voter who has to go through a list of fifty candidates belonging to fifty different serious parties is able to make an informed choice only after putting in considerable effort to educate herself on the distinctive ideological commitments and political platforms of all these fifty parties. She might as well focus her research on the fifty individual candidates in such cases (which would not be any less daunting, in any case). Too many choices may not matter when the stakes are low — such as when one is ordering a meal from a restaurant’s menu — for one can make a legitimate choice having considered only the first five options. But when the stakes are as

49 Contrast them with freedom of expression, which is fully transparent in that it includes my freedom to remain silent.

high as entrusting the government of one's polity, the voters' information costs must be reasonable enough to enable a judicious voter to consider the pros and cons of all candidates.

The sum of these concerns is the 'party system optimality principle': in contemporary democratic polities which divide along multiple salient axes, party systems should be optimised such that the total number of serious political parties is large enough to broadly represent every major 'voter type', but not so large that the information costs on judicious voters are too high.

C. The Party-State Separation Principle

The third constitutional principle in relation to parties is that a state should seek to ensure a separation of the ruling party/coalition and the state, so as to allow a genuine hope for today's losers to be tomorrow's winners. We will call this the 'party-state separation principle'. The basic argument is that if a party (usually the ruling party/coalition) becomes entrenched in the apparatus of the state, the political participation costs of the supporters of all other parties become insurmountable. The party-state separation principle demands a recognition of a host of opposition rights: including a significant opposition voice — perhaps even a veto — in constitutional amendments and constitutional appointments. It requires the bureaucracy, police, prosecution, judiciary, and fourth branch institutions to function in a non-partisan manner. The principle also demands equity — although, not necessarily equality — in state benefits given to the ruling party/coalition and to opposition parties. Recognising this principle is especially important given the salience of the *institutional* 'separation of powers' principle in constitutional theory — given how partisan loyalties can scramble institutional separation, it is essential that the party-state separation principle is considered alongside the institutional separation of powers principle, and given the same weight in constitutional thought.

The party-state separation principle requires that a state should preserve the genuine likelihood of different parties securing governmental power at different points in time. The transfer of power following elections should be peaceful, and the political opposition must be able to plausibly imagine itself as a government

in waiting. It should therefore be hostile to a one-party system (where only one party is allowed to exist, *de jure* and *de facto*), or a hegemonic party system (where smaller parties are allowed to exist, but the system *de facto* and *de jure* favours a hegemonic party which remains in power) at all times.⁵⁰ It should even be hostile to the kind of two-party system in which the two parties operate like a cartel, and make it structurally difficult for a third party to emerge.⁵¹ Any such fusion of parties and the state is not only bad for democracy, it is also likely to make the regime unstable because any significant voter type without mainstream political representation is likely to find solace in anti-system parties. On the other hand, the party-state separation principle is compatible with a predominant party system, where a single party or coalition *de facto* dominates all others, although *de jure* the system permits free and fair political competition and gives no structural advantage to the predominant party. That said, the purposive autonomy principle would still view a predominant party system as non-ideal, and seek to enable opposition parties to rise and flourish in such a system. Even if the opposition does not win elections, a robust opposition is essential to check the political power of the ruling party/coalition, and to reduce the four democratic costs effectively. Recall that these costs remain high in a system with only one healthy political party.

D. The Anti-Faction Principle

We can now consider the final principle. We must accept that an elected democratic government is unlikely to represent all the people of a state at any one given time, where representation is understood in terms of voters' electoral preferences as expressed on the ballot. But it does not follow that we should also

⁵⁰ On party systems, see Zim Nwokora & Riccardo Pelizzo, "Sartori Reconsidered: Toward a New Predominant Party System" (2014) 62:4 Political Studies 824 at 833.

⁵¹ Issacharoff and Pildes show how the two main parties have created an effective political duopoly in the United States: Issacharoff & Pildes, *supra* note 33 at 644. Katz and Mair argue that the phenomenon of cartelization extends to Europe as well: Richard S Katz & Peter Mair, "The Cartel Party Thesis: A Restatement" (2009) 7:4 Perspectives on Politics 753.

accept that such an under-representative government only needs to serve the *interests* of those it represents. An under-representative government can, and should, still aspire to serve the interests of all its people. Parties, in their idealized sense, work towards the flourishing of all the people of their state; factions care only for a sub-section thereof.⁵² Parties are committed to the *common* good, factions are not.⁵³ Factions *a priori* exclude the interests of their disfavoured section of the people even from being considered when framing policies — if these interests are considered at all, it is with a view to hurt them rather than to advance them. Importantly, given our capacity to threaten the very survival of humanity, at least in our times, factions would include parties that do not count the interests of the future people as legitimate concerns for their political calculations.

Factions fail to reduce the policy packaging costs for state institutions. We have seen that one of the key functions of political parties is to package the interests of all voters based on the party's value commitments. These policy packages are then tested in elections, and voters express their preferences for or against such packages, which information is then available to state institutions when framing policy. In the process, parties also translate any voter's factional interests into a subset of the common good through their policy packaging function, thereby moderating them to make them compatible with the interests of other citizens. Factions fail to do so. They also increase the political participation costs of the excluded voters — it is one thing to not have every party reflect one's voter type, quite another to have a party in a system not even consider one's interests as legitimate and relevant alongside the interests of all others.

52 It should be obvious that I am *not* speaking of infighting 'factions' within parties.

53 Barber characterises factions as "sectarian parties": Barber, *supra* note 16 at 168. For a brief historical overview of the development of the conceptual distinction between parties and factions, see Bonotti, *supra* note 27 at 103–105.

This distinction between a party and a faction has been long recognized in political theory.⁵⁴ As Sartori put it, “[i]f a party is not a part capable of governing for the sake of the whole, that is, in view of a general interest, then it does not differ from a faction. Although a party only represents a part, this part must take a non-partial approach to the whole”.⁵⁵ Factions are concerned with the interests and well-being of only a sub-section of the people. Parties, even when they make claims on behalf of particular groups, “must transcend the language of particularity and re-articulate the claims they represent in such a way that their demand for a share in political power is justified to the entire people and not only to that particular group of individuals that chooses to associate with them”.⁵⁶ The point of the distinction is normative rather than taxonomical: “[it] is very likely that the empirical analysis of existing practices will show how parties and factions are often entangled, with different political agents exhibiting features of both, to a greater or lesser extent”.⁵⁷ It is important to note that the distinction attaches itself to the entity as a whole, and not to its individual actions. A party may have distinct policies catering to the interests of different sub-sections of the people — it will be a faction only if, taken as a whole, its political ideology and its policy platform is not justifiable to all the people. Admittedly, any attempt to distinguish real-world parties from factions too sharply is likely to fail. Having said that, Rosenblum is probably right when she suggests that, even as an empirical matter, “[w]here it is an original identity, or at least not reducible to prior political identities, the “we” of partisanship is more inclusive than other political identities”.⁵⁸

‘Rule of the people’ demands not only that political power is exercised by the people’s representatives, but also that it is exercised in the name of all the

54 Jonathan White & Lea Ypi, *The Meaning of Partisanship* (Oxford: Oxford University Press, 2016) at 32.

55 Sartori, *supra* note 4 at 50.

56 White & Ypi, *supra* note 54 at 34.

57 *Ibid.*

58 Nancy L Rosenblum, *On the Side of Angels: An Appreciation of Parties and Partisanship* (Princeton: Princeton University Press, 2010) at 356.

people. In the words of White and Ypi, “[t]he very ideal of collective self-rule implies that power is considered legitimate to the extent that it is justified to the whole people”.⁵⁹ It is this normative ideal which leads us to our final constitutional principle: that a state should seek to ensure that political parties do not operate as factions. We will call this the ‘anti-faction principle’, and amend White and Ypi’s formulation somewhat to suggest that it requires political parties to ensure that their policies are objectively justifiable (rather than subjectively justified) to all the people. The amendment is required because it may be that a party fails to even communicate, let alone actually justify, its policies to all the people. So long as its policies are justifiable to all of them, the anti-faction principle should be satisfied. The anti-faction principle, therefore, does not require parties to articulate their policies in Rawlsian ‘public reason’ terms.⁶⁰ Furthermore, a justifiability-standard is more tolerant of parties appealing strategically to particular sub-sections of the people as a matter of electoral tactics — so long as their policy platforms are nonetheless justifiable to all the people. Other independent moral and political constraints no doubt exist — such strategic appeals should not demonize any other section of the people, for example.

Unlike the purposive autonomy principle, which frowns upon single-issue parties, the anti-faction principle — on its own — does not require parties to have a plenary policy package. An anti-corruption party is not a faction. The party’s size doesn’t matter either. A small Green Party is likely to be a party, since its environmental objectives are justifiable to all. Even a party whose entire policy platform is devoted to advantaging a single societal group may not necessarily be a faction. A Workers’ Party, a Dalit Party in India (for former ‘untouchable’ castes), or an African-American Party in the US can be parties, if they can justify the interests of their preferred groups by reference to the general interest (for example, that historically excluded groups have a greater claim on the state’s resources). Furthermore, parties are allowed to make ideological and policy

59 White & Ypi, *supra* note 54 at 34 [emphasis in original].

60 John Rawls, “The Idea of Public Reason Revisited” (1997) 64:3 University of Chicago Law Review 765.

mistakes — the anti-faction principle does not demand that their policies actually work. But it does demand sincerity and plausibility — some obviously unworkable or implausible policies may evidence lack of sincerity. A party that continues to deny human impact on global environment and its potential implications for future people, despite all the evidence to the contrary, is probably a faction because it is refusing to consider the interests of the future people, and its policies are unlikely to be justifiable to them. The one exception to the sincerity and plausibility test is this: even if a ‘party’ sincerely believes that the only interests that count are the interests of a sub-section of the people rather than those of all the people, its sincere rejection of democracy as rule-of-all-the-people is not enough to dodge its characterization as a faction.

The absence of a bright line dividing parties from factions may especially bother legal scholars: as our discussion of a preference for second order regulation will shortly demonstrate, their fears are unfounded. The proposed regulatory architecture would never require a court to decide whether a defendant before it is a genuine party or a faction.

IV. The Contours of Moderated Parliamentarism

As constitutional principles, the principles discussed in the preceding parts are primarily addressed to the framers (and changers) of constitutions, who should consider them alongside numerous other relevant principles, their political context, historical path dependencies, and so on. An all-things-considered judgment in particular contexts may legitimately reject design preferences derived from acontextual first principles. Furthermore, few democracies have the option of starting with a clean slate — existing design structures create path dependencies: it is often better to change a long-standing existing system incrementally than to impose some theoretically optimal model through radical reform. Context and history are key ingredients in constitutional design, so a general conceptual article can do little more than indicate the likelihood that certain design combinations will further or detract from a given set of normative principles.

With these limitations of the current project in mind, let us consider if these principles have any general implications for the design of key partisan constitutional institutions (i.e. the political executive and the legislature). The first thing to note is that the four aforementioned principles can come into tension with each other. The anti-faction principle demands that constitutional architecture should disincentivize factions — however, if it does so for a faction that represents a salient voter type in a deeply divided society, the party system optimality principle will be compromised. The party-state separation principle sometimes requires curtailing the autonomy of the ruling party/coalition. A wise constitution maker will not seek to maximise any of these principles, for doing so will almost certainly be at the cost of another one of these principles (or, for that matter, other principles that we should care about). What we need to find is a Goldilocks zone of optimality, where we can sufficiently respect each of these important norms.

Secondly, the constitutional principles we canvassed in the previous part have implications for many aspects of constitutional design, and not just what the political executive and the legislature might look like. These other implications include campaign finance regulation, antidiscrimination regulation, design of the fourth branch, protection of opposition rights, and so on. By focussing on the design of the key institutions of the partisan state in this article, I do not wish to imply that the force of the principles is spent once the shape of the two key political institutions is settled.

Finally, we should note that the need to protect purposive autonomy of parties dictates not only a cautious approach to imposing duties on parties, but also *how* any duties may be imposed. Duty-imposing norms should be crafted so as to not destroy the dual character of parties. In general, and subject to their effectiveness in a given context, three broad regulatory criteria should govern design possibilities for duty-imposing norms with respect to political parties:

- Political enforcement and self-regulation are better than judicial enforcement,⁶¹

61 Khaitan, “Constitutional Directives”, *supra* note 31.

- Nudges are better than command-and-control,⁶² and
- Carrots are better than sticks.⁶³

These criteria are partial to ‘second-order regulation’, which emphasizes the importance of ‘background competitive structures’ that shape decision-making, rather than seeking to police behaviour directly through first-order commands.⁶⁴ Note that all background institutional structures shape the behaviour of actors who inhabit them — the question is not so much whether to have second-order regulation, but what type of second-order regulation is worth having. For example, a democracy has to choose *some* electoral system, and each system shapes the behaviour of politicians differently. Many regulatory objectives in relation to parties can be achieved by attending to achieving the right combination of institutional design of elected state bodies and the manner in which they are constituted in partisan elections. Indirect, second-order, regulation is generally more conducive to party autonomy than first-order legal regulation.

A. Mapping Regime Type and Electoral Systems

Before I move to defend moderated parliamentarism, a brief overview of the key options available to the designers of the political executive and the legislature is helpful. There are three key *institutional* variables for classifying the main modes of organising representative power in democracies:

1. whether the political executive and/or the legislature are unified/unicameral or divided/multicameral;
2. what is relationship between the president and the premier in a divided executive, and between the several chambers in a multicameral legislature; and

62 Cass R Sunstein, “Nudging: A Very Short Guide” (2014) 37:4 Journal of Consumer Policy 583.

63 In other words, it is better to ensure compliance by making the realization of some regulatory principles a precondition to accessing state support for parties, rather than through penalties.

64 Issacharoff & Pildes, *supra* note 33 at 647.

3. what is the relationship between the political executive (or a part thereof, if divided) and the legislature (or a part thereof, if multicameral).

Presidential systems (*e.g.* the US) have a unitary political executive elected directly by the people. Its survival is temporally fixed and does not depend on whether the legislature has confidence in it. Semi-presidential systems (*e.g.* Sri Lanka) have a divided political executive — typically a president and a prime minister. The relationship between the two is variable, institutionally as well as politically, although the president is typically superior to the premier institutionally. In such systems, the president is elected by the people in direct elections, and the prime minister is appointed (usually by the president) but must enjoy the confidence of the legislature (or a part thereof). Semi-presidential systems can be further divided into two sub-types: ‘premier-presidentialism’ systems do not allow the president to fire the prime minister (Sri Lanka between the 19th and 20th amendments), but ‘president-parliamentarism’ systems do (Sri Lanka after the 20th amendment).⁶⁵ In parliamentary systems, the legislature (or a part thereof) does have the institutional power to fire the prime minister at will through a vote of no confidence.⁶⁶

All of these systems are compatible with a unicameral legislature or a multicameral one. New Zealand’s parliament is unicameral, India’s is bicameral.

65 See Thomas Sedelius & Jonas Linde, “Unravelling Semi-Presidentialism: Democracy and Government Performance in Four Distinct Regime Types” (2017) 25:1 Democratization 136 for the distinction. The labels that they assign to the sub-types are confusing, but retained here because of the currency they have gained in the literature.

66 A no confidence vote is distinct from impeachment: the former typically requires a simple majority to be passed and need not be based on any bad behaviour on the part of the premier; impeachment usually requires a super-majority and must be based on some specific bad conduct. Germany employs the *constructive* vote of no confidence, which allows parliament to withdraw confidence from a head of government, but only if there is a positive majority for a successor government. Although still easier to secure than an impeachment, it grants more political security to a premier than a parliamentary system with a simple vote of no confidence.

In some bicameral systems, both houses are directly elected by the people (*e.g.* in the US), in others one is elected directly and another indirectly (*e.g.* in India); in others still, one chamber may be directly elected while the other appointed (*e.g.* in the UK). The two houses may have roughly co-equal legislative powers (*e.g.* the US) or one chamber may have greater legislative powers than the other (*e.g.* India).

Ganghof has recently added a new model to the matrix for organising executive-legislative relations: ‘semi-parliamentarism’. This type of system is a mirror image of a semi-presidential system. Instead of dividing the political executive leadership, “a semi-parliamentary system divides the *assembly* into two (roughly) equally legitimate parts, only one of which possesses the power to dismiss the prime minister in a no-confidence vote. It establishes a formal separation of power between the executive and *one part* of the assembly”.⁶⁷ Given this definition, New Zealand — with its unicameral legislature — is a parliamentary system rather than a semi-parliamentary one. But the United Kingdom and Canada do not qualify as semi-parliamentary either: although they are bicameral, their second chamber is largely or entirely appointed. Neither does India, which has a second chamber that is *indirectly* elected by provincial legislatures. These are all parliamentary systems, because their second chambers lack sufficient democratic legitimacy to effectively and adequately check the government and the confidence chamber. Australia, on the other hand, has two directly elected chambers, only one of which has the power to remove the government from office — it therefore qualifies as a semi-parliamentary system. The Indian example should, however, alert us to the fact that the distinction between parliamentary and semi-parliamentary regimes may well be one of degree — an indirectly elected chamber still has *some* democratic legitimacy, and is best placed half-way between these two regime types. On the other hand, even in semi-parliamentary systems with two elected houses, it is important to avoid a *legitimacy tie* between the two houses. Such ties can muddle the design

67 Steffen Ganghof, “Australian Bicameralism As Semi-Parliamentarism: Patterns of Majority Formation in 29 Democracies” (2018) 53:2 Australian Journal of Political Science 211 at 212.

imperative of reserving the confidence-supplying function for one chamber alone. A well-designed semi-parliamentary system would ensure that the checking and appointing chamber has sufficient democratic legitimacy to effectively check the government and the confidence chamber, but not enough to threaten the survival of the government itself—if that happens, the checking and appointing chamber would effectively transform itself into a second confidence chamber. Thus, it is important to finely calibrate the democratic legitimacy of the checking and appointing chamber in a semi-parliamentary regime—close enough to that of the confidence chamber, but just a step behind to not usurp the latter’s confidence function. Hence the importance of Ganghof’s qualification that their legitimacy must only be *roughly* equal.

All of these permutations can be replicated or reconfigured at the federal, provincial, or local level, depending on the number of layers of political government in the state. The table below summarises the key features of the various key models.⁶⁸

	Political Executive: United or Divided	Legislature: Unicameral or multicameral	Who can fire the premier?
Presidentialism	United	Either	No premier exists
Parliamentarism	United	Either	Legislature (or part thereof)
Premier-presidentialism	Divided	Either	Legislature (or part thereof)
President-parliamentarism	Divided	Either	President and Legislature (or part thereof)
Semi-parliamentarism	United	Bicameral	One (of two) legislative chambers

68 These models are far comprehensive. South Africa, for example, does not neatly fit into any of these models.

These choices ought not to be made without simultaneously considering their relationship with different available options for the choice of electoral system. One of the key takeaways of this article is that in order to take parties and party systems seriously, constitutions must not retrofit electoral system choices to a specific executive-legislature design chosen *ex ante*. Rather, both choices must be made alongside each other, after careful consideration of their mutual impact on each other. So, here are the broad possibilities available with respect to the electoral system. Note that for every office or institution constituted through direct elections, a different electoral system can be applied. Thus, there is a mind-bogglingly large number of ways in which different electoral systems can be designed. An overly simplistic map of most of these systems can be drawn by teasing out four key variables:⁶⁹

1. the district magnitude (single-member, multi-member, or at large);
2. the object(s) of voter choice (candidate, party, or both);
3. the ballot structure (categorical or individual, cardinal or preferential); and
4. the electoral schedule (simultaneous or asynchronous, staggered or wholesale).

District magnitude concerns the number of constituencies into which the electors for an office or institution are distributed. They can range from single-member districts which elect a single candidate for an assembly at one end of the spectrum (as in British parliamentary elections) to the entire electorate constituting one national district (*e.g.* Israel) — with multi-member districts of various sizes (*e.g.* Ireland) in between. So, in order to elect a 200-member assembly, single-member districts will require 200 constituencies electing one candidate each, five-member districts will need a total of 40 electoral districts electing 5 candidates each, and an at-large election will have a single national constituency electing all 200 members. In general, larger the district magnitude,

⁶⁹ Much of the discussion that follows — excepting the variable concerning electoral schedules — is drawn from Michael Gallagher & Paul Mitchell, “Dimensions of Variations in Electoral Systems” in Herron, Pekkanen & Shugart, eds, *supra* note 18 at 23.

the more proportionate the relation between votes and seats is likely to be — thus, when the entire electorate forms a single electoral district, the votes to seats translation will be most proportionate. When the electorate is divided into five-member constituencies, the outcome is likely to be more proportionate than if it were divided into single-member constituencies. So, district magnitude is directly related to the proportionality of the election.

The object of a voter's choice could be individual candidates, or political parties, or both. In some systems, a voter casts her votes for candidates directly (usually, but not necessarily, affiliated to a party); in others for a party directly. Some systems (*e.g.* New Zealand or Germany) allow each voter to cast two votes: one for an individual candidate and another for a particular party. Even in systems where voters cast only one vote for a candidate, the system can 'count' it twice if it *adjusts* the final seat distribution in the assembly by allocating additional seats based on the aggregate votes received by each party (through their candidates) in order to reduce disproportionality.

Third, a ballot can be structured along two distinct classifications. On the one hand, a ballot can either be *categorical*, where the voter simply votes for an individual candidate or a party, or *dividual*, in which a voter may/must split her vote among several candidates. For example, in a five-member constituency, a *dividual* ballot may allow each voter five votes, which may be cast for five different candidates, or all five for the same candidate, or distributed between two candidates and so on. While a categorical ballot will always be *cardinal*, a *dividual* ballot may be *cardinal* or *ordinal*. A *dividual* ordinal ballot can allow/require a voter to express her preference for any, some, or all candidates/parties by ranking them in order of preference (*i.e.* a preferential vote or ranked-choice vote); in a *dividual* cardinal ballot she may be permitted to mark all the candidates she approves of, but without ranking them (*i.e.* cast an *approval vote*)⁷⁰ or distribute a fixed number of voting 'points' or fractions — say

70 For details of approval voting, see George Tsebelis, "How Can We Keep Direct Democracy and Avoid 'Kolotoumba'" (2018) 35:1–2 *Homo Oeconomicus* 81.

five vote points or one-fifths of her vote — between any number of candidates (through a *cumulative vote*).⁷¹

Finally, electoral schedules can be organised in various ways. Different state institutions or offices that are constituted through direct elections may go to polls simultaneously (and, therefore potentially impact each other) or asynchronously (where this mutual impact is arguably lesser). An assembly can be elected in a staggered manner, where a fraction of its membership is elected every few years, or it may be reconstituted wholesale after each term. Elections to the same institution or office may be held on a single day, or over a period of few weeks (sometimes, even months). Finally, elections schedules may be fixed and predictable, or variable and unpredictable or determined by the incumbents.

There are other dimensions of variations which we will avoid discussing here. The possible ways in which just these four dimensions can be combined are numerous. How each of these permutations might combine with the possibilities of institutional design of the legislature and the political executive makes things even more complicated. A president can be directly elected based on a single, national, constituency or through multiple constituencies (such as the electoral college system in the US). The unenviable task of constitution makers is to combine these variables — within political constraints and path dependencies — in ways that optimise not only the four constitutional principles in relation to parties, but also result in an institutional set-up that is best-suited to all other purposes the constitution has set out to achieve!

B. Moderated Parliamentarism

Mercifully, our task here is more manageable. In the rest of this part, I will outline a particular version of semi-parliamentarism, and then defend it as an attractive way to optimize our four constitutional principles. The claim is not

⁷¹ On cumulative voting generally, see Richard L Engstrom, Delbert A Taebel & Richard L Cole, "Cumulative Voting as a Remedy for Minority Vote Dilution: The Case of Alamogordo, New Mexico" (1989) 5:3 Journal of Law & Politics 469.

that it is the only defensible way — that would require a consideration of all possibilities in this high-population field of options. And we aren't even considering the constraints and path-dependencies imposed by particular histories and contexts. By necessity, therefore, my theoretical claim has to be a modest one. The specific version of semi-parliamentarism I will defend has several distinctive features: mixed bicameralism, moderated (but distinct) electoral systems for each chamber, weighted multipartisanship, asynchronous electoral schedules, and deadlock resolution through conference committees. We can call this version moderated parliamentarism.⁷²

1. Semi-Parliamentarism

Like all semi-parliamentary systems, moderated parliamentarism has two directly elected chambers with distinctive functions.⁷³ Only one of these chambers, the *confidence and opposition chamber* has the power to dismiss the prime minister at will. The function of this chamber is to supply confidence to the political executive, which itself must be drawn entirely *from within its own ranks*. While this chamber also performs a checking function, it will tend to do so with material — as opposed to ‘merely’ expressive — consequences only in politically extraordinary circumstances, *i.e.* when the government’s majority is

72 Readers will note that many features of moderated parliamentarism can be seen in the Australian system. Even so, there are important distinctions: the composition of the Australian senate is scrambled by federalism and the adoption of a complicated version of single-transferable-vote. Further differences relate to electoral schedules, dispute resolution mechanisms and so on. The extent to which these differences matter is a task for another day.

73 Russell argued that the traditional political science distinction between weak and strong bicameralism along the axes of symmetry of powers and congruence of partisan composition is insufficient to capture the de facto functioning of the system, and that a third dimension of “perceived legitimacy” is essential to consider: Meg Russell, “Rethinking Bicameral Strength: A Three-Dimensional Approach” (2013) 19:3 *The Journal of Legislative Studies* 370. While a requirement of direct elections is neither necessary nor sufficient for a political institution being perceived to be legitimate, it is a good rough indicator, at least for an acontextual, theoretical, argument like this one.

in doubt (say, due to a brewing rebellion against the leadership within the ruling party). To put the point differently, the confidence function itself is a specific type of checking function: it is not deployed during ordinary legislative business, but the threat of the loss of confidence exerts checking pressures on the government of the day — usually through the mediation of the party, the political executive knows how far it can push its party members in the confidence chamber without losing support. Thus, the confidence chamber ensures that the ruling party/coalition is able to exercise a continuous check on the political executive.

Another, often-ignored, dimension of a confidence *and opposition* chamber is its opposition function.⁷⁴ Normally, the political opposition in such a chamber lacks the power to fire the government, because it does not control the chamber. But it does exercise considerable influence: a tactful opposition knows that it only needs to break away enough legislators from the ruling party/coalition to topple a government. More importantly, well-functioning confidence and opposition chambers allow the political opposition to hold the government discursively accountable. The opposition parties in the confidence and opposition chamber share this checking function with the other chamber, about which more shortly. But because of their common checking function, and because all of them merit the rights and powers that moderated parliamentarism must guarantee to the opposition, references to ‘opposition parties’ in this article should be understood to include all legislative parties — in *both* chambers — that do not form part of the political executive. The opposition members’ right to speak freely, criticise the government and the ruling party/coalition, and seek accountability from ministries is an essential feature of parliamentary systems that must be fully preserved, nay strengthened, with constitutional safeguards in moderated parliamentarism. A sub-majority of members (say 40% of the

⁷⁴ David Fontana, “Government in Opposition” (2009) 119:3 Yale Law Journal 548; Gregoire Weber, “Loyal Opposition and the Political Constitution” (2017) 37:2 Oxford Journal of Legal Studies 357; Sujit Choudhry, “Opposition Powers in Parliamentary Democracies” (2020) [unpublished, on file with author].

members in either chamber) or a significant opposition voice (say any three of the five largest parties in the checking and appointing chamber and the leader of the opposition in the confidence and opposition chamber) should be empowered to convene a session of a chamber, veto the end of a session, and set the agenda for some fraction of the chamber's business (say, one day every week).⁷⁵ As the government in waiting, the leader of the opposition and the shadow cabinet also need to receive regular intelligence and national security briefings, and briefings from senior civil servants in the department they are shadowing, respectively (suitably subject to a confidentiality oath).

However, the largest opposition party (or alliance) in the confidence and opposition chamber has an *additional* function: to supply a government-in-waiting, *i.e.* a shadow cabinet, led by the constitutional office of the *leader of the opposition*. The role of this office is to channel criticism of the government's acts, omissions, ideology, and policies, to offer alternatives on each of these fronts, and to continuously communicate its criticisms and alternatives to the people. Unlike other opposition parties that can confine themselves to criticism, the shadow cabinet has to propose viable alternatives, if it is to inspire any confidence in its claim as the government-in-waiting. All necessary resources and protections must be guaranteed to the office to enable it to perform its key democratic function. As the government-in-waiting, the shadow cabinet's critical democratic function in constantly asking the government to justify publicly why it continues to deserve the confidence of the chamber should not be underestimated. If the government falls, it is the shadow cabinet's experience in opposition that enables it to form an effective government from day one.

The other chamber in moderated parliamentarism — the *checking and appointing chamber* — lacks the power to remove the political executive by

⁷⁵ On sub-majority rules, see Adrian Vermeule, "Submajority Rules: Forcing Accountability upon Majorities" (2005) 13:1 *The Journal of Political Philosophy* 74. See also *R (Miller) v Prime Minister*, [2019] UKSC 41. Here the UK Supreme Court recognises the dangers of permitting the government to escape parliamentary scrutiny by relying on its agenda control and scheduling powers.

withdrawing its confidence. The key functions of the checking and appointing chamber are — as its name suggests — (i) to check the political executive by seeking accountability from ministers, as well as by acting as a check on the legislative actions of the confidence and opposition chamber, and (ii) to make appointments to various constitutional offices of the state, especially senior offices of its fourth branch institutions such as electoral commissions. In order to discharge these functions effectively, the checking and appointing chamber must be sufficiently separated from the confidence and opposition chamber. ‘Mixed bicameralism’ achieves that to some degree, as we will shortly see. But further measures are necessary to ensure that the two chambers don’t become mirror images of each other, each controlled by the political executive of the day — that would defeat the point of moderated parliamentarism. Two key measures of the separation of the two chambers, apart from mixed bicameralism are: (i) there should be an eligibility bar for a current or former member of the checking and appointing chamber to contest any partisan elections other than seeking re-election to the same chamber, and (ii) current or former members of the checking and appointing chamber should be ineligible for any appointments or perks that are within the gift of the political executive of the day. These features are essential to guarantee the independence of this chamber from the powerful political executive.

The checking function for legislative proposals is apt for a default simple majority based decision-making rule.⁷⁶ Suitable deviations are advisable on key matters, such as super-majority rules for constitutional amendments and sub-majority rules for preliminary and procedural actions that allow opposition parties to “force public accountability and transparency upon majorities”.⁷⁷ At least in polities with more than one salient political axes, it is unlikely that any single party will have a working majority in the proportionately-elected checking and appointing chamber. The ruling party that dominates the confidence and opposition chamber may well be the largest party in the checking and

76 Kenneth May, “A Set of Independent Necessary and Sufficient Conditions for Simple Majority Decision” (1952) 20:4 *Econometrica* 680.

77 Vermeule, *supra* note 75 at 74.

appointing chamber. Even so, ordinarily, it should still need to convince at least one or two other parties to support a legislative measure if it is to be enacted. Since high executive office will be reserved for members of the confidence and opposition chamber alone, the only consideration the ruling party or alliance can offer to these smaller parties in the proportional chamber in return for their support for legislative proposals is influence on policy (or appointments). Mixed bicameralism therefore incentivises policy-based shifting alliances between parties necessitated by the need for a majority in the checking chamber, forcing the ruling party to take at least a part of the opposition along on most legislative issues.

2. Weighted Multipartisanship

On the other hand, the appointing function is best discharged through *weighted multipartisanship*, rather than through a simple majority rule. Constitutional appointments are best made by a committee of the checking and appointing chamber in which all parties above a threshold number of seats in the chamber have an equal voting strength. The goal is to give an equal say in appointments to the largest 3-7 parties that — together — represent the largest voter types in the polity (comprising at least 60% or so of the electorate). The precise thresholds can vary depending on the context: in highly fragmented polities, a larger number of parties (say, seven) need to be involved, whereas in less fragmented polities, vesting the appointment power in the three largest parties should suffice. The number of appointing parties should never be less than three, however: the process must be *multipartisan*, rather than *bipartisan* or *unipartisan*; furthermore, the voice of the eligible parties should be weighted to make them equal, rather than be proportionate to their seat share. There are, no doubt, other ways to ensure weighted multipartisanship in constitutional appointments. A quick note on *judicial* appointments: they may require special considerations, and a separate judicial appointments commission may well be desirable. Even so, any *political* voice in judicial appointments should still be organised according to the aforementioned weighted multipartisanship principle.

3. Mixed Bicameralism

Moderated parliamentarism adopts *mixed* bicameralism in the sense that it seeks to accrue the benefits of both majoritarian as well as proportional electoral systems in its two distinctive chambers. There is no perfect electoral system because the two goals that elections must serve — representation of the people and constitution of stable and effective governments — pull in different directions. While proportional electoral systems better serve the need to represent all the people, majoritarian electoral systems are better at providing stable and effective governments. Some efforts have been made to combine their respective virtues in what are generally called mixed *electoral systems*. A mixed electoral system is one which *simultaneously* ‘implements the two principles of representation’ — plurality/majority and proportionality — in elections to a ‘particular collective body’.⁷⁸ There are many ways of mixing electoral systems, such as mixed-member proportional representation or parallel voting. Unlike mixed electoral systems, in mixed bicameralism the electoral systems remain (largely) distinct, but are applied respectively to the two chambers of a bicameral legislative. The *mixing* in mixed bicameralism takes place in the representative outcome in the legislature taken *as a whole*: the confidence and opposition chamber is elected using a single-member-constituencies based majoritarian system, while the checking and appointing chamber is elected through a proportional system based on multi-member or at-large constituencies. As Waldron says, since there is “virtue in arranging different bases of legislative representation in *two assemblies*”, it is better to have two legislative chambers “rather than putting all one’s eggs in one basket … and trying to perfect a single scheme of legislative representation”⁷⁹ Since there is no perfect electoral system for representation, a combination of two systems — via two assemblies elected

78 Michalak, *supra* note 18 at 94.

79 Waldron, *supra* note 16 at 76. See also William Riker, “The Justification of Bicameralism” (1992) 13:1 International Political Science Review 101.

on different bases — are likely to complement each other and provide more optimal representation than a single assembly.⁸⁰

4. Moderated Electoral Systems

Under moderated parliamentarism, the majoritarian electoral system used to constitute the confidence and opposition chamber as well as the proportional electoral system for the checking and appointing chamber are both *moderated*. The mechanism for moderation in each case is different, but they do not transform either system into a *mixed* electoral system. The most common mode of moderating the proportionality of a proportional electoral system (short of mixing it with elements of majoritarianism) is the use of electoral thresholds. Almost all proportional systems around the world moderate the proportionality of an exact translation of votes into seats in some manner. Requiring an electoral threshold — the minimum number of votes a party must win in order to secure any seats at all — mitigate the proportionality of the system somewhat. Without any thresholds, the total number of parties that win seats in the chamber can be extremely large.

While parties must be *an* object of voter choice, moderated parliamentarism is compatible with the electoral system being either ‘closed list’ (*i.e.* where voters vote for a party alone) and an ‘open list’ (where they may have at least some influence over the ordering of candidates on their preferred party’s list). Moderated parliamentarism is also compatible with the checking and appointing chamber being elected from either an at-large constituency of the entire polity, or from several multi-member constituencies — so long as the size of these constituencies is sufficiently large.⁸¹ As we have already noted, district magnitude has a positive relationship with the proportionality of the outcomes

⁸⁰ Waldron, *ibid* at 77–78.

⁸¹ Multi-member constituencies may be most appropriate for federal states, which often need to extend a federal dimension to the “upper chamber”; in federal polities, then, each province or state can count as one constituency. Assessment of any disproportionality introduced in the checking and appointing chamber to accommodate federalism is beyond the scope of this article.

— larger the constituency district, more proportionate will the result be. However, systems like the single transferable vote get uncomfortably close to a mixed model, inasmuch as they can distract the voter too far from focussing on the party and pay too much attention to the individual candidates.⁸² The goal is to create a checking and appointing chamber that is largely (but not purely) proportional.

The majoritarianism of majoritarian electoral systems can also be mitigated, without adopting a mixed electoral system. The most commonly used majoritarian system — first-past-the-post system — adjudges the candidate or party with the most number of votes as the winner of an election. The system is described as ‘majoritarian’ because it is designed to squeeze out smaller parties, although it is very difficult for any candidate to secure an actual majority of the votes cast in a contest between more than two credible candidates. Very often, therefore, the winner of an election in a first-past-the-post majoritarian system only secures a plurality of the votes cast. This is what hurts minority parties (and minority voter types that they represent) — it is entirely possible for a minority party with geographically dispersed (rather than concentrated) popular support to secure 20% of the votes nationwide without winning a single seat in its legislature under first-past-the-post. It is also possible for the winning party to secure a simple majority of seats in the legislature with as little as 30% of the popular vote. The system over-translates the winner’s vote-share into seat-share.

The main way to mitigate the majoritarianism of the first-past-the-post system — without opting for a mixed electoral system — is by changing its ballot structure from categorical to individual. Forcing — or even permitting — voters to favour more than one candidate reduces polarization and incentivises parties to build broader coalitions. A individual ballot is normally used for multi-member districts, but there is no reason why they cannot be employed in single-member constituencies. Two forms are possible: a cardinal individual ballot (*approval vote*) or an ordinal individual ballot (*ranked-choice or preferential vote*). In

82 Marsh shows that a majority of Irish voters in single transferable vote elections were primarily candidate-centred. Michael Marsh, “Candidates or Parties?: Objects of Electoral Choice in Ireland” (2007) 13:4 Party Politics 500.

a fully optional approval vote system, each voter is allowed to *approve* as many candidates as she thinks are electable. She may concentrate her approval in a single candidate, or two, or five. In a mandatory approval vote system, she may be required to approve at least (say) two candidates. In a limited optional approval vote system, she may be permitted to approve up to (say) four candidates. The candidate who secures the most votes wins.

An ordinal didual ballot also permits a voter to vote for multiple candidates. However, unlike a cardinal didual voting system, she can allocate different weights to her preference for different candidates. She must/may rank all/any/some (such as her top two) of the candidates in her order of preference.⁸³ Only the first-ranked votes are counted in the first round. If no candidate crosses the 50% mark in the first round, the candidate with the least number of first-choice votes is eliminated and the second-choice preferences of her voters is distributed to the other candidates. The process is repeated until one candidate crosses the 50% threshold, or only one candidate remains. A different way of counting is to eliminate all but the top two candidates after the first round and distribute the second-preference votes of all eliminated candidates to the two candidates still in the fray.

Whether cardinal or ordinal, both moderation techniques employing a didual ballot have the same goal: of politically rewarding parties and candidates who are closer to the median voter. Because every voter has the same voting capacity, the egalitarian principle behind one-person-one-vote is not violated. The effect of either approach is to moderate the relatively harsher impact that first-past-the-post system has on minority voter-types. The didual ballot system in single-member constituencies is still not proportionate, for minority parties would still fail to translate their votes into seats proportionately; winning parties are still likely to over-translate their votes into seats. But the majoritarianism of the first-past-the-post system is nonetheless moderated.

83 On preferential vote, see Benjamin Reilly, “Centripetalism and Electoral Moderation in Established Democracies” (2018) 24:2 Nationalism & Ethnic Politics 201.

5. Asynchronous Electoral Schedules

Finally, further *systemic* moderation is achieved, and a legitimacy tie is avoided, by adopting specific electoral schedules. Elections to the confidence and opposition chamber must be wholesale, given the nature of parliamentary systems. Because they can fire, and be fired by, the premier, the terms of the confidence and opposition chamber are also going to be variable (subject to a maximum limit). Holding the elections for the two chambers largely asynchronously rather than at the same time is likely to increase the moderation in the system — the qualification ‘largely’ permits some elections to take place simultaneously for feasibility reasons, but requires as much temporal separation between them as possible. The overall term of office for the legislators in the checking and appointing chamber should be longer (say, around six to ten years) than the maximum term of the confidence and opposition chamber (with an upper limit, say, between four and six years). A staggered electoral schedule for the checking and appointing chamber, with a fraction (rather than the whole) of its membership retiring every few years should further gear the system towards moderation. This combination of electoral schedules (longer, staggered, terms versus shorter, wholesale, renewal) must be organised in a manner that ensures that the confidence and opposition chamber, as a whole, *always* has a more recent mandate than the checking and appointing chamber. This way, a legitimacy tie between the two chambers can be avoided. The relative temporal freshness of the confidence and opposition chamber is important to ensure that the checking and appointing chamber does not seek to usurp its confidence-supplying role.

6. Deadlock-Resolving Conference Committees

While moderated parliamentarism avoids a legitimacy tie, it still opts for symmetrical *legislative* powers between the two chambers. This sets the system up for the possibility of a legislative *impasse*, thereby necessitating an efficient and party-conscious deadlock-resolution mechanism. A good mechanism to

resolve a legislative deadlock — if a *navette*,⁸⁴ i.e. the legislative shuttling of the proposal between the two houses, fails to resolve the matter — is through a party-conscious conference committee system. Conference committees are widely used to resolve differences between legislative chambers and facilitate a compromise solution. The conference committee mechanism may be designed in many ways, so long as it ensures that the ruling party/alliance needs secure the consent of *some* opposition parties in order to get the controversial legislation enacted. Here is one way such a committee may be designed under moderated parliamentarism:⁸⁵ each house may nominate (say) ten members to a joint standing conference committee of the legislature. The confidence and opposition chamber's nominees represent the strength of the parties in the house proportionately. The checking and appointing chamber, on the other hand, nominates members in accordance with the weighted multipartisanship principle employed for constitutional appointments: it could send (say) two nominees from each of its five largest parties. What is important is that all major parties that represent a significant portion of the population in the chamber should be represented, and that the representation of parties from this chamber should be weighted to be equal rather than be proportional to their seat share. The joint committee may hammer out a compromise Bill by a majority vote of the combined membership (rather than through the unit rule — in which a majority of the members of each house must support the compromise, making a compromise harder to be achieved). Other measures that increase the likelihood of cross-partisan compromise may also be adopted: such as guaranteeing the secrecy of deliberations (at least for a limited period of time) and a bar on amendments to the conference committee proposals (such that each chamber can only accept or reject it). The awareness that the compromise proposal will still need to secure a simple majority in each house should

⁸⁴ George Tsebelis & Jeannette Money, *Bicameralism* (Cambridge: Cambridge University Press, 1997) at 55.

⁸⁵ The model is based on the German conference committee system. See generally, *ibid* at 181.

constrain the outcomes the committee endorses. The likely compromise may not have consensus, but it will have to be multipartisan in order to be enacted.

Weighted multipartisan conference committees are an attractive mechanism for resolving institutional disagreements. No single opposition party, acting on its own, can bring the government's legislative business to a halt. So, deadlocks don't become a persistent feature of the polity — governments can still eke out legislative victories. But, unlike unmoderated parliamentarism, legislative victories are not normally guaranteed to governments in moderated parliamentarism. They can win only if they are politically nimble, and accommodate at least some opposition parties (even if these are different parties at different points in time). Opposition parties can veto a legislative proposal, but usually only by acting in concert. While the prospect of a legislative loss to the government is real, it is not catastrophic (*i.e.* a legislative defeat in the checking chamber does not signal a loss of confidence and, therefore, executive office). Moderated parliamentarism avoids both extremes of governmental dysfunction and regime instability associated with divided government under presidentialism,⁸⁶ and unfettered government under unmoderated parliamentarism.⁸⁷

86 Ginsburg & Huq, *supra* note 1 at 176–86.

87 Scott Prasser, JR Nethercote & Nicholas Aroney, eds, *Upper Houses and the Problem of Elective Dictatorship* (Perth: University of Western Australia Press, 2008).

Once we combine the different features of moderated parliamentarism, the following picture emerges:

	District Magnitude	Object of Voter Choice	Ballot Structure	Electoral Schedule	Deadlock Resolution
Confidence & opposition chamber	Single-member constituencies	Candidate	Dividual	Wholesale, asynchronous, Shorter & Variable Term	Conference committee
Checking & appointing chamber	Large multi-member or at-large constituencies (with threshold)	(Primarily) Party	Categorical	Staggered, asynchronous, Longer & Fixed Term	Conference committee

The intended effects of these features, in Lijphart's terminology, is to create a bicameral legislature that is incongruent and symmetric.⁸⁸ A bicameral legislature is incongruent when the two chambers are likely to have different partisan makeups;⁸⁹ moderated parliamentarism seeks to achieve partisan incongruence through the different electoral system and asynchronous electoral schedules, with staggered elections and longer terms for the checking and appointing chamber. Chambers are symmetric, on the other hand, if they have equal legislative powers. Moderated parliamentarism gives equal legislative powers to both chambers, and is therefore symmetric. Even so, it avoids a legitimacy ties between the chambers using temporal tools to justify vesting the confidence function in one of the two chambers alone. Furthermore, it greatly

⁸⁸ Arend Lijphart, *Patterns of Democracy* (New Haven, CT: Yale University Press, 1999) at 198.

⁸⁹ Cf. Tsebilis & Money, *supra* note 84 at 53–54 who argue that even with partisan congruence, it is possible for two chambers to have non-identical preferences on some matters because of other factors.

reduces the likelihood of an impasse through the multipartisan conference committee mechanism.

Readers can see that while moderated parliamentarism demands certain features, it leaves many design choices open. In particular, it is fairly ambivalent about the specific form of proportional representation that should be adopted for the second chamber — much will depend on the particular issues in the state concerned. A form of proportional representation that is desirable for a deeply divided country with a territorially concentrated minority population may not at all be suitable for a state where the main political division is ideological along a left-right spectrum, and dispersed more or less evenly across its territory. There may also be reasons to accommodate the federal character of the state in its checking and appointing chamber through multi-member constituencies mapping onto existing state boundaries. The dilution of the value of urban votes in majoritarian systems can also be compensated by extra representation for these areas in the checking chamber.⁹⁰ In the rest of this article, I will argue that moderated parliamentarism is a good way to optimize the four constitutional principles we have identified in relation to political parties.

V. In Defence of Moderated Parliamentarism

Other things being equal, moderated parliamentarism is likely to better optimise all four of the constitutional principles in relation to political parties that we identified in Part III. In this part, we will see how.

A. Purposive Autonomy Principle

The purposive autonomy principle requires the design of the partisan state to be one that nurtures healthy parties and party systems, *i.e.* a system where most parties effectively perform their bidirectional and plenary intermediary function by keeping these four democratic costs relatively low: voters' information cost, political participation cost, policy packaging cost, and ally prediction cost.

90 On the dilution of the urban vote under majoritarianism, see Ran Hirschl, *City, State: Constitutionalism and the Megacity* (Oxford: Oxford University Press, 2020).

Moderated parliamentarism facilitates the realisation of the purposive autonomy principle by enhancing the capacity of parties to enable them to perform their unique bidirectional intermediation function between the state and its people in five key ways.

First, the parliamentarism of the confidence and opposition chamber increases the likelihood that the link between the state and the people remains firmly routed through the political party. Although individual leaders may well reduce some of the transactional and informational costs associated with representative democracy, especially with the aid of social media, they are unlikely to be as efficient in doing so as a collective organisation like a party, at least not over an extended period of time. It is difficult, if not impossible, for an individual to have sufficiently developed plenary policy platform on all matters of governance.

The main difficulty with presidential regimes is that they allow presidents to compete with their parties for the intermediary function. In their influential book that comprehensively analyses data from all democracies between 1945 and 2007, Samuels and Shugart have shown that presidential systems are not ideal for nurturing a healthy party system. Their argument begins by noting that presidential and parliamentary regimes differ in two key respects: (i) the *electoral incentives* in parliamentarism are unified for the leader and her party — they sink and swim together. In presidentialism, these can, and often do, come apart.⁹¹ (ii) the guaranteed survival of the presidency for a fixed term means that there is little, if any, *intraparty accountability* of the leader to her colleagues, unlike in parliamentary regimes. Thus, the checks and balances that presidentialism secures *across branches* comes at the cost of their absence *within the party*.⁹² The impact of these differences, they argue, is that presidential systems are likely to see ‘presidentialized’ parties, whereas parliamentary systems

91 See also Nina Wiesehofer & Kenneth Benoit, “Presidents, Parties, and Policy Competition” (2009) 71:4 *The Journal of Politics* 1435.

92 David J Samuels & Matthew S Shugart, *Presidents, Parties, and Prime Minister: How the Separation of Powers Affects Party Organization and Behaviour* (Cambridge: Cambridge University Press, 2010) at 15.

are more likely to have ‘parliamentarized’ parties. The key difference between these two party-types is that in a parliamentarized party, the party is the principal and its leader is its agent; in a presidentialized party, that relationship is absent — instead, the leader has a significant degree of autonomy from the party.⁹³ They admit that exceptions may exist such that we may witness presidentialized parties under parliamentarism, and vice versa — but they present evidence to show that these exceptions are “usually ephemeral … because of the inescapable logic of such regimes”.⁹⁴ While individual charismatic prime ministers may seek to forge a direct, personal, link with the electorate, their vulnerability to the support of their parliamentary party ensures that the ruling party/coalition is more likely to remain more important to their survival in office than it is for a president in a presidential or a semi-presidential system. Parliamentary and semi-parliamentary systems do not split electoral accountability for *governance* between two different institutions: the confidence and opposition chamber, and the cabinet as *its* most powerful committee, remain the joint bearers of political accountability to the electorate. Their electoral fortunes sink or swim together. Samuels and Shugart argue that even in semi-presidential systems, although the Prime Minister may act as an agent of her party, the President “may be able to *reverse* the principal-agent relationship, making the prime minister an agent of the president rather than the party”⁹⁵

Without passing an all-things-considered judgment on presidential and semi-presidential systems, we could tentatively conclude that to the extent they tilt the balance against party organization and in favour of individual party leaders, the purposive autonomy principle will be less keen on these systems. In order to be autonomous, parties ought to have considerable control over their members — *especially* its leaders — including the power to discipline and expel them. A weak party organisation, dominated by its leader, is likely to be too top-heavy to effectively perform its *bidirectional* function as an intermediary between

93 *Ibid* at 16.

94 *Ibid* at 18.

95 *Ibid* at 19.

the state and the people. While it is true that Prime Ministers often act like Presidents, and there have no doubt been Presidents who are more ministerial in their functioning, the ability of a legislature to fire the executive leadership at will allows the ruling party or coalition to change the Prime Minister whenever the latter's interests diverge sufficiently from those of the party's. Furthermore, the role of parties *between* elections is likely to be different in presidential and parliamentary regimes. Presidentialized parties are more likely to ebb and flow, becoming active around elections and relatively dormant between elections by ceding the policy space to the government. Parliamentarized parties, on the other hand, are more likely to continue to function between elections, and are more likely to perform their bidirectional and plenary intermediary function continuously rather than cyclically. Thus, parliamentarism and semi-parliamentarism — which allow the legislature (or a part thereof) to fire the top political executive leadership at will — are more likely to be conducive to the purposive autonomy principle.

The second feature highlights the superiority of moderated parliamentarism over pure parliamentarism. Pure parliamentary systems require the ruling party's internal rebellion to reach a critical mass before it affects the leadership. This feature means that as long as the number of internal dissenters remains under a threshold, the leadership can more or less ignore them, or indeed bully them into silence. While presidential systems can make the party largely irrelevant to president between elections, pure parliamentary systems allow powerful prime ministers to ignore below-threshold dissensions in the party ranks. Moderated parliamentarism corrects this weakness of the party vis-a-vis its leadership in pure parliamentarism through the checking and appointing chamber. The following features are designed to ensure the relative independence of the members of the ruling party in this chamber from the political executive (which is usually also the party leadership): relatively longer term of these members, asynchronous and staggered elections compared to those for the confidence and opposition chamber, and the ban on their candidature for any elections other than seeking re-election to the checking and appointing chamber. In effect, upon becoming a member of the checking and appointing chamber, a legislator

can only nurse two political ambitions: continued membership of the same chamber through re-election or a political appointment within the gift of this chamber (rather than the political executive). These limited ambitions ensure that the partisan tie is retained.⁹⁶ Legislators will remain accountable to the party in order to be successfully re-elected on the party ticket, but with somewhat greater protection from the political executive of the day than they might have under pure parliamentarism or other forms of semi-parliamentarism. At any rate, the key attraction of moderated parliamentarism is that the incongruent checking chamber — taken as a whole — is genuinely independent of the political executive. The fact that members of the ruling party in that chamber are still beholden to the party leadership is less of a problem because they are unlikely to hold a majority in the checking chamber. The checking function of the legislature is, therefore, made feasible *without* weakening the bond between the party and its legislators — a structure that optimises the centrality of the bidirectional intermediation function of political parties.

Third, single-member — and therefore smallish — constituency-based elections to the confidence and opposition chamber necessitate party structures to seep into the local level, allowing a closer connection between the party — through its local representative — and the people. Unlike presidents, who can compete with their parties for the intermediary function, local members of parliament tend to have a symbiotic rather than a parasitic relationship with their parties — their political fates tend to be closely aligned such that — like prime ministers — they usually sink or swim together with their party. This allows for a representative model that strengthens, rather than weakens, the party's bidirectional intermediation role.

96 Julie VanDusky-Allen and Willian Heller argue that candidate selection under bicameralism tends to become centralised because party leaders seek coherence between the parliamentary parties in the two chambers: Julie VanDusky-Allen & William B Heller, “Bicameralism and the Logic of Party Organization” (2014) 47:5 Comparative Political Studies 715. This is a strength, rather than a weakness, of moderated parliamentarism, which seeks to encourage strong, autonomous, parties capable of enforcing party discipline politically.

Fourth, a individual ballot for the election of the confidence and opposition chamber can reduce the policy packaging and ally prediction costs more effectively than a first-past-the-post ballot. A individual ballot incentivises parties to build loose pre-electoral coalitions based on specific policy agreements. Smaller parties extract policy concessions from governance parties in return for advising their supporters to rank their larger ally as their number two choice or to approve the candidates of their larger ally.⁹⁷ If some of the weight of inter-party ally-identification and policy-packaging is moved prior to elections, these costs are likely to be even lower for the party or coalition in power, as well as for state institutions.

Finally, mixed bicameralism separates plenary *governance* parties — that are more likely to control the confidence and opposition chamber — from single-issue *influence* parties — that are more likely to exercise proportional influence in the checking and appointing chamber. This bifurcation permits some influence to single-issue parties, but incentivises plenary policy platforming by *governance* parties (*i.e.* parties that are serious about winning executive power). This feature of mixed bicameralism is likely to enhance the plenary intermediation role of parties better than many of its alternatives.

B. The Party System Optimality Principle

Moderated parliamentarism is good for party system optimality, which requires that party systems should be optimised such that the total number of serious political parties is large enough to broadly represent every major ‘voter type’, but not so large that the information costs on judicious voters are too high. Moderated parliamentarism is particularly apt at making a party system optimal. The mixed bicameralism of the system allows all above-threshold parties to be represented in the checking and appointing chamber. It is unlikely that any salient voter type will be left unrepresented in this chamber. Under a pure proportional system, lacking any threshold, the number of parties in the checking and appointing chamber can become so large that the voter

97 Reilly, *supra* note 83.

information costs become unreasonably high. On the other hand, unlike a purely majoritarian system, smaller parties are unlikely to be squeezed out of the party system entirely. The power and influence they acquire in the checking and appointing chamber are meaningful enough to make these parties electorally sustainable. Furthermore, the moderation in the individual ballot structure of the confidence and opposition chamber — by basing it on approval vote or preferential vote — also gives smaller parties considerable pre-electoral influence over the larger parties that are likely to dominate that chamber.⁹⁸

On the other hand, the majoritarianism of the confidence and opposition chamber combined with the threshold in the checking and appointing chamber can ensure that the fragmentation of the party system does not go too far. A reasonably (but not very) high threshold is necessary to keep the voters' information costs low — the proliferation of a very large number of parties makes democracy difficult. Furthermore, too many parties fragment the polity excessively, such that the economies of scale that politics through parties affords start decreasing, thereby affecting the citizens' political participation costs. Moderated parliamentarism is, therefore, committed to avoiding an artificial two-party system in a polity that is divided by more than one salient ideological axis, while at the same time ensuring that the system keeps a check on the total number of parties becoming too large. What is more, it seeks to realize this entirely through second-order regulation.

C. The Party-State Separation Principle

The party-state separation principle requires the state to ensure a separation of parties and the state. Unlike the other three principles, which are *good* for democracy, the party-state separation principle is *essential* to democratic functioning of any state. A system that permits the ruling party to entrench itself in state institutions is — definitionally — no longer a democracy. There are many features of moderated parliamentarism that facilitate the separation of the state and the ruling party/coalition.

98 *Ibid.*

First, a key the supposed virtue of presidential regimes is that the separation of executive and legislative power ensures the possibility of two — rather than one — ruling parties, controlling different branches of the elected state. The main problem with a regime with two ruling parties — in opposition to each other rather than in coalition — is the possibility of a legitimacy tie. A democratic legitimacy tie between a directly elected president and a directly elected legislature is either going to result in an insurmountable — and, therefore, status-quoist — deadlock, or one institution — typically the presidency — asserting itself over the other (thereby changing the character of the regime into a sort of super-presidential system).⁹⁹ The first possibility leads to a libertarian state, the second to an authoritarian one — as default, rather than considered, outcomes of institutional architecture, they are both undesirable. Like presidentialism, moderated parliamentarism also clips the wings of the ruling party/coalition significantly, but without creating destabilising legitimacy ties or irresolvable deadlocks.

Secondly, the incongruent (and, therefore, independent) checking and appointing chamber is a significant check on the ruling party and the political executive. Waldron's main caveat when defending what I have characterised as mixed bicameralism was that the second chamber must be functionally independent of the political executive.¹⁰⁰ The point of the system is to ensure that the ruling party is unlikely to be able to dominate this chamber in the way that it might dominate the confidence and opposition chamber. Features such as staggered (as opposed to wholesale) elections to the checking and appointing chamber, and its asynchronous (rather than simultaneous) electoral schedule vis-à-vis the other chamber are designed to make it even less likely that the partisan

99 On super-presidentialism, see Michael S Fish, "The Executive Deception: Superpresidentialism and the Degradation of Russian Politics" in Valerie Sperling, ed, *Building the Russian State: Institutional Crisis and the Quest for Democratic Governance* (New York: Routledge, 2000) at 177.

100 Waldron, *supra* note 16 at 81–85. See also Nicholas Aroney & Steve Thomas, "A House Divided: Does MMP Make an Upper House Unnecessary for New Zealand" (2012) 2012:3 New Zealand Law Review 403.

makeup of the two chambers will mirror each other.¹⁰¹ Putting the point in more traditional institutional (rather than partisan) terms, Waldron argues that each house can check the other's abuse of power if both must concur to enact a legislation.¹⁰² Tsebelis and Money have shown that houses being forced into navette (shuttling) upon disagreement can itself have a considerable influence on legislative outcomes, even in contexts where the second chamber does not formally wield a veto.¹⁰³ The joint conference committee mechanism in place if navette fails is especially useful for forcing the ruling party to a compromise position that is acceptable to at least some opposition parties. Independence of the checking and appointing chamber is also furthered by a lifetime bar on members of the checking and appointing chamber to be eligible for any partisan election other than a re-election to this chamber, as well as for any appointments or perks that are within the gift of the political executive of the day. In particular, because the prime minister must draw all her ministerial colleagues from the confidence and opposition chamber alone, she cannot dangle ministerial posts to secure long-term allies in the checking and appointing chamber. No doubt additional or alternative mechanisms to secure the independence of the checking and appointing chamber may be necessary in particular contexts.

Thirdly, although the need to avoid a legitimacy tie requires the confidence and opposition chamber to always have the most recent mandate, the conference committee mechanism for deadlock resolution does not afford either chamber the final say. As a form of parliamentarism, legislative initiative is likely — for most part — to remain with the ruling party or coalition. However, moderated parliamentarism requires the ruling party to secure the consent of at least some opposition parties in order to get its legislative business through; on the other

¹⁰¹ Bicameral legislatures with staggered electoral schedules are unlikely to affect the important of political parties in parliamentary systems generally: David M Willumsen, Christian Stecker & Klaus H Goetz, "The Electoral Connection in Staggered Parliaments: Evidence from Australia, France, Germany and Japan" (2018) 57:3 European Journal of Political Research 759.

¹⁰² Waldron, *supra* note 16 at 78–80.

¹⁰³ Tsebilis & Money, *supra* note 84 at ch 6–7.

hand, the likely multipartisan (rather than bipartisan) character of the checking chamber should ensure that the political opposition can block a governmental legislative proposal only if it opposes it in concert. In other words, moderated parliamentarism does not allow the winner to take all, but at the same time, does not make the winner's agenda to be held hostage to an intransigent opposition party. Complex political negotiations would still be necessary for the ruling party to prevail legislatively. Unlike the British system, where the Commons can institutionally override the Lords on most matters,¹⁰⁴ under the proposed model, deadlocks between the two chambers are resolved politically rather than institutionally. Furthermore, unlike the US model, where the combination of a two-party system alongside a legislative process with three institutional veto players (the two houses and the President), moderated parliamentarism does not have an ideological tilt towards small-state libertarianism (which is what any system riddled with frequent and irresolvable institutional deadlocks is likely to come to embody).

Fourthly, moderated proportionality of the checking and appointing chamber ensures that there is no significant over-translation of votes into seats in this chamber. This is a further check on the power grab opportunity that a pure first-past-the-post system affords to the ruling party. Admittedly, the confidence and opposition chamber is indeed majoritarian, and will, therefore, overtranslate the votes of the ruling party/coalition into seats. For reasons we will shortly consider, this is necessary to check factionalism in the polity. But by ensuring a proportional checking and appointing chamber, a balance of sorts is achieved.

Finally, in moderated parliamentarism, appointments to key unelected constitutional offices (such as to the senior judiciary and fourth branch institutions such as electoral commissions) are made by the checking and appointing chamber — either directly on its own or through its weighted multipartisan appointing committee, with the consent of or consultation with other relevant stakeholders, where necessary. Oversight of non-judicial fourth

¹⁰⁴ See *Parliament Act 1911* (UK), 1 & 2 Geo V, c 13; *Parliament Act 1949* (UK), 12, 13 & 14 Geo VI, c 103.

branch bodies is also the domain of a weighted multipartisan legislative committee. Given the proportional character of the checking and appointing chamber, it is unlikely to be dominated by any single political party. Furthermore, it makes appointment decisions through a process that over-weights the voice of the larger minority parties, rather than through a simple majority of members. This can be achieved by providing (say) the largest five parties in the chamber an equal vote in the appointments committee. Alternatively, (say) the five largest parties may each get to nominate candidates who may then be selected through a single transferable vote in the assembly. Whatever the chosen method, the idea is to avoid a simple majority rule that would allow the one or two dominant parties to make most appointments themselves. This is achieved by amplifying the voices of at least the larger of the small parties through weighted multipartisanship. It is important, however, that whatever decision-making process is selected does not give any party the power to prevent any appointment from being made — it is one thing to be given a voice in a decision, quite another to stall any decision on the matter entirely. Important constitutional offices cannot be left unoccupied because of intransigent veto players. Combined with the proportional character of the assembly, this mechanism should ensure that constitutional appointments are made jointly by all political parties that have won a significant measure of the democratic mandate, rather than by the majority party through a winner-takes-all mechanism. The ruling party or coalition should find it a lot more difficult under these conditions to capture or compromise the autonomy of key constitutional offices.

D. The Anti-Faction Principle

The very nature of factions is such that they are at best indifferent to the interests of a part of the demos; at worst, they seek to exclude a part of the demos from the polity itself. They tend, therefore, to be polarising — voters that a faction seeks to exclude are overwhelmingly likely to detest it, whereas another group of voters may well like the faction precisely because of its hostility to the targeted group. No electoral system can effectively check a faction in a polity where the

size of the hateful group far outweighs that of the hated group.¹⁰⁵ Other constitutional measures, such as consociational guarantees, for the hated group may be necessary, even in a moderated parliamentary system.

In polities where factions do not have overwhelming popular support already, moderated parliamentarism incentivises parties to not act as factions. It seeks to moderate factions that represent a salient voter type by keeping them within the system, and affording them with some voice, while simultaneously ensuring that their access to power is limited. Moderated parliamentarism exerts a firm, but not overwhelming, centripetal force on the polity, moderating and, over time, eliminating factions. However, unlike the party-ban approach of some continental jurisdictions, moderated parliamentarism does not outlaw factions as a general matter. The feasibility and efficacy of ex post first-order regulations such as party bans in containing factions is questionable in any case.¹⁰⁶

The individual vote system in the confidence and opposition chamber is likely to make it difficult for factions to win executive power.¹⁰⁷ Polarising parties, like *Marmite* (a horrible-tasting British condiment that is inexplicably adored by some people), are either loved or hated. Under approval vote, factions will be disapproved by voters who hate them, but more tolerable centrist parties are likely to be approved even by voters who are only lukewarm in their support for them. Under preferential vote, factions are likely to be a voter's first choice, or last. In circumstances where no party is likely to secure 50% of the votes in the first count, a preferential vote system forces parties to vie not just for the rank one vote, but also enough rank two votes to win a contest. In other words, the individual ballot forces parties to ask voters to at least tolerate them, even if they are not their first choice. This encourages parties to be broad churches, and to

¹⁰⁵ Reilly, *supra* note 83 at 207.

¹⁰⁶ Tom Gerard Daly & Brian Christopher Jones, "Parties Versus Democracy: Addressing Today's Political-Party Threats to Democratic Rule" (2020) 18:2 International Journal of Constitutional Law 50.

¹⁰⁷ Donald L Horowitz, "Where Have all the Parties Gone?" (2007) 133:1 Public Choice 13.

speak to the interests of a larger group of people. Dividual ballots are, therefore, a key centripetal mechanism.

A dividual vote system is also a more sophisticated centripetal tool in comparison with the first-past-the-post system. It has been long recognised that a majoritarian system like first-past-the-post tends to move a polity towards a two-party system, by squeezing out smaller parties ('Duverger's Law').¹⁰⁸ But first-past-the-post is an unsophisticated tool that punishes all smaller parties indiscriminately by denying them power *and* influence. Ironically, the only small parties that are likely to flourish under first-past-the-post are factionalized parties that target geographically-concentrated ethnic groups. Reilly shows, however, that while preferential vote systems also deny executive power to smaller parties, they tend to confer significant influence on smaller parties that don't operate as factions.¹⁰⁹ Essentially, parties like the Greens are able to advise their voters on which large party to put down as their second preference in return for policy deals reached with such parties. In addition, because factionalism is penalized by the system, larger parties are more likely to be reluctant to enter into similar deals with smaller factionalized parties like the Australian One Nation Party. Similar benefits should accrue under approval vote. Thus, a dividual ballot in a single member constituency not only distinguishes between governance parties and influence parties, it also privileges non-factional influence parties over factional ones.

That said, the dividual ballot has its limitations. Even as it distinguishes between the Greens and One Nation Party, this system does not distinguish between a hateful dominant group party seeking to exclude a minority, and a party for a hated minority group seeking inclusion. Both types of parties are likely to suffer in a dividual ballot, even though only the former will qualify as a faction under our model. It will, therefore, require parties seeking to help vulnerable sections to organise themselves on non-identitarian or multi-

¹⁰⁸ Maurice Duverger, *Political Parties*, translated by Barbara North & Robert North (New York: John Wiley & Sons, 1954) at 217f.

¹⁰⁹ Reilly, *supra* note 83.

identitarian bases if they are to win elections. This should not worry us too much because in a well-functioning individual ballot system, concerns of disadvantaged groups should be part of the broad church built by the centrist parties; at any rate, centrist parties are likely to be less hostile ideologically to inclusive parties representing disadvantaged groups than they will be to exclusionary factions (and, therefore, more willing to accommodate the policy preferences of non-factional small parties in exchange for legislative support in the checking and opposition chamber).

The total exclusion of factions from politics may not be desirable, because if they have no stakes in the system, they will seek to upend it. Furthermore, organising a polity solely around a moderated majoritarian system (through a individual ballot) may reduce the ideological distance between the major parties too much — as all the large parties are nudged towards the median voters, there is a danger that they become mutually indistinguishable, and dramatically reduce voter choice. For both these reasons, the checking and appointing chamber in moderated parliamentarism is elected proportionally through a categorical, cardinal, vote. This allows factions some voice in the system, without letting them close to executive power. It also keeps the larger parties on their toes, for they are constantly forced to appeal to voters of smaller parties without losing the median voter. Essentially, the bicameral system forces parties to stretch across the extant political spectra, rather than artificially nudge them towards the centre, leaving swathes of voters without effective representation. A system in which all representation was proportional would struggle to check or moderate factions. It may even incentivise factionalism, for it may even be easier for a small party to secure 10% of the vote share through a distinctive polarising campaign than by competing with the larger parties that speak to and for all the people.¹¹⁰ Unmixed proportional systems, therefore, can exert a significant centrifugal force on the polity by encouraging smaller parties to distinguish

¹¹⁰ See Daniel Weinstock, “Sites of Deliberation in Contemporary Electoral Systems” (2015) 9:2 Journal of Parliamentary & Political Law 291 at 301 (on “targeting”).

themselves by operating as factions.¹¹¹ The only ways to cancel this centrifugal incentive in an unmixed proportional system is to either impose very (rather than ‘reasonably’) high proportionality thresholds for converting votes to seats, or to ban extremist parties through party-ban mechanisms. Moderated parliamentarism avoids both of these extreme responses. Like first-past-the-post systems, these heavy-handed exclusionary tools can be counterproductive, inasmuch as they can fuel a faction’s politics of resentment in an ‘unfair’ system.¹¹² Sure, unmixed proportional systems may yet allow that the legislature — acting as a whole — balances out competing interests. But this cannot be ensured: in particular, if factions hold the balance of power, they may have an enormous influence on governmental policy. Furthermore, the polity can be irreparably damaged by too many factional parties wielding governmental influence or power, even if the legislature as a whole represents all major factions. In moderated parliamentarism, factions have a limited expressive platform in the checking and appointing chamber, and may occasionally wield the power to influence legislative power in exchange for supporting governmental proposals. Even then, to have a meaningful influence, they will still need to count as one of the five (or so) largest parties in the checking and appointing chamber — only then can they secure a seat in the joint conference committee which hammers out compromises. Factions in moderated parliamentarism are

¹¹¹ This may well be the most significant reason for preferring moderated parliamentarism over a Greek-style unicameral legislature that is elected on a proportional basis, but the largest party is allocated a large number of bonus seats (say 50) to secure its majority in the chamber. Such a system can approximate to many other benefits of moderated parliamentarism, but fails to provide a sufficiently centripetal impetus to the larger parties, promoting political polarization: George Tsebelis, “The Greek Constitution from a Political Science Point of View” (2014) 2014:42 *Greek Political Science Review* 145 at 166.

¹¹² Daly & Jones, *supra* note 106; Party bans are a key technology for ‘militant democracies’. See also, Jerg Gutmann & Stefan Voigt, “Militant Constitutionalism: A Promising Concept to Make Constitutional Backsliding Less Likely?” (2021) *Public Choice*, who distinguish militant democracy from militant constitutionalism.

provided some space within the system to ensure that they don't have the incentive to destroy the system. But their influence and power within the system is kept firmly in check. There is no ideal approach to factions in politics — their existence itself is unideal. Moderated parliamentarism believes in charting a course that discourages and manages them, rather than outlawing them or letting them flourish.

Mixed bicameralism therefore optimises the strengths and weaknesses of both major types of electoral systems. And, it does so better than a hybrid or mixed electoral system. The latter system seeks to combine the virtues of the two systems in the same assembly — its success in doing so has been doubted. Mixed bicameralism, on the other hand, maximises the virtues and moderates the ill-effects of each system in different chambers. Michalak shows that “mixed electoral systems certainly are – apart from the two existing, traditional types of electoral systems – a separate, third class of electoral systems … they have created a completely new entity which cannot be reduced to the sum of the results produced by their majoritarian and proportional components”.¹¹³ Mixed bicameralism, on the other hand, preserves the two traditional systems in each chamber, albeit moderated. Unlike mixed electoral systems, mixed bicameralism allows only the majoritarian part of the representative unit to select the political executive, while reserving the important checking and appointing functions for the proportional part. Furthermore, a dvidual ballot flourishes in a multiparty system — where electoral outcomes are more likely to be uncertain — rather than a two-party one. There is no point ranking or approving multiple candidates in a two-horse race: it makes no difference whether the ballot is categorical or dvidual, or cardinal or preferential, if there are only two candidates in the fray. A proportional chamber, which encourages the growth of multiple parties, may be necessary to ensure that a de jure preferential system does not become a de facto first-past-the-post two-party system. These nuanced outcomes would be impossible to achieve in a mixed electoral system that constitutes a unicameral assembly.

¹¹³ Michalak, *supra* note 18 at 103. See also Aroney & Thomas, *supra* note 100.

VI. Conclusion

In this article, I have first summarised an idealised account of the functions of a political party in a healthy democracy developed in an earlier article. That account emphasised their Janus-faced role as intermediaries between the state and its people, which they perform by lowering key information and transaction costs in a democracy. Parties are therefore simultaneously public and private. Party systems that successfully reduce political participation costs, voters' information costs, policy packaging costs, and ally prediction costs grease the wheels of representative democracy and are indispensable to its smooth operation. In order to aid parties in performing their intermediary function well, constitutions should seek to optimise four key principles in relation to political parties. First, they ought to protect the purposive autonomy of parties, and align their rights and duties closely to their hybrid public-private character. Second, constitutions should optimise the number of parties such that there are enough parties to represent every salient voter-type, but not so many that voters' information costs become unaffordable. Third, constitutions should ensure the separation of the parties from the state so that no party is able to entrench itself in the institutions and offices of the state. Breach of this principle increases the political participation costs of the supporters of opposition parties. Finally, the anti-faction principle requires that constitutions should encourage parties to cater to the interests of all the people, rather than those of merely a sub-section thereof. Factional parties increase the political participation costs of excluded minorities. They also make policy packaging difficult.

Relying upon these claims, the article made a case for moderated parliamentarism. Moderated parliamentarism is a sub-type of semi-parliamentarism, *i.e.* systems in which the political executive must enjoy the continuous confidence of one (and only one) chamber of a bicameral legislature to remain in power. In the *moderated* version of this regime-type, the two chambers are elected through two different electoral systems: a confidence and opposition chamber elected on a majoritarian basis, and a checking and appointing chamber elected on a proportional basis. Each electoral system is itself moderated: in moderated parliamentarism, the majoritarian ballot is

dividual (either through approval vote or preferential vote, rather than first-past-the-post), whereas the proportional system applies a reasonably demanding threshold before translating votes into seats. The article argued that moderated parliamentarism optimises the benefits of different regime types and electoral systems in a way that optimizes the proposed constitutional principles, and — context permitting — can be a good theoretical model for representative democracies.

Moderated parliamentarism is a relatively thin constitutional design model inasmuch it is not pre-committed to too many thick normative values, besides democracy. It is compatible with many conceptions of liberalism and at least some conceptions of socialism.¹¹⁴ Unlike many other separationist accounts, especially those that draw their inspiration from the US federal system, moderated parliamentarism is not predisposed to a minimalist or libertarian state. In a presidential system, veto players can create impasse, defaulting to state inaction on policy matters. Over time this leads to a neoliberal or libertarian small state. Moderated parliamentarism, on the other hand, does not default to either a minimalist or a maximalist state. By providing effective checks without the possibility of an irresolvable deadlock, it ensures that state action as well as inaction is a deliberated choice of governing institutions, rather than a status quoist default forced by an impasse. Its vision of constitutionalism embraces both its negative and positive dimensions: moderated parliamentarism assumes that effective constitutions restrain, permit, and facilitate the exercise of state power.¹¹⁵ Moderated parliamentarism should therefore be additionally attractive for its compatibility with a wide range of ideological commitments in a constitution, as well as with constitutions that choose not to align themselves with any thick ideology other than representative democracy.

One pragmatic objection to moderated parliamentarism may be that the preferential vote system for the confidence and opposition chamber may be

¹¹⁴ I speak, of course, of democratic socialism. On constitutionalism in authoritarian socialist countries, see Bui Ngoc Son, *Constitutional Change in the Contemporary Socialist World* (Oxford: Oxford University Press, 2020).

¹¹⁵ Waldron, *supra* note 16; Barber, *supra* note 16.

difficult for the people to understand, especially when illiteracy afflicts a significant portion of the electorate. The first response to this feasibility worry is that preferential vote is only one way to design a individual ballot: an approval vote is also individual, without necessitating any ranking. Secondly, although preferential voting is indeed harder to explain or administer than first-past-the-post, we must distinguish between the ease of understanding what the voter needs to do from understanding how the votes are counted. Ideally, both aspects should be perfectly transparent to an electorate, and a moderated parliamentary system should undertake educational programmes to explain both aspects. However, the difficulty of explaining preferential vote mainly afflicts the vote counting stage, entailing various elimination rounds. Ranking multiple options is intuitively accessible to humans, and there should be little difficulty in designing voter-friendly ballots where they can rank their preferences. When Estonia transitioned from a categorical voting system to single transferable vote (which is even more complex than ranked-choice voting because it entails multi-member, rather than single-member, constituencies), the new system was found to be “not too complex to handle even for voters and officials used to one-candidate fake elections”.¹¹⁶

Tweaks can be adopted to make the system more feasible: *limited* preferential vote only requires/allows rankings of a voter’s top two or three candidates, rather than the more laborious demand of ranking all candidates in a lengthy ballot; *contingent* vote eliminates all but the top two candidates after the first round of counting and reallocates their votes to these two remaining candidates; *optional* vote permits voters to rank their candidates, but does not mandate it, so that a categorical ballot cast for a single candidate is still valid as the voter’s first choice. These simple tweaks can still accrue the benefits of a preferential vote while making the system simpler to explain and to administer. In any case, most of the feasibility concerns about preference voting tend to apply to preferential ballots in multi-member constituencies that use a complicated ‘group voting’

116 Rein Taagepera, “STV in Transitional Estonia” (1996) 34:1 Representation 29 at 36.

ticket.¹¹⁷ What is proposed in moderated parliamentarism is preferential vote in single-member constituencies (aka alternative vote, ranked-choice vote, instant runoff), which is far more intuitive and far less complicated.

Moderated parliamentarism is a theoretical hypothesis, that will need confirmation through empirical evidence. Like any self-consciously acontextual theoretical model, it is not offered as an all-things-considered prescription. In constitutional design, context matters as much as norms do. Nor is moderated parliamentarism, on its own, sufficient safeguard for the four principles we have identified in this article. These principles demand a lot else from a constitution: a robust protection of opposition rights, stringent campaign finance regulations,¹¹⁸ protection of the autonomy (from parties as well as from wealth) of truth-telling institutions such as the media and universities. They require an independent, non-partisan, judiciary and fourth branch offices. And much else beside. Moderated parliamentarism is best seen as a theoretical model that may be used as a yardstick to test existing structures: both empirically and theoretically.¹¹⁹

Political parties are the life-blood of representative democracy. If democracy is to survive, political parties need to be supported and improved, not eliminated. Hence the four political principles that I argue should inform constitutional design of democracies. Moderated parliamentarism could be one way of supporting a healthy party system, with mostly healthy parties — a necessary, albeit insufficient, condition for a flourishing and stable constitutional democratic regime.

¹¹⁷ Marian Sawer & Anika Gauja, “Party Rules: Promises and Pitfalls” in Anika Gauja & Marian Sawer, eds, *Party Rules?* (Canberra: ANU Press, 2016) 1 at 1, 17.

¹¹⁸ Tarunabh Khaitan, “Political Insurance for the (Relative) Poor: Constitutionalism Could Resist Plutocracy” (2019) 8:3 Global Constitutionalism 536.

¹¹⁹ One interesting way of making normative and theoretical scholarship to speak to each other is articulated in Archon Fung, “Democratic Theory and Political Science: A Pragmatic Method of Constructive Engagement” (2007) 101:3 American Political Science Review 443.

Knowledge Institutions in Constitutional Democracies: Preliminary Reflections

Vicki C. Jackson*

This paper argues that “knowledge institutions” should be recognized as an essential component of constitutional democracy. They include government statistical offices and university departments; a free press; libraries and museums. Many of these institutions exist in both private and public forms. Their commonality lies in their having as a central purpose the development or dissemination of knowledge of the world and in their being committed to the application of disciplinary standards in

-
- * Vicki C Jackson, Laurence H. Tribe Professor of Constitutional Law, Harvard Law School. The author gives thanks for helpful conversations and comments on this subject to Martha Minow, Bob Taylor, Oren Tamir, Erin Delaney, Daphna Renan, John Manning, Dick Fallon, Dan Tarullo, Yochai Benkler, Ron Daniels, Gillian Lester, Vince Rougeau, Ron Krotocynski, Richard Delgado, Meredith Render, Heather Elliot, Paul Horwitz, William S. Brewbaker, Adam Steinman, Grace Lee, Judy Areen, Mark Alexander, Wendy Perdue, Darby Dickerson, Mila Versteeg, Mark Tushnet, Richard Albert, Rosalind Dixon, Matthew Stephenson, Ernest Young, Joseph Blocher, Neil Siegel, Arti Rai, Steven Jackson, Noah Feldman, John Goldberg, Joseph Singer, Laurence Tribe, Christopher Havasy, David Wilkins, Jonathan Zittrain, Tarun Khaitan, and other colleagues and friends. The author is also grateful for the opportunity to present this work as it was in process in the Harvard Public Law Workshop, the University of Alabama Law School Faculty Workshop, the IFFC Modern Challenges in Constitutionalism Workshop, and the Harvard Faculty Workshop. Finally, thanks are owed for valuable research assistance to Oren Tamir, Joao Victor Archegas, Samuel Stratton, Alisha Jarwala, Lauren O'Brien, Sam Weinstock, Morgan Sandhu, and Colleen O'Gorman. This draft draws in part from the author's post, Vicki C Jackson, "Knowledge Institutions in Constitutional Democracy: Of Objectivity and Decentralization" (29 August 2019), online (blog): *Harvard Law Review*
Blog <www.blog.harvardlawreview.org/knowledge-institutions-in-constitutional-democracies-of-objectivity-and-decentralization/>.

pursuit of knowledge and evaluation of knowledge claims. These distinctive norms that characterize knowledge institutions transcend public/private (or government/civil society) boundaries. These norms require in turn that knowledge institutions, and those who work within them, enjoy a degree of independence in applying their disciplinary standards for the pursuit of better knowledge, in ways that existing constitutional doctrine (at least in the United States) may not always recognize and support, across areas ranging from administrative law to free speech. Focusing on the role of knowledge institutions and their shared commitments provides a useful new lens through which to think about what democratic constitutionalism requires and what constitutional law should protect and promote.

I. INTRODUCTION

II. WORKING DEFINITIONS

- A. Knowledge
- B. Institutions
- C. Constitutional Democracies
- D. What Counts as Knowledge Institutions: a Non-Exhaustive Discussion
 - 1. Higher Education
 - 2. Free Press
 - 3. Government Offices and NGOs that Collect or Report Data
 - 4. Courts as Knowledge Institutions
 - 5. Congress?

III. WHY FOCUS ON KNOWLEDGE INSTITUTIONS IN CONSTITUTIONAL DEMOCRACIES?

- A. Why Constitutional Democracies as a Focus?
 - 1. Knowledge Institutions and Constitutional Text
 - 2. Special Role of Knowledge Institutions in Constitutional Democracies
- B. Why Institutions as a Focus?
 - 1. Rights Exercised by or Within Institutions are More Likely to be Respected
 - 2. Institutions Can Advance the Search for ‘Truer Knowledge’ with Less Damage to Free and Open Inquiry Than Coercive Government Regulation
 - 3. Disciplinary Norms Developed Through Knowledge Institutions Can Temper Government Decisions
- C. Shared Principles?
 - 1. Objectivity and Improved Understandings
 - 2. Epistemic Humility
 - 3. Independence in Applying Disciplinary Standards
 - 4. Decentralization

IV. CONCLUSION: THOUGHTS FOR FUTURE WORK

I. Introduction

Knowledge institutions are fundamental to the success of constitutional democracy. They span the public and the private sectors. They include universities — public and private; the press — both privately-developed press media and some governmentally-supported broadcasting entities; elementary and secondary educational institutions; libraries and museums, public and private; government offices that collect, analyze or make available objective data or other sources of knowledge; and non-governmental organizations (“NGOs”) that do the same. Courts and other parts of the government may also serve as knowledge institutions, as may some online websites like Wikipedia. The field of comparative constitutional studies needs a kind of nomenclature to capture and conceptualize this boundary-crossing but essential set of institutions, central to both the democratic and the constitutionalist components of democratic constitutionalism. This paper aims to make a start.

Knowledge institutions face threats from governments and from social, technological and economic changes. As recent scholarship suggests,¹ threats by governments against knowledge institutions — including institutions of higher learning, the press, and NGOs — often accompany threats to independent judiciaries, to government watchdog offices, and to genuinely free, fair, and open elections in countries with rising authoritarianism. In the last decade we have seen rising illiberalism in countries once regarded as solidly ‘free and democratic’. Several co-existing trends have been identified by scholars, such as Huq and Ginsburg, including attacks on independent courts, on law, and other

1 See e.g. Tom Ginsburg & Aziz Huq, *How to Save a Constitutional Democracy* (Chicago: University of Chicago Press, 2018) [Ginsburg & Huq]; Mark Gruber, Sanford Levinson & Mark Tushnet, eds, *Constitutional Democracy in Crisis?* (Oxford: Oxford University Press, 2018); Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford: Oxford University Press, 2019). On the role of political parties in building or sustaining constitutional democracy, see e.g. Nancy Bermeo & Deborah Yazhar, eds, *Parties Movements and Democracy in the Developing World* (Cambridge: Cambridge University Press, 2016); Steven Levitzky & Daniel Ziblatt, *How Democracies Die* (New York: Crown Publishing Group, 2018).

institutional checks on government;² efforts to undermine the competitiveness of elections;³ “centralization and politicization” of executive power;⁴ and a shrinking of the public sphere that provides an epistemic foundation for liberal democracy.⁵

-
- 2 See e.g. Aziz Huq & Tom Ginsburg, “How to Lose a Constitutional Democracy” (2018) 65:1 UCLA Law Review 78 at 127 (quoting honorary speaker of Polish Parliament as saying “[i]t is the will of the people, not the law that matters”).
- 3 See e.g. Kim Lane Schepppele, “An Election in Question: Part II, Writing the Rules to Win” (24 February 2014), online (blog): *The New York Times* <<http://krugman.blogs.nytimes.com/2014/02/28/hungary-an-election-in-question-part-2/>> (describing effect of new election rules and districts drawn by the Fidesz government to assure Fidesz electoral victories in Hungary).
- 4 Huq & Ginsburg, *supra* note 2 at 118. This consists of attacks on the autonomy, meritocratic orientation, expertise, and impartiality of the bureaucracies that make up so much of government. See *ibid* at 130 (reporting purges or detention of thousands of Ministry of Education officials, judges, university deans, and others in Turkey); “Freedom in the World 2018: Turkey” (2018), online: *Freedom House* <www.freedomhouse.org/country/turkey/freedom-world/2018> (describing Turkish government’s “crackdown on its real and suspected opponents”, dismissing “more than 110,000 people from public-sector positions and arrest[ing] more than 60,000 people”, many held in pretrial detention for long periods, closing civil society organizations, prosecuting journalists and closing media outlets, and arresting civil society and human rights leaders).
- 5 See generally Huq & Ginsburg, *supra* note 2 at 132–34 (noting attacks on journalists and media in Venezuela, Turkey, Poland, and Russia, including through libel laws, and license revocation). On the prosecution of Ibrahim Kaboglu, a professor of human rights law in Turkey, see *infra* note 29. He has more recently had his passport revoked and his university position terminated. In Hungary, since the 2010 election, there has been a dismantling of institutions of constitutionalism and competitive democracy, with less press and academic freedom. See e.g. Franklin Foer, “Victor Orban’s War on Intellect”, *The Atlantic* (June 2019), online: <www.theatlantic.com/magazine/archive/2019/06/george-soros-viktor-orban-ceu/588070/>. In Poland, there have been attacks on courts, and on critical voices in universities, including criminal and civil defamation suits against our

But governments are not the only threats to the development of that epistemic foundation. Economic threats to serious investigative journalism have been developing for decades, as have concentration of ‘news’ distribution through social media based on largely unknown algorithms and social media’s contribution to the spread of false information.⁶ Public distrust of journalists and of academic experts has sometimes been fanned by charismatic political leaders, but also has longstanding roots in public consciousness. Historian Sophia Rosenfeld, explains that over the last 200 plus years, truth in democracies has been contested, veering between popular and elite understandings; truth, she argues, is “understood … as the product of multiple constituencies in an egalitarian world pursuing it according to varied methods and as continually open to fresh challenges and revision”.⁷ Public mistrust of academia, of expertise and of the press, exacerbate the epistemic challenges of democracy.

Ginsburg and Huq argue that “[t]he practical operation of liberal democracy requires a shared epistemic foundation. … Where information is systematically withheld or distorted by government so as to engender correlated, population-wide errors, democracy cannot fulfill this epistemic mandate”.⁸ I agree. And if the practical operation of constitutional democracy requires some shared epistemic base, a base that is under threat both from some governments and from other forces — economic, technological, and social — a critical set of

brilliant colleague, Wojciech Sadurski, for criticizing the government. See *infra* note 29 and note 32; see also Sadurski, *supra* note 1.

- 6 See Martha Minow, “The Changing Ecosystem of News and Challenges for Freedom of the Press” (2018) 64:3 Loyola Law Review 499 [Minow, “Changing Ecosystem”]; Tim Wu, “Is the First Amendment Obsolete?” (2018) 117:3 Michigan Law Review 547; Katie Langin, “False news spreads faster than true news on Twitter — thanks to people, not bots”, *Science* (8 Mar 2018), online: <www.sciencemag.org/news/2018/03/false-news-spreads-faster-true-news-twitter-thanks-people-not-bots>.
- 7 Sophia Rosenfeld, *Democracy and Truth: A Short History* (Philadelphia: University of Pennsylvania Press, 2018) at 8.
- 8 Huq & Ginsburg, *supra* note 2 at 130–131; see Rosenfeld, *ibid* at 173 (“commitment to truth-telling or veracity as a moral position is central to maintaining the interpersonal trust that democracy … needs”).

questions is how to sustain and protect epistemic capacities? How can reliable knowledge be created and tested and disseminated in constitutional democracies? What is the role of law in securing the foundations of knowledge institutions?

Knowledge institutions work together, as part of a system, to sustain the epistemic and ethical base of democratic constitutionalism. But knowledge institutions are sometimes studied in categories that obscure rather than illuminate their connected role in contributing to a sound epistemic base for representative democracy. This does not mean that the same legal analysis should necessarily be applied to public and private entities, or to universities, the press, or government offices; there are institutional differences that matter among them as well. But it is to suggest that there is a benefit to scholarship that conceptualizes knowledge institutions, working together, as part of a knowledge ecosystem requiring constitutional protection and effective self-monitoring.

Part II of this paper discusses what kinds of institutions should be regarded as ‘knowledge’ institutions. It is not confined to those institutions — universities, the press, NGOs — commonly discussed in U.S. First Amendment terms, but includes government offices devoted to gathering scientific or objective data and may include courts or other governmental bodies. The need to protect knowledge institutions is grounded not only in explicit protections for freedom of expression or research, but also on constitutional commitments to democratic elections as the building blocks of government legitimacy.

Part III of the paper asks why focus on institutions, and argues for the special role of knowledge institutions in a constitutional democracy, based on a commitment to reason and rationality, and to accountability to the voting public, as bases for legitimate governmental decision and action. It argues that, in constitutional democracies, there are several common principles that link these institutions — first, an aspiration to impartiality and objectivity in working towards achieving better understandings of phenomena; second, a commitment to apply the relevant disciplinary standards with appropriate independence; third, an attitude of epistemic humility and openness to one’s beliefs being dis-verified; and finally, a commitment to a plurality of sources, so

that not all knowledge institutions derive from or are controlled by the same power holders and so that communities of knowledge in discrete fields are sufficiently pluralistic as to enhance the reliability of their expert conclusions.

The conclusion sketches some possible implications of this framework for further work.

II. Working Definitions

My basic claim is that knowledge institutions are fundamental to the success of constitutional democracy and should be so recognized. They contribute to a knowledge ecosystem through institutions that span the public and private sphere. These boundary crossing institutions are not a branch of government,⁹ nor should they be, but they are an essential component of constitutional democracy.

A. Knowledge

In philosophy, one widely accepted view is that knowledge is a “justified true belief”.¹⁰ A ‘naturalized’ epistemology develops the idea of justification by arguing that a belief is knowledge if it arises from “a generally reliable process”.¹¹

9 ‘Knowledge institutions’ are conceptually distinct from ‘fourth branch’, ‘democratic integrity’ or ‘supplementary’ institutions designed as parts of governments, see e.g. Mark Tushnet, “Institutions protecting constitutional democracy: Some conceptual and methodological preliminaries” (2020) 70:2 University of Toronto Law Journal 95; Kim Lane Schepple, “Parliamentary Supplements (or Why Democracies Need More than Parliaments)” (2009) 89 Boston University Law Review 795 at 810–823, though these categories may have some overlaps.

10 See Jonathan Jenkins Ichikawa & Matthias Steup, “The Analysis of Knowledge” in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy*, Summer 2018 ed (Stanford: Metaphysics Research Lab, Stanford University, 2018), online: *Stanford Encyclopedia of Philosophy Archive* <plato.stanford.edu/archives/sum2018/entries/knowledge-analysis/>; see also Joseph Blocher, “Free Speech and Justified True Belief” (2019) 133:2 Harvard Law Review 439.

11 See Ronald J Allen & Brian Leiter, “Naturalized Epistemology and the Law of Evidence” (2001) 87:8 Virginia Law Review 1491 at 1494 (quoting Alvin I

Naomi Oreskes' approach considers the relationship between process, context, and participants. For her, science should be trusted for a two-fold reason: "1) its sustained engagement with the world and 2) its social character".¹² Although recognizing that individual scientists or experts may not always be correct, science as a whole is worthy of trust; it is made of "social practices and procedures of adjudication designed to ensure [...] that the process of review and correction are sufficiently robust as to lead to empirically reliable results".¹³ The institutional context of science, including academic tenure, and peer review of scholarly work, helps prevent individual biases or errors from having too much influence, provided that the scientific community is sufficiently diverse: "[t]he social character of science forms the basis of its approach to objectivity and therefore the grounds on which we may trust it"; "[d]iversity serves epistemic goals".¹⁴

Oreskes' argument about the social and contextual basis for trusting science is appealing and applies across academic disciplines outside of those called 'science'. But I am concerned with a somewhat broader understanding of knowledge and of those institutions that work to produce and disseminate knowledge. Consider a recent statement by the American Association of University Professors ("AAUP"), titled *In Defense of Knowledge and Higher Education*, and declaring that "we ... define [knowledge] ... as those

Goldman, *Epistemology and Cognition* (Cambridge Mass: Harvard University Press, 1986) at 51).

12 Naomi Oreskes, *Why Trust Science?* (Princeton: Princeton University Press, 2019) at 55.

13 *Ibid* at 57.

14 *Ibid* at 58–59. One can agree with Oreskes at a general level, while recognizing that diversity is a broad (and contestable) concept, embracing intellectual, disciplinary, demographic, and other forms of perspective and identity, whose relationship(s) to advancing knowledge have been challenged by some. See e.g. Anthony Kronman, *The Assault on American Excellence* (New York: Free Press, 2019) at 107–108 (Kindle edition, 2019) (arguing that current conceptions of diversity, as about race, ethnicity, gender, and sexual orientation, are "defensible in political and legal terms but hostile to the pursuit of truth").

understandings of the world upon which we rely because they are produced by the best methods at our disposal".¹⁵ Peter Byrne's work on academic freedom emphasizes that the very idea of scholarship "presupposes a goal of *truer knowledge*",¹⁶ implying that knowledge is neither static nor certain, but the best understanding possible in a given context and at a given time. Note that this view of knowledge does not necessarily privilege academia: the responsible press may be regarded as a knowledge institution, albeit one working within much more constraints of time and resources than scholars and producing much more contingent and imperfect forms of knowledge.

B. Institutions

Of course knowledge is produced not only in institutions but also by individuals and in many contexts. But I focus here on knowledge institutions, defined by three criteria:

1. first, an institution is a relatively stable entity, rather than unorganized individuals in society or even individuals organized as ad hoc groups. Knowledge institutions are ongoing, established, and organized entities;¹⁷

15 American Association of University Professors, "In Defense of Knowledge and Higher Education" (January 2020) at 2, online (pdf): *American Association of University Professors* <www.aaup.org/file/DefenseofKnowledge.pdf> (adopted by Committee A on Academic Freedom and Tenure October 2019 and approved by the AAUP Council November 2019).

16 Peter Byrne, "Neo-Orthodoxy in Academic Freedom" (2009) 88:1 Texas Law Review 143 at 154 [emphasis added].

17 See Daryl J Levinson, "Parchment and Politics: The Positive Puzzle of Constitutional Commitment" (2011) 124:3 Harvard Law Review 657 at 681 (referring to institutions as "stable and durable organizational frameworks" for decision making). See also *ibid* at 681, n 69 (quoting Douglass C North, *Institutional Change and Economic Performance* (Cambridge: Cambridge University Press, 1990) as writing that "[i]nstitutions are the rules of the game in a society or, more formally, are the humanly devised constraints that shape human interaction", and Stephen Skowronek, "Order and Change" (1995) 28:1 Polity 91 at 93 as "identifying the central characteristic of an 'institution'

2. second, the entity is devoted to producing or disseminating knowledge, as one of its central purposes. That is, the entity is oriented towards the production and/or dissemination of knowledge as an important institutional goal; and
3. the institution pursues knowledge through the application of disciplinary standards and norms, designed to promote the reliability and elicit the justifications for conclusions reached or disseminated.

Below I discuss different types of knowledge institutions.

C. Constitutional Democracies

My claim is about the role of knowledge institutions in constitutional democracies. I explain this focus in Part III. Here, I offer a relatively thin definition of ‘constitutional democracy’, to include polities committed to regular and free elections; to those liberal rights that are widely viewed as necessary to free and fair elections — including rights of speech, press, assembly, and broad adult suffrage; and to maintaining enforcement mechanisms to assure fair elections and to protect and secure rights from arbitrary and lawless action. Separation of powers, whether in parliamentary or presidential systems, and judicial review of government acts or omissions are among the enforcement mechanisms that constitutional democracies use.

D. What Counts as Knowledge Institutions: a Non-Exhaustive Discussion

Applying the three criteria set forth above — (1) ongoing entity, (2) whose principal purpose is knowledge production or dissemination, (3) according to disciplinary norms — what institutions should be regarded as knowledge institutions? Information technologies are not equivalent to knowledge

as the persistence of its rules through time and the creation of ‘durable norms and dependable structures’”).

institutions.¹⁸ As I argue below, universities, the organized press, and government offices charged with objectively collecting or reporting data are plainly knowledge institutions. Some other possibilities are also discussed.

1. Higher Education

Knowledge institutions plainly include colleges and universities, the whole of higher education. Institutions of higher education are oriented towards and have as a goal sustaining and advancing the pursuit of knowledge. The AAUP's statement, *In Defense of Knowledge and Higher Education*, elaborated an understanding of knowledge as follows:

The expert knowledge to which we refer is not produced merely by immediate sense impressions. One cannot know the half-life of plutonium-238 merely by staring at a lump of rock [...] One cannot know whether the climate is changing merely by bringing snowballs into the well of the Capitol. To know any of these things, one must use the disciplinary methods of chemistry [...] or atmospheric science. These disciplines cumulatively produce understandings that are continuously tested and revised by communities of trained scholars. Expert knowledge is a process of constant exploration, revision, and adjudication. Expert knowledge, and the procedures by which it is produced, are subject to endless reexamination and reevaluation. It is this process of self-questioning that justifies society's reliance on expert knowledge. Such knowledge may in the end prove accurate or inaccurate, but it is the best we can do at any given time. That is why we are largely justified in relying on it.¹⁹

18 Social media, and many websites, are surely part of a large information ecosystem but, because they do not typically apply disciplinary criteria designed towards the production or dissemination of knowledge, I have not treated them as knowledge institutions; rather, they are more an information trading institution without significant filters. Cf. Drew Harwell, "Doctored images have become a fact of life for political campaigns. When they're disproved, believers 'just don't care.'", *The Washington Post* (14 January 2020), online: <www.washingtonpost.com/technology/2020/01/14/doctored-political-images/>.

19 American Association of University Professors, *supra* note 15 at 2–3 [footnotes omitted].

This process of reexamination and reevaluation is characteristic of the academic disciplines that live in universities (and their law schools); these critical mindsets apply to law and government, as well as other fields of inquiry.²⁰

The knowledge conveyed in higher education institutions includes grasping causal effects in the sciences, more inclusive and accurate understandings of history, culture, literature and the arts, and appreciating different approaches to philosophy and government, as well as the practices and institutions on which constitutional democracies rest. “Education is one part of maintaining a constitution; it helps forge the ideas and practices necessary to sustain the political order …”²¹ Higher education institutions play a role in sustaining constitutional democracy as well through their work educating young people in the skills of critical inquiry and other habits of mind that are important for citizens in a democracy.²² Those habits of mind include independent thinking

20 On the role of legal scholars in sustaining constitutional democracy see Liora Lazarus, “Constitutional Scholars as Constitutional Actors” (2020) 48:4 *Federal Law Review* 483 online (pdf): *Sage Journals* <journals.sagepub.com/doi/10.1177/0067205X20955056>. Cf Michael

Ignatieff, “Academic Freedom and the Future of Europe” (lecture delivered at the Centre for Global Higher Education at the UCL Institute of Education, University College London, 11 April 2018), Centre for Global Higher Education Working Paper No 40, online (pdf): *Centre for Global Higher Education* <www.researchcge.org/perch/resources/publications/wp40.pdf> (viewing the academic freedom and autonomy of universities — like the press and the courts — as ‘counter-majoritarian’ institutions). I do not adopt the vocabulary of counter-majoritarianism: universities, the press, and the courts may use their independence to stand up for majority interests, e.g. in fair electoral processes.

21 George Thomas, *The Founders and the Idea of a National University: Constituting the American Mind* (New York: Cambridge University Press, 2015) at 2; cf. Doris K Goodwin, *Leadership in Turbulent Times* (New York: Simon & Schuster, 2018) at 19 (quoting Abraham Lincoln as saying “every citizen must be able to read history to ‘appreciate the value of our free institutions’”).

22 On the need to educate citizens for democracy see John Dewey, *Democracy and Education* (New York: Macmillan, 1916) at 225–26 (“Democratic society is peculiarly dependent for its maintenance upon the use in forming a course of

and the courage to express one's thoughts; tolerance for those who disagree or are different; a capacity to engage with others both collaboratively and in reasoned disagreement; and a willingness to devote some effort to participate in sustaining or improving the broader community. Finally, institutions of higher education play a role in advancing the aspiration towards equality of opportunity that is implicit in commitments to democracy, to the presumptively equal right of each adult to participate in the project of self-governance; both in their admissions policies and in the work of educating those in attendance universities and colleges can function as engines of social mobility.²³

In suggesting the establishment of a national university at the time of the founding, George Washington argued that knowledge contributed to “the security of a free Constitution” in various ways:

study of criteria which are broadly human”, and devoted to “the problems of living together, … where observation and information are calculated to develop social insight and interest”); Amy Gutmann, *Democratic Education* (New Jersey: Princeton University Press, 1987) at 173–74 (“[L]earning how to think carefully and critically about political problems, to articulate one’s views and defend them before people with whom one disagrees is a form of moral education to which young adults are more receptive and for which universities are well suited … The relative autonomy of a university is rooted in its primary democratic purpose: protection against the threat of democratic tyranny… [Universities] can provide a realm where new and unorthodox ideas are judged on their intellectual merits … Universities thereby serve democracy as sanctuaries of nonrepression”). Cf. George Washington, “First Annual Address” (8 January 1790), online: *The Avalon Project* <avalon.law.yale.edu/18th_century/washs01.asp> (“Knowledge is in every country the surest basis of publick [*sic*] happiness. In one, in which the measures of government receive their impression so immediately from the sense of the community, as in our’s [*sic*], it is proportionately essential”).

23 That higher education did so for many decades in the second part of the 20th century seems reasonably clear; whether they are doing so adequately today is less clear, although some schools, including Johns Hopkins, have recently abandoned legacy admissions, a practice that made them less able to function as engines of social mobility. Cf. *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71, art 26 (“higher education shall be equally accessible to all on the basis of merit”).

[b]y convincing those who are entrusted with the publick [*sic*] administration, that every valuable end of government is best answered by the enlightened confidence of the people: And by teaching the people themselves to know, and to value their own rights; to discern and provide against invasions of them; to distinguish between oppression and the necessary exercise of lawful authority; between burthens proceeding from a disregard to their convenience, and those resulting from the inevitable exigencies of society; to discriminate the spirit of liberty from that of licentiousness, cherishing the first, avoiding the last, and uniting a speedy, but temperate vigilance against encroachments, with an inviolable respect to the laws".²⁴

The perceived importance of higher education to the success of the republic is evidenced by the fact that "the creation of a national university was supported by every president from Washington to John Quincy Adams — and would be put forward by later presidents such as Ulysses S. Grant, Rutherford B. Hayes, and James A. Garfield".²⁵

Today, higher education in the United States faces risks and threats of various sorts. Cuts and threatened cuts in government funding for universities and student tuition pose one kind of a challenge. The obstruction to foreign students and scholars posed by "travel bans", increased security requirements, and slowness and unpredictability in the visa process pose another. Lawrence Bacow, President of Harvard University expressed deep concern in 2019 to the Secretaries of State and Homeland Security that U.S. immigration policy,

24 Washington, *supra* note 22.

25 Thomas, *supra* note 21 at 5. Even James Madison, sometimes thought of as focusing on institutional checks to promote good government and control ambition and adverse passions, repeatedly sought to establish a national university, both while he was in Congress and as President. *Ibid* at 6, 12, 32; see also, e.g. James Madison, "Transcript For: James Madison's State Of The Union Address" (9 December 1810), online: *The Monticello Classroom* <classroom.monticello.org/view/74178/> (arguing that "*a well-instructed people alone can be permanently a free people*" [emphasis added] and that "a seminary of learning instituted by the National Legislature within the limits of their exclusive jurisdiction" would "strengthen the foundations [and] adorn the structure of our free and happy system of government").

including increased problems with visas for both students and scholars, is now so “unpredictable and uncertain” that it “poses risks not just to the individuals caught up in it, but also to the entirety of our academic enterprise”, interfering with the essential functions of American research universities.²⁶ Foreign student enrollments in higher education have declined while, at the same time, the predicted numbers of students graduating from high school and seeking higher education is also likely to be lower. Higher education also faces perceptions that cost and elitist bias obstruct its accessibility, and a worrisome partisan divide in public perceptions of its value to society.²⁷ More direct attacks on institutions of higher learning were threatened by President Trump.²⁸

26 See Letter from Lawrence Bacow, President of Harvard University, to Secretary Michael Pompeo and Acting Secretary Kevin McAleenan (16 July 2019) online: *Harvard University* <www.harvard.edu/president/news/2019/letter-to-secretary-pompeo-and-acting-secretary-mcaleenan>.

27 See e.g. Andrew Kreighbaum, “Persistent Partisan Breakdown on Higher Ed”, *Inside Higher Ed* (20 August 2019), online: <www.insidehighered.com/news/2019/08/20/majority-republicans-have-negative-view-higher-ed-pew-finds> (reporting on studies showing that slide in Republicans’ views of the value of higher education, and significant gap between the views of Republicans and Democrats, which began in 2016, persist).

28 See e.g. Juan Perez Jr, “Trump Tweet Threatens Tax Exempt Status of Schools”, *Politico* (10 July 2020), online: <www.politico.com/news/2020/07/10/trump-threatens-schools-colleges-356294> (describing presidential tweets reflecting instructions to the IRS “to review the tax-exempt status of U.S. schools, colleges and universities, … [and] turn education into a political wedge issue”). The tweets asserted that “[t]oo many Universities [...] are about Radical Left Indoctrination, not Education”, and that “their Tax-Exempt Status … and/or Funding [...] will be taken away if this Propaganda or Act Against Public Policy continues”. On July 6, 2020, the Trump administration issued an order prohibiting visas for international students attending universities or colleges that were teaching remotely; the order was withdrawn so that such foreign students could remain in the country to complete their degrees in response to a lawsuit by Harvard and Massachusetts Institute of Technology. See Miriam Jordan & Anemona Hartocollis, “U.S. Rescinds Plan to Strip Visas from International Students in Online Classes”, *The New York Times* (last modified 16 July 2020), online:

The relationship of higher education to constitutional democracy is suggested by the degree to which rising authoritarian governments have threatened their institutions of higher education. In Turkey, universities and their faculty have been the object of dismissals, constraints and prosecutions, in conjunction with the rise of more authoritarian leadership.²⁹ India has seen attacks on students at institutions of higher education.³⁰ In Hungary, an

<www.nytimes.com/2020/07/14/us/coronavirus-international-foreign-student-visas.html>.

- 29 See e.g. Suzy Hansen, “‘The Era of People Like You is Over’: How Turkey Purged its Intellectuals”, *The New York Times Magazine* (24 July 2019), online: <www.nytimes.com/2019/07/24/magazine/the-era-of-people-like-you-is-over-how-turkey-purged-its-intellectuals.html>; “Turkey: Government Targeting Academics”, *Human Rights Watch* (14 May 2018), online: <www.hrw.org/news/2018/05/14/turkey-government-targeting-academics> (reporting on dismissal of 5800 academics since 2016 coup attempt and the targeting of signatories of the ‘Academics for Peace’ petition criticizing the government’s security measures in the Kurdish southeastern part of the country); Huq & Ginsburg, *supra* note 2 at 130 (reporting Turkish purges or detention of “21,000 private school teachers, … 1,570 university deans, and 21,700 Ministry of Education officials”); see also Sophia Sideridou, “Kaboglu and Oran v. Turkey: protecting the private life of scholars, yet failing to recognize the academic freedom dimension at issue” (26 November 2018), online (blog): *Strasbourg Observers* <strasbourgobservers.com/2018/11/26/kaboglu-and-oran-v-turkey-protecting-the-private-life-of-scholars-yet-failing-to-recognize-the-academic-freedom-dimension-at-issue/> (reporting on prior unsuccessful criminal prosecution of human rights scholars Ibrahim Kaboglu and Baskin Oran for their minority report on human rights issues and criticizing the European Court of Human Rights for failing to address the academic freedom component of Kaboglu’s and Oran’s applications).
- 30 See e.g. “Protect India’s Universities” (2020) 577 International Journal of Science 293, online: *Nature Research* <www.nature.com/articles/d41586-020-00085-6> (describing police attacks on university communities where students and faculty are protesting India’s new law adversely affecting citizenship rights for India’s Muslim community); TV Jayan, “Attacks on students on the rise in India, globally”, *The Hindu Business Line* (27 November 2019), online: <www.thehindubusinessline.com/news/education/after-turkey-and-china-india->

influential university with foreign faculty and funding was forced out of the country, while the Academy of Science's independence has been undermined.³¹ And in Poland, civil and criminal defamation actions have been brought against a leading constitutional scholar critical of the current government, Wojciech Sadurski, by the dominant political party and the public broadcast station, and another action was instituted by the Ministry of Justice against law professors at Cracow University for their critical comments on proposed criminal code reform.³²

[has-highest-number-of-attacks-on-students-academic-community-report/article30097285.ece](https://www.economist.com/europe/2019/05/21/poland-is-a-country-with-the-highest-number-of-attacks-on-students-academic-community-report/article30097285.ece).

- 31 On the forced closure in Hungary of Central European University (CEU) and other intrusions on academic freedom there, see e.g. Marc Santora, "George Soros-Founded University Is Forced Out of Hungary", *The New York Times* (3 December 2018), online: <www.nytimes.com/2018/12/03/world/europe/soros-hungary-central-european-university.html> (reporting on Hungary's ban on certain academic subjects (gender studies) and imposition of new requirements, e.g. for campus in university's home country, and application of that law to force the shutdown of CEU notwithstanding its agreement with Bard College); see also Elizabeth Redden, "Central European U Forced Out of Hungary", *Inside Higher Ed* (4 December 2018), online: <www.insidehighered.com/news/2018/12/04/central-european-university-forced-out-hungary-moving-vienna>; Judgment of 6 October 2020, *Commission v Hungary*, C-66/18, Court of Justice of the European Union 2020:414 (finding aspects of Hungary's treatment of foreign higher education institutions to be unlawful). On the government's takeover of the Hungarian Academy of Sciences, see Allison Abbott, "Hungarian Government Takes Control of Research Institutes Despite Outcry" (8 July 2019), online: *Nature* <www.nature.com/articles/d41586-019-02107-4>.
- 32 On Sadurski, see "Academic Freedom Monitoring Project, University of Warsaw" (20 January 2019), online: *Scholars at Risk Network* <www.scholarsatrisk.org/report/2019-01-20-university-of-warsaw/>; John Morijn, "Open Letter in Support of Professor Wojciech Sadurski" (6 May 2019), online (blog): *Verfassungsblog* <verfassungsblog.de/open-letter-in-support-of-professor-wojciech-sadurski/>; Wojciech Sadurski, "I Criticized Poland's Government. Now it is Trying to Ruin Me", *The Washington Post* (21 May 2019), online: <www.washingtonpost.com/opinions/2019/05/21/i-criticized-polands-government-now-its-trying-ruin-me/>. For later reports, see

Such actions in foreign countries have harmful effects not limited to their own borders. These actions help normalize assaults on academic freedom in ways that may encourage other countries to take similar action or may cause judges, or other decisionmakers, to fail to appreciate what a threat they are.

2. Free Press

The free press is another kind of knowledge institution, of especial importance to the reliable disclosure and evaluation of current events and the conduct of elected officials and government offices, in a time frame that — unlike much scholarship, typically produced in a longer time frame — enables voters to make evaluations of performance and policy. Moreover, the press can play an important role in disseminating new knowledge generated by the scholarly community to the general public, knowledge relevant both to the conduct of people's own lives and to their evaluation of government policy.³³ The press

Gráinne de Búrca & John Morijn, "Repression of Freedom of Expression in Poland: Renewing support for Wojciech Sadurski" (3 June 2020), online (blog): *Verfassungsblog* <verfassungsblog.de/repression-of-freedom-of-expression-in-poland-renewing-support-for-wojciech-sadurski/> (noting that cases against Sadurski were recently rescheduled on very short notice); John Morijn, "The Trial that Wasn't, the Impact that Was" (28 January 2020), online (blog): *Verfassungsblog* <verfassungsblog.de/a-trial-that-wasn't-an-impact-that-was/>. On the Polish Ministry of Justice's short-lived lawsuit against law faculty at Cracow University for their criticism of a draft bill amending the criminal code, see Barbara Grabowska-Moroz, Katarzyna Łakomiec & Michał Ziółkowski, "The History of the 48 Hour Lawsuit: Democratic Backsliding, Academic Freedom, and the Legislative Process in Poland" (28 June 2019), online (blog): *IACL-AIDC Blog* <blog-iacl-aidc.org/2019-posts/2019/6/27/the-history-of-the-48-hour-lawsuit-democratic-backsliding-academic-freedom-and-the-legislative-process-in-poland>.

33 Some scholars have urged greater attention to institutional characteristics, e.g. of the press, under the First Amendment. See generally Frederick Schauer, "Principles, Institutions and the First Amendment" (1998) 112:1 Harvard Law Review 84; Frederick Schauer, "Towards an Institutional First Amendment" (2005) 89:5 Minnesota Law Review 1256; Paul Horwitz, *First Amendment Institutions* (Cambridge, Mass: Harvard University Press, 2013).

arguably has an organized, albeit evolving character with debatable boundaries.³⁴ One of its central purposes is to investigate and report publicly significant facts (and to check the fact claims of the powerful). And journalism is a profession

³⁴ In the United States there is disagreement on whether the Press Clause applies only to an organized professional press or may apply to ad hoc groups or even individual ‘pamphleteers’. Cf. *Citizens United v Federal Election Commission*, 558 US 310 (2010) at 352 [*Citizens United*] (casting doubt on validity under Free Speech clause of distinguishing media corporations from others in context of regulation of campaign speech or expenditures). For differing views on who or what is protected under the Press Clause, compare Michael W McConnell, “Reconsidering Citizens United as a Press Clause Case” (2013) 123:2 Yale Law Journal 412 (arguing that ‘the press’ cannot be limited to the organized traditional press) with Supplemental Brief of Amicus Curiae for the Reporters Committee for Freedom of the Press in Support of Appellant in *Citizens United*, at 12 (providing definition of the press focused on “intent to gather and disseminate news”). In my view the organized professional press, aspiring to standards of journalistic integrity and with the reputational incentives created by regular dissemination of its product, is able to serve important democratic functions in ways that are distinct from those served by the wide range of other speakers whose voices should be protected by the Speech Clause. Even if the case law prohibits distinctions among providers of ‘news’ based on their organizational character for purposes of laws prohibiting certain activities, the organizational character might serve as a basis for other forms of support. See above, McConnell at 433–34 (“The Court permits legislatures to pass special laws protecting the journalism business, but it has not interpreted the First Amendment to require them”). But compare Eugene Volokh, “Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today” (2012) 160:2 University of Pennsylvania Law Review 459 at 461–65 (arguing that, since the founding, press freedoms have generally been understood to protect the press as a technology, along with any of its users, rather than extending only to a certain set of institutions), with Sonja R West, “Press Exceptionalism” (2014) 127:8 Harvard Law Review 2434 at 2443–45 [West, “Press Exceptionalism”] (conceptualizing the press as engaged in ongoing investigating and reporting of news, as distinct from occasional commenters), and Minow, “Changing Ecosystem” *supra* note 6 at 501, 518–19 (conceptualizing the freedom of the press as based on a distinctive “private press industry”).

with disciplinary standards, *e.g.* of verification of information³⁵ and of journalistic integrity.³⁶

According to Sonja West, the U.S. Constitution's founding press freedoms were viewed as "paramount" over and beyond the freedom of speech.³⁷ There was a broadly shared understanding that the press was essential to self-government, for at least two reasons. First, the press would serve to prevent government tyranny, both by itself serving as a check on government abuse and by providing the public with the information they needed to check on how laws were implemented. Second, the press would also provide a means for each citizen to air his sentiments to all, thereby participating in the process of self-governing discourse.³⁸ The first set of purposes, she argues, requires a press that has an ongoing, organized character, distinct from "occasional commenters".

Martha Minow also describes the constitutional importance of a privately controlled press: "the freedom of the press defended by the First Amendment of the United States Constitution assumes the existence and durability of a private press industry".³⁹ She elaborates on how the founders viewed the role of the press:

The Continental Congress sought support for their cause, in part, by extolling the freedom of the press: 'The importance of this consists, besides the

35 See Horwitz, *supra* note 33 at 151 (quoting Bill Kovach and Tom Rosenstiel's identification of principles of journalism, including that "[j]ournalism's first obligation is to the truth ... Its essence is a discipline of verification ... Its practitioners must maintain an independence from those they cover ...").

36 See David A Anderson, "Freedom of the Press" (2002) 80:3 Texas Law Review 429 at 483 (describing 'journalistic integrity' and commenting that "the law probably does not forbid reporters from taking money for favorable coverage, but one who did so would risk professional disgrace" and also noting "journalistic autonomy; self-respecting journalists do not allow others to control their voices") [footnotes omitted].

37 Sonja R West, "The 'Press,' Then & Now" (2016) 77:1 Ohio State Law Journal 49 at 62 [West, "The Press, Then & Now"].

38 *Ibid* at 66.

39 Minow, "Changing Ecosystem" *supra* note 6 at 501.

advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated into more honorable and just modes of conducting affairs'.⁴⁰

"Freedom of the press", Minow writes, "came to symbolize liberty for all".⁴¹

Definitional questions complicate legal efforts to develop a separate jurisprudence about the press that is distinct from the protections for freedom of speech.⁴² Recent scholarship suggests that workable approaches can be

40 *Ibid* at 520 [footnotes omitted]; see McConnell, *supra* note 34.

41 Minow, "Changing Ecosystem" *supra* note 6 at 501 [footnotes omitted]. See also *ibid* at 520 ("State constitutions, and then the Bill of Rights amending the United States Constitution, emphasized freedom of speech and of the press. Historian Leonard Levy concluded that for the founders, 'freedom of the press had come to mean that the system of popular government could not effectively operate unless the press discharged its obligations to the electorate by judging officeholders and candidates for office'"') [footnotes omitted].

42 These definitional concerns have inhibited development of U.S. constitutional doctrine (at the federal level) separately protecting the press as an institution. See e.g. *First National Bank of Boston v Bellotti*, 435 US 765 (1978) at 801–02 (Burger, CJ); *Citizens United*, *supra* note 34 at 352. Yet a number of state laws do provide protections or special rights to the press. Jonathan Peters, "Shield Laws and Journalist's Privilege: The Basics Every Reporter Should Know" (22 August 2016), online: *Columbia Journalism Review* <www.cjr.org/united_states_project/journalists_privilege_shield_law_primer.php> (noting that 30 states have shield laws). Sonja West argues that "there exists a naturally evolving subset of speakers who fulfill unique and constitutionally valuable press functions"; "a 'search' for these special speakers would logically change as their tools and methods advance. The quest, therefore, should not be to define the press but rather to train our courts to recognize them in action". West, "Press Exceptionalism", *supra* note 34 at 2443. The search would be informed by the following distinctive attributes: "Compared to occasional public commentators, ... [t]he press, for example, has knowledge, often specialized knowledge, about the subject matter at issue. The press serves a gatekeeping function by making editorial decisions regarding what is or is not newsworthy. The press places news stories in context locally, nationally, or over time. The press strives to convey important information in a timely manner. The press has accountability to its audience and gives attention to

developed. Professor West, for example, distinguishes the press from mass communications technologies, arguing that in order to truly act as a watchdog on government, more is required “than a passing interest in the news or a mere desire to express” a view; effectively being a watchdog on government, especially as it has grown more complex, she argues, requires time and resources to investigate as well as sufficient background knowledge.⁴³ It requires, in other words, the capacities to act as a knowledge institution,⁴⁴ and the legal rights, protection, and support to enable it to do so.⁴⁵ “Regularity of publication” and “established readership” would, West argues, correlate with the devotion of time and resources to investigating potentially newsworthy items.⁴⁶

Whether developed privately or through a mix of private and public support, an independent press is widely viewed today as necessary for a free and open

professional standards or ethics. The press devotes time and money to investigating and reporting the news. It also expends significant resources defending itself against legal attacks as well as advocating for legal changes that foster information flow. And the press has a proven ability to reach a broad audience through regular publication or broadcast”. *Ibid* at 2444–45 [footnotes omitted]. See also Horwitz, *supra* note 33, at 155–56 (arguing for a constitutional focus on the press as an institution, and limited to those functions of the press in the process of gathering and reporting the news).

43 West, “The Press, Then & Now”, *supra* note 37 at 102–03.

44 On the press as a structural institution contemplated by the Constitution’s free press clause, see Potter Stewart, “Or of the Press” (1975) 26:3 Hastings Law Journal 631 at 643 (arguing that the Constitution contemplated and the press needed a degree of institutional autonomy). But see Volokh, *supra* note 34.

45 See Sonja West, “Favoring the Press” (2018) 106:1 California Law Review 91 [West, “Favoring the Press”] (arguing that statutes allowing journalists to protect confidential sources or providing special access to proceedings are constitutional and criticizing the decision in *Citizens United* holding unconstitutional a news media exemption to the campaign finance law); Horwitz, *supra* note 33 at 156 (arguing that under an institutional approach the decision in *Branzburg v Hayes* on the confidentiality of press sources should be reconsidered).

46 West, “Press Exceptionalism”, *supra* note 34 at 2437, 2456, 2460–61. See also, notes 33 and 34 above.

society and meaningful democratic governance. Yet as Minow details, the press today in the United States faces serious threats and challenges, many derived from economic and technological changes that have, for example, seen a dramatic diminution in the number and distribution of newspapers and ensuing “news deserts”, as well as the emergence of more partisan-identified news outlets.⁴⁷ Moreover, journalists around the world have been subject to escalating verbal attack and physical violence — including the deadly attack on Washington Post reporter Jamal Kashoggi in the Saudi embassy in Istanbul in 2018, the murders of four staffers of the Annapolis Gazette, in Annapolis, Maryland, in 2018, the killings of at least two reporters in India in 2017 (Gauri Lankesh, killed in Bangalore, India) and 2018 (Chandan Tiwari, killed in Jharkhand, India), multiple killings in Mexico, as well as killings of journalists in Afghanistan, Syria, and a number of other countries.⁴⁸

Normalizing Disrespect for Press and Extraterritorial Effects: As noted above, attacks on academics and journalists, on academic and press freedoms in one country, may hurt not only that country’s democratic foundations but also the knowledge-building and critical functions of universities and journalists around the world. They may do so through direct efforts by governments to influence and limit academic activities in other countries.⁴⁹ But they also may do so by

47 Minow, “Changing Ecosystem”, *supra* note 6 at 503, 518.

48 See generally, “1365 Journalists Killed Between 1992 and 2020” (2020), online: *Committee to Protect Journalists*

<cpj.org/data/killed/?status=Killed&motiveConfirmed%5B%5D=Confirmed&type%5B%5D=Journalist&start_year=1992&end_year=2020&group_by=year>. While killings of journalists declined in 2019, there were still in that year at least 25 journalists killed in 13 countries. See Siobhan O’Grady, “In the past decade at least 554 journalists have been killed worldwide”, *The Washington Post* (13 December 2019), online: <www.washingtonpost.com/world/2019/12/30/past-decade-least-journalists-were-killed-worldwide/> (At year’s end, more than 250 journalists around the world were detained by governments).

49 See e.g. Elizabeth Redden, “Prosecution in China of students for tweets he posted while studying in the U.S. raises free speech concerns”, *Inside Higher Ed* (31 January 2020), online:

<www.insidehighered.com/news/2020/01/31/prosecution-china-student->

inspiring — and normalizing — restrictions on journalistic or academic freedoms from one country to another⁵⁰ and thereby limiting the spread of knowledge and information by academics and journalists.

3. Government Offices and NGOs that Collect or Report Data

Knowledge institutions are not limited to universities and the press but include both government and nongovernmental offices devoted to the gathering, evaluation, and dissemination of objective information. NGOs of various sorts are understood to provide important epistemic space for democratic dialogue and learning. Private institutions devoted to the creation and dissemination of knowledge — newspapers and other news sources, universities, libraries, museums,⁵¹ NGOs devoted to objective data gathering and dissemination —

tweets-he-posted-while-studying-us-raises-free-speech> (reporting that a former University of Minnesota student received a 6-month prison sentence on his return to China for tweets made while at Minnesota that mocked Chinese President Xi Jinping); Austin Ramzy, “China Uses Growing Clout to Stifle Critics Abroad, Rights Group Says”, *The New York Times* (14 January 2020), online: <www.nytimes.com/2020/01/14/world/asia/china-human-rights-watch.html> (describing recent report by Human Rights Watch on many countries but focusing on China); “Obstacles to Excellence: Academic Freedom & China’s Quest for World Class Universities” (24 September 2019), online: *Scholars at Risk Network* <www.scholarsatrisk.org/resources/obstacles-to-excellence-academic-freedom-chinas-quest-for-world-class-universities/>; “China: Government Threats to Academic Freedom Abroad” (21 March 2019), online: *Human Rights Watch* <www.hrw.org/news/2019/03/21/china-government-threats-academic-freedom-abroad> (reporting instances of universities in other countries experiencing pressures from the Chinese government about who could speak on campus and Chinese students studying abroad fearing monitoring from their government).

50 Cf. Kim Lane Schepppele, “Autocracy Under Cover of the Transnational Legal Order” in Gregory Shaffer, Tom Ginsburg & Terence C Halliday, eds, *Constitution Making and the Transnational Legal Order* (Cambridge: Cambridge University Press, 2019) 188 at 207 (describing how repressive techniques spread).

51 Libraries and museums may be either public or private but in either event can provide a disciplined, curated repository of sources of knowledge. In later work,

have played important roles in preserving knowledge from destruction at the hands of powerful authorities.⁵² Attacks on the integrity and independence of such private NGOs are associated with attacks on universities and on the press; threats to NGOs have been reported in a number of countries recently and are associated with rising authoritarianism and declining commitment to free and open societies.⁵³ As I argue below, having multiple such independent sources is an important protection for both knowledge and constitutional democracy.

Here, however, I will focus primarily on government offices charged with the objective collection, evaluation, and analysis of data, for threats to their

I hope to discuss the distinctions between offices that collect and analyze data, and libraries and museums, which collect and make accessible works by others.

52 See e.g. Ian McNeely & Lisa Wolverton, *Reinventing Knowledge: From Alexandria to the Internet* (New York: WW Norton & Company, 2018) at 39 (on the role of monasteries in the first millennium).

53 See Arch Puddington, “Breaking Down Democracy: Goals, Strategies, and Methods of Modern Authoritarians” (June 2017) at 22–28, online (pdf): *Freedom House* <freedomhouse.org/sites/default/files/June2017_FH_Report_Breaking_Down_Democracy.pdf> (describing threats to civil society organizations in Russia, China, Venezuela, and Iran, as well as in democracies like including India and Indonesia and “in settings where democracy’s prospects are unclear, as with Ecuador, Hungary, and Kenya”); see also, e.g. Judgment of 18 June 2020, *European Commission v Hungary (Transparency of Associations)*, C-78/18, EU:C:2020:476 (finding that certain restrictions on civil society organizations receiving support from abroad were unjustified and contrary to EU law). On recent laws targeting human rights NGOs in Israel, see “Five Quick Points on Israel’s Contested NGO Law and Netanyahu’s Intentions to make It Even Tougher”, *Haaretz* (11 June 2017), online: <www.haaretz.com/israel-news/5-quick-points-on-israel-s-contested-ngo-law-1.5482801> (NGO Funding Transparency Law); see also Yotam Berger, “NGO Law Will Not Apply to Us’ Israeli Anti-occupation Groups Say”, *Haaretz* (17 July 2018), online: <www.haaretz.com/israel-news/ngo-law-will-not-apply-to-us-israeli-anti-occupation-groups-say-1.6289109>. A proposed but not enacted law would prohibit filming Israeli Soldiers in the West Bank. See Jonathan Lis, “Israel Plan to Jail Anyone Filming Soldiers in the West Bank Hits Legal Wall”, *Haaretz* (17 June 2018), online: <www.haaretz.com/israel-news/israeli-plan-to-jail-anyone-filming-soldiers-hit-legal-wall-1.6179262>.

independence and integrity have important ripple effects throughout society and other knowledge institutions. It may be startling to think of government offices as part of a knowledge system infrastructure. Yet government offices exist that have important data-gathering functions on which academics and journalists rely, and administrative bodies or executive departments may be charged with making detailed policy based on their expert judgment about ongoing challenges and data.

A surprisingly large number of government entities exist whose purpose can be understood as contributing to a body of shared, objective knowledge of facts.⁵⁴ Organized and ongoing offices like a census bureau, a tax bureau, a ministry of agriculture, a bureau of labor statistics, a bureau of justice statistics, are typically charged with the collection, verification, and publication of data. They are sometimes specifically charged by statute to act objectively, or in accordance with scientific rules.⁵⁵ Such offices typically employ professionals in the relevant fields and do so systematically and for purposes of obtaining objective data. They thus meet my three criteria for being a knowledge institution.

The U.S. Constitution requires that every 10 years, an ‘enumeration’, or census, of persons, be conducted for purposes of apportioning representatives among the States; many federal statutes, in turn, use the Census data to distribute federal resources to the states. The Census Bureau was created in 1902 to provide a more stable organization for this decennial collection of data about the population mandated by the Constitution. The results are used to allocate seats in the House of Representatives and for a number of other purposes under

⁵⁴ I am indebted to HLS student Alisha Jarwala for her research assistance in identifying relevant US federal statutes; I draw from and rely on her work in this section.

⁵⁵ In the United States, the Census is constitutionally required to occur at ten year intervals; so this specific knowledge function is required by the Constitution. This is not a universal constitutional requirement even among federal states. See e.g. *Commonwealth of Australia Constitution Act 1900* (UK), 1900, 63 Vic, c 12, s 51(xi) (empowering parliament to make laws regarding a census and statistics but without direction as to timing).

federal law. Allocations of power and resources turn on the accuracy of such efforts.

The Census Bureau's website refers to itself as "factfinder for the nation", noting the uses of Census data "for basic research in many academic fields".⁵⁶ The taking of the decennial population census is only one of many knowledge-creating duties assigned to the Census Bureau.⁵⁷ The Director of the Census Bureau is to be appointed "without regard to political affiliation", and must "have a demonstrated ability in managing large organizations and experience in the collection, analysis, and use of statistical data"; the term of office is five years and no one can serve more than two terms.⁵⁸ One may infer from these provisions that the data collection is to be nonpartisan and based on accepted approaches to collecting and analyzing statistical data.

A number of departments include bureaus specifically charged with collecting or disseminating statistical information, such as the Bureau of Justice Statistics,⁵⁹ the Bureau of Labor Statistics,⁶⁰ the Bureau of Transportation

56 US Census Bureau, "Factfinder for the Nation: History and Organization" (3 May 2000), online (pdf): *United States Census Bureau* <www.census.gov/history/pdf/cff4.pdf>.

57 See 13 USC §141(a), (d) (2012) (in addition to decennial census, requiring a mid-decade data collection). Other sections of Title 13 impose other duties on the Bureau to collect information. See e.g. 13 USC §161 (requiring the taking of a census of governments).

58 *Presidential Appointment Efficiency and Streamlining Act of 2011*, § 3, 13 USC § 21 (2012).

59 "Bureau of Justice Statistics" (last visited 4 November 2018), online: *USA.gov* <www.usa.gov/federal-agencies/bureau-of-justice-statistics> ("publishes information on crime, criminal offenders, victims of crime, and the operation of justice systems").

60 "Bureau of Labor Statistics" (last visited 4 November 2018), online: *USA.gov* <www.usa.gov/federal-agencies/bureau-of-labor-statistics> ("measures labor market activity, working conditions, and price changes in the economy").

Statistics,⁶¹ and the National Agricultural Statistics Service.⁶² Federal libraries, research services, and archives play key knowledge related roles: The Library of Congress describes its mission to provide “Congress with *objective* research to inform the legislative process, administe[r] the national copyright system, and [to manage] the largest collection of books, recordings, photographs, maps and manuscripts in the world”.⁶³ The Congressional Research Service likewise describes itself as providing *objective* research, which, though sometimes confidential, is often made public.⁶⁴ The Congressional Budget Office “produces independent, nonpartisan, analysis of economic and budgetary issues to support the Congressional budget process”; it has a stated commitment to objectivity, impartiality, and nonpartisanship.⁶⁵ The National Archives

61 “Bureau of Transportation Statistics” (last visited 4 November 2018), online: *USA.gov* <www.usa.gov/federal-agencies/bureau-of-transportation-statistics> (“collects and publishes comprehensive transportation statistics”).

62 “National Agricultural Statistics Service” (last visited 4 November 2018), online: *USA.gov* <www.usa.gov/federal-agencies/national-agricultural-statistics-service> (“studies and provides the market with detailed information about U.S. agriculture”).

63 “Library of Congress” (last visited 4 November 2018), online: *USA.gov* <www.usa.gov/federal-agencies/library-of-congress> [emphasis added].

64 See “Congressional Research Service” (last visited 4 November 2018), online: *USA.gov* <www.usa.gov/federal-agencies/congressional-research-service> (describing itself as serving “the Congress throughout the legislative process by providing comprehensive and reliable legislative research and analysis that are timely, *objective*, authoritative, and confidential, thereby contributing to an informed national legislature”) [emphasis added]. On other nonpartisan offices in the Congress, see Jess M Cross & Abbe R Gluck, “The Congressional Bureaucracy” (last visited 12 December 2020) Center for the Study of the Administrative State, CSAS Working Paper No 20–23 online (pdf): *Administrative State* <<https://administrativestate.gmu.edu/wp-content/uploads/sites/29/2020/10/Cross-Gluck-The-Congressional-Bureaucracy.pdf>>.

65 “Congressional Budget Office” (last visited 4 November 2018), online: *USA.gov* <www.usa.gov/federal-agencies/congressional-budget-office>; see “Objectivity, Congressional Budget Office” (last visited 5 November 2018), online: *Congressional Budget Office* <www.cbo.gov/about/objectivity>.

“preserves U.S. government records, manages the Presidential Libraries system, and publishes laws, regulations, Presidential, and other public documents”.⁶⁶

Other federal entities have missions to advance knowledge and enable informed government policy in specific substantive areas. The Centers for Disease Control and Prevention, for example, works “to create the expertise, information, and tools that peoples and communities need to protect their health”;⁶⁷ the Food and Drug Administration (“FDA”) is “responsible for protecting the public health by assuring the safety, efficacy, and security of human and veterinary drugs, biological products, medical devices, our nation’s food supply, cosmetics, and products that emit radiation … and also provides accurate, science-based health information to the public”;⁶⁸ the National Institutes of Health conducts and supports medical research (and has been the largest source of funding for medical research in the world).⁶⁹ National Aeronautics and Space Administration scientists “conduct groundbreaking research across earth science, planetary science, heliophysics and astrophysics to answer some of the most profound questions facing humanity”, and aim to “expan[d] human knowledge of the Earth and of phenomena in the atmosphere

66 “National Archives and Records Administration” (last visited 4 November 2018), online: *USA.gov* <www.usa.gov/federal-agencies/national-archives-and-records-administration>.

67 “Centers for Disease Control and Prevention” (last visited 4 November 2018), online: *USA.gov* <www.usa.gov/federal-agencies/centers-for-disease-control-and-prevention>.

68 “Food and Drug Administration” (last visited 4 November 2018), online: *USA.gov* <www.usa.gov/federal-agencies/food-and-drug-administration>.

69 See “National Institutes of Health” (last visited 4 November 2018), online: *USA.gov* <www.usa.gov/federal-agencies/national-institutes-of-health>; Roderik F Viergever & Thom CC Hendriks, “The 10 Largest Public and Philanthropic Funders of Health Research in the World: What They Fund and How They Distribute Their Funds” (2016) 14:1 *Health Research Policy and Systems* 1; Rachel Silver, “National Institutes of Health (NIH) Founded – 1887” (2 May 2014), online (blog): *IMARC Research* <www.imarcresearch.com/blog/bid/344355/national-institutes-of-health-nih-founded-1887>).

and space".⁷⁰ And the Environmental Protection Agency "protects people and the environment from significant health risks, [and] sponsors and conducts research", as well as developing and enforcing environmental regulations.⁷¹

The number and variety of government organs devoted to research activity — either for pure knowledge purposes or to serve as a basis for policy-making — illustrates how much government and the public need knowledge for "accurate, science-based" information and decisions. Yet the legal infrastructure for protecting the independence of those offices and professional employees in them may not be adequate.

As both Bruce Ackerman and Robert Post have argued, albeit from different perspectives, knowledge-based *competence* is an important component of democratic self-government.⁷² Effective, competent governance is both a purpose of having a constitution and a necessary prerequisite to the protection of individual rights and to the "pursuit of happiness".⁷³ As Robert Post suggests, there are domains of self-government in which what matters most is the equal participation (through speech and voting) of citizens in general (which Post

70 "Science and Research" (last visited 29 March 2021), online: *NASA.gov* <<https://www.nasa.gov/careers/science>>; *National Aeronautics and Space Act*, 51 USCA § 20102(d)(1), (f) (2010).

71 "Environmental Protection Agency" (last visited 4 November 2018), online: *USA.gov* <www.usa.gov/federal-agencies/environmental-protection-agency>; see also *EPA Purpose and Functions*, 40 CFR §1.3 (2020) (providing for EPA coordination and support of "research and antipollution activities carried out by State and local governments, private and public groups, individuals, and educational institutions").

72 See Bruce Ackerman, "The New Separation of Powers" (2000) 113:3 Harvard Law Review 633 at 688–97; Robert C Post, *Democracy, Expertise and Academic Freedom: A First Amendment Jurisprudence for the Modern State* (New Haven: Yale University Press, 2012). Cf. Matthew C Stephenson, "The Qualities of Public Servants Determine the Quality of Public Service" (2019) 2019:5 Michigan State Law Review 1177 (discussing the importance of civil servants' competency).

73 See *United States Declaration of Independence* (1776); see generally Vicki Jackson & Yasmin Dawood, eds, *Constitutionalism and a Right to Effective Government* (Cambridge: Cambridge University Press) [forthcoming in 2022].

refers to as the domain of “democratic legitimization”); and there are domains in which what is needed is the best possible (or at least good enough) expert understandings — a domain Post refers to as that of “democratic competence”.⁷⁴ Both are important, he argues, because “educated and informed public opinion will more intelligently and effectively supervise the government”.⁷⁵

Other scholars agree on the need for both “expert” and democratic components in decision-making:⁷⁶ even issues that call for expert judgment should include what Bruce Ackerman calls “special forms of legitimization” necessary in a democracy. Thus, he praises the Administrative Procedure Act for recognizing “that regulatory decisionmaking [*sic*] needs special forms of legitimization that enhance popular participation, provide ongoing tests for bureaucratic claims of knowledge, and encourage serious normative reflection upon the policy choices inevitably concealed in abstract statutory guidelines”.⁷⁷

Cass Sunstein emphasizes the superior capacity of executive branch entities to “genuinely understand the facts” in complex areas involving medical or scientific knowledge.⁷⁸ As Sunstein elaborates, many government agencies or departments have features of knowledge institutions:

With respect to the acquisition of information, the executive branch is usually in a far better position than the legislative and judicial branches. It has a large stock of specialists, often operating in teams, and the teams often have an

74 Post, *supra* note 72 at 34 (“Democratic *legitimation* requires that the speech of all persons be treated with toleration and equality. Democratic *competence*, by contrast, requires that speech be subject to a disciplinary authority that distinguishes good ideas from bad ones. Yet democratic competence is necessary for democratic legitimization”).

75 *Ibid* at 35.

76 See Blocher, *supra* note 10 at 442 (“A well-functioning democracy relies on expert knowledge”).

77 Ackerman, *supra* note 72 at 697.

78 Cass R Sunstein, “The Most Knowledgeable Branch” (2016) 164:7 University of Pennsylvania Law Review 1607 at 1612.

impressive degree of epistemic diversity. Some of those specialists have spent many years studying and working on the subject.⁷⁹

As this account suggests, some government offices may be regarded as knowledge institutions. Offices like the Bureau of Justice Statistics, or the FDA, are ongoing organizations; their mission includes the development and dissemination of facts; and they may apply disciplinary modes, sometimes borrowed from academic fields, sometimes developed internal to their offices, and subject to external review according to the reason-giving discipline of administrative review, for assessing the validity of their factual and justificatory claims. In these respects, they are ‘knowledge institutions’.

Sharing Ackerman’s concern for competence and integrity of knowledge-based decisions in government, the National Task Force on Rule of Law and Democracy, cochaired by Preet Bharara and Christine Todd Whitman, in a 2019 report discussed the need for “Integrity and Accessibility of Government Research and Data”, while advancing an ideal of unbiased and accessible government research. Concerned with the “growing politicization of government science”, it argued that “objective data and research are essential to effective governance and democratic oversight”.⁸⁰ It noted a number of incidents of improper pressures on objective research that had occurred recently, as well as worrisome failures to fill important senior positions. And it expressed concern that “[g]overnment research that is guided by politics, not the facts, can lead to ineffective and costly policy, among other harms ...”.⁸¹ It thus advanced proposals to “create scientific integrity standards and require agencies to establish

79 *Ibid* at 1613.

80 Preet Bharara et al, “National Task Force on Rule of Law & Democracy: Proposals for Reform Volume II” (3 October 2019) at 1, online (pdf): *Brennan Center for Justice at New York University School of Law* <www.brennancenter.org/sites/default/files/2019-09/2019_10_TaskForce%20II_0.pdf>. Cf. Matthew C Stephenson, “Information Acquisition and Institutional Design” (2011) 124:6 Harvard Law Review 1422 at 1423 (“Good information is the lifeblood of effective governance”).

81 Bharara et al, *ibid* at 1.

protocols for adhering to them [including standards for how public officials interact with career researchers], prohibit politically motivated manipulation or suppression of research, ensure the proper functioning of scientific advisory committees, and increase public access to government research and data.”⁸²

In addition to examples cited by this report,⁸³ other concerns have been raised about threats to the objectivity of scientific and professional offices in the government.⁸⁴ Thus, for example, in response to reports that an ad hoc committee on climate change was being established, with involvement by a well-known skeptic of climate change who believes that increased carbon dioxide is good for the planet, some 58 leaders in the military and national security communities across administrations of different parties expressed concern that political pressures “[i]mposing a political test on reports issued by the science agencies, and forcing a blind spot onto the national security assessments that depend on them, will erode our national security”.⁸⁵ In May 2020, months into

82 *Ibid* at 2.

83 *Ibid* at 1 (noting, *inter alia*, that “the secretary of commerce [was instructed] to have the National Oceanic and Atmospheric Administration (NOAA) … issue a misleading statement in support of the president’s false assertion about the trajectory of a hurricane, contradicting an earlier statement released by the National Weather Service. The secretary of commerce reportedly threatened to fire top NOAA officials in pressuring them to act”; that the Agriculture Department “relocated economists across the country after they published findings showing the financial harms to farmers of the administration’s trade policies”; and that the “Interior Department reassigned its top climate scientist to an accounting role after he highlighted dangers posed by climate change”).

84 See e.g. John Shattuck, Amanda Watson & Matthew McDole, “Trump’s First Year: How Resilient Is Liberal Democracy in the US?” (February 2018), online (pdf): *Carr Center for Human Rights Policy* <carrcenter.hks.harvard.edu/files/cchr/files/trumpsfirstyeardiscussionpaper.pdf> (noting displacement of professional staff at EPA by outside industry lobbyists; efforts to intimidate scientists through surveillance; refusals to permit EPA scientists to speak about their research; resignation of the EPA Director of Science and Technology).

85 Dino Grandoni, “White House’s plans to counter climate science reports ‘will erode our national security,’ 58 former officials warn”, *The Washington Post* (5 March 2019), online: <www.washingtonpost.com/climate>

the COVID-19 pandemic, a high-ranking government scientist said he was removed from his positions as deputy assistant secretary of Health and Human Services and director of an office responsible for procuring vaccines after he raised concerns about the president's advocacy for using an unproven medical treatment against the virus.⁸⁶ And a State Department analyst, it was reported, resigned in the summer of 2019, because he was required to delete from written testimony reference to scientific studies supporting his assertions about climate change.⁸⁷

Government, in this country and elsewhere, has long been involved in providing support for scientific research, either directly or by encouraging private initiatives. Government offices are often required to make expert

[environment/2019/03/05/white-house-plans-counter-climate-change-will-erode-our-national-security-former-officials-warn/](https://www.scientificamerican.com/article/white-house-plans-counter-climate-change-will-erode-our-national-security-former-officials-warn/). But see Scott Waldman, "Trump White House shelves 'adversarial' review of climate science", *Science* (9 July 2019), online: <<https://www.sciencemag.org/news/2019/07/trump-white-house-shelves-adversarial-review-climate-science>> (indicating that the plan had been shelved).

86 See Michael D Shear & Maggie Haberman, "Health Dept. Official Says Doubts on Hydroxychloroquine Led to His Ouster", *The New York Times* (last modified 14 May 2020), online: <www.nytimes.com/2020/04/22/us/politics/rick-bright-trump-hydroxychloroquine-coronavirus.html>. The scientist subsequently told the press he worried that the administration made decisions based on political expediency rather than science. *Ibid.*

87 See Timothy Puko & Warren P Strobel, "State Department Analyst Resigns After White House Blocked Climate Change Testimony", *The Wall Street Journal* (10 July 2019), online: <www.wsj.com/articles/state-department-analyst-resigns-after-white-house-blocks-climate-change-testimony-11562780573> (describing the resignation of Rod Schoonover). More recently, an official at the Department of Homeland security was fired for reporting, accurately, that there was no evidence of significant fraud in the 2020 presidential election. See David E Sanger & Nicole Perlroth, "Trump Fires Christopher Krebs, Official Who Disputed Election Fraud Claims", *The New York Times* (17 November 2020), online: <www.nytimes.com/2020/11/17/us/politics/trump-fires-christopher-krebs.html>.

findings that support, in a reasoned and objective way, their design of rules and policies. Especially in areas where the government is the largest or dominant funder of research (as in medical research), it is particularly important that scientific decisionmakers be able actually to exercise objective, independent judgments on matters within their expert knowledge. Yet scientists and other professionals who work in government or share interests with those who do suggest that the law needs to address the demands of research integrity within the government much more clearly than it does at present.⁸⁸ Modifying First Amendment doctrine addressing the speech of government employees may be a part of this effort,⁸⁹ but more may well be needed to recognize *ex ante* the institutional characteristics of good knowledge institutions in how these offices as a whole are dealt with within the government.

4. Courts as Knowledge Institutions

Courts seem at first very different from universities, or the press, or government science offices. They are not self-initiating pursuers of facts, truth, or knowledge. Their dispute resolution function sometimes requires that settlement and finality be valued over accuracy.⁹⁰ Yet, arguably they meet the criteria set forth above for being viewed as a knowledge institution.

88 See Jeff Ruch, “Emerging Law of Scientific Inquiry – A Bumpy Birth”, *Fisheries News & Science* 42:7 (27 June 2017) 353, online: American Fisheries Society <fisheries.org/2017/06/emerging-law-of-scientific-integrity-a-bumpy-birth/>.

89 Critiques of *Garcetti v Ceballos*, 547 US 410 (2006), are widespread, notwithstanding the modest retrenchment on its scope in *Lane v Franks*, 573 US 228 (2014). See generally Heidi Kitrosser, “The Special Value of Public Employee Speech” (2015) 2015 Supreme Court Review 301; Helen Norton, *The Government’s Speech and the Constitution* (Cambridge: Cambridge University Press, 2019); Judith Areen, “Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance” (2009) 97:4 Georgetown Law Journal 945.

90 See Allison Orr Larsen, “Constitutional Law in an Age of Alternative Facts” (2018) 93:2 New York University Law Review 175 at 223 (noting that science rejects finality while courts seek it).

First, they are ongoing institutions. Second, is their purpose the production of knowledge? Arguably yes. Trials are often characterized as a search for truth, for justified knowledge of what happened in a disputed factual setting.⁹¹ Trial courts function as finders of fact — within the constraints of having to decide something, based on the evidentiary materials presented and applying the applicable burden of proof. Courts, then, are factfinders — at least in a contingently final sense — that is, as final between the parties,⁹² even if not ‘final’ in the judgment of history. Courts or court-like bodies have played a significant role in providing mechanisms to determine and/or disseminate facts about important historical events — in the Nuremberg trials at the close of World War II, for example, and in some more recent reconciliation processes involving a past regime’s human rights abuses.⁹³ Third, do courts apply

91 Cf. Barbara J Shapiro, *A Culture of Fact: England, 1550-1720* (Ithaca: Cornell University Press, 2000) at 30 (“[W]e consider the courtroom, as others have considered the scientific experiment, as a site of knowledge making, that is, a setting where a variety of participants engage in creating or determining the ‘truth’ of something by a set of site-specific rules”). Criminal laws against perjury and professional rules requiring that lawyers be honest with the tribunal reinforce the court’s truth-determining roles. Cf. Adam Winkler, “Trump’s Wildest Claims Are Going Nowhere in Court. Thank legal ethics.”, *The Washington Post* (22 November 2020), online: <[washingtonpost.com/outlook/trump-lawyers-legal-ethics/2020/11/20/3c286710-2ac1-11eb-92b7-6ef17b3fe3b4_story.html](https://www.washingtonpost.com/outlook/trump-lawyers-legal-ethics/2020/11/20/3c286710-2ac1-11eb-92b7-6ef17b3fe3b4_story.html)>.

92 See e.g. *Federal Rules of Civil Procedure*, Rules 59–60 (US) (providing, inter alia, that vacatur based on new evidence is available only if the evidence could not have been discovered in time to move for new trial); *Antiterrorism and Effective Death Penalty Act of 1996*, 28 USC § 2254(d)(2) (2012) (habeas corpus relief unavailable with respect to previously adjudicated claim unless the finding was ‘unreasonable’ based on evidence presented at original trial).

93 On the S.A. Truth and Reconciliation process, see John Dugard, “Reconciliation and Justice: The South African Experience” (1998) 8 Transnational Law & Contemporary Problems 277; cf. Martha Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* (Boston: Beacon Press, 1998) at 71–72 (describing South Africa’s Truth and Reconciliation Commission, while noting how its procedures differed from trials, for example, by providing victims “the chance to tell their

‘disciplinary’ standards designed to promote the search for knowledge? It is fair to say that they do, although the rules of procedure and evidence are not devoted only to the development of truth but serve other values as well. But the adversarial process is widely defended as a reliable way to elicit truth; and, although this claim has also been challenged, it is nonetheless a disciplinary method relatively consistently applied and intended to improve the reliability of judicial factfinding.⁹⁴ And despite some scholarly critics, other scholars have written appreciatively of the role of actual trial processes in eliciting better forms of knowledge about socially contentious matters.⁹⁵

Courts also may play a role in promoting the reliability of executive and administrative agency evaluation of factual and causal claims. In *Department of Commerce v New York*,⁹⁶ for example, the Court considered whether the Commerce Department’s explanation of a decision concerning the addition of a question on citizenship met requirements for “genuine justifications” and “reasoned” decisionmaking. As the Court explained:

The reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public. Accepting contrived reasons would defeat the purpose of the enterprise. If judicial review

stories before sympathetic listeners”, *ibid* at 71, and make a public record, without being subject to cross-examination).

94 On the historic connection in Great Britain between the development of the concept of facts (as distinct from law) in the legal community, and the evolution of the idea of facts and how they are established in the sciences, see Barbara Shapiro, “The Concept ‘Fact’: Legal Origins and Cultural Diffusion” (1994) 26:2 Albion: A Quarterly Journal Concerned with British Studies 227.

95 See Kenjo Yoshino, *Speak Now: Marriage Equality on Trial* (New York: Crown Publishing Group, 2015).

96 *Department of Commerce v New York*, 139 S Ct 2551 (2019). Cf. *Massachusetts v EPA*, 549 US 497 at 534 (2007) (finding that the EPA had not explained “its refusal to decide whether greenhouse gases cause or contribute to climate change” as statute required).

is to be more than an empty ritual, it must demand something better than the explanation offered for the action taken in this case.⁹⁷

Perhaps a purpose of judicial review is to assure that agency decision-making is itself “more than an empty ritual”, and is based on a genuine and competent evaluation of the state of knowledge and how that affects government policy.⁹⁸

In Chief Justice Roberts’ 2019 Year-End Report on the Federal Judiciary, he makes a different claim for the role of courts as knowledge institutions — for their educational role: “By virtue of their judicial responsibilities, judges are necessarily engaged in civic education … When judges render their judgments through written opinions that explain their reasoning, they advance public understanding of the law”.⁹⁹ So we might see courts as both developers of knowledge, in their factfinding and decisional roles, and as disseminators of knowledge, in their explanatory and educational role. Courts bring well-instantiated aspirations towards impartiality and objectivity in factfinding to their work, attitudes that in some respects overlap with aspirations towards independence and objectivity in academic research and analysis and journalistic independence in reporting the news. At least in the highly polarized U.S.

97 *Ibid* at 2575–76.

98 But cf. *infra* note 156 (noting *Little Sisters of the Poor*); Sunstein, *supra* note 78 at 1613–14 (“For the judiciary, a great problem is that it cannot acquire information on its own. It must depend on arguments and briefs, and hence, on advocates … [J]udges are generalists who usually lack specialized knowledge of technical areas … [E]ven when they are specialists, their own understanding of a particular problem is likely to be only partial, simply because they must depend on advocates. And because advocates are self-interested, clever, and often superb with rhetoric, they will present judges with highly stylized and distorted pictures of reality … Because of the distorting prism of litigation, judges may never be made aware of [important facts about agency consideration]”).

99 Chief Justice John Roberts, “2019 Year-End Report on the Federal Judiciary” (2019) at 2, online (pdf): *Supreme Court of the United States* <www.supremecourt.gov/publicinfo/year-end/2019year-endreport.pdf>.

context, courts are an “impartiality resource”,¹⁰⁰ a place in government that can be trusted — more than some other places — to find facts and law with independent judgment and application of professional norms.

5. Congress?

It is not uncommon for U.S. federal courts to praise the factfinding capacities of the Congress and suggest that Congress’s factfinding capacities about legislative or social facts are superior to those of courts.¹⁰¹ A considerable body of scholarly writing agrees.¹⁰² Others are more skeptical. Thus, Professor Sunstein notes:

[i]n theory [...] Congress can obtain its own information by holding hearings or consulting experts. But members of Congress are also generalists, their staffs

100 Vicki C Jackson, “Thayer, Holmes, Brandeis: Conceptions of Judicial Review, Factfinding, and Proportionality” (2017) 130:9 Harvard Law Review 2348 at 2378 [Jackson, “Thayer, Holmes, Brandeis”] (discussing courts as an “impartiality resource” and arguing that courts “offer advantages over legislatures as relatively objective fora for factfinding”).

101 See e.g. *Gonzales v Carhart*, 550 US 124 at 165 (2007) (“[W]e review congressional factfinding under a deferential standard ...”); see also *Turner Broadcasting System, Inc v FCC*, 520 US 180 at 199 (1997) (“The Constitution gives to Congress the role of weighing conflicting evidence in the legislative process”); *Katzenbach v Morgan*, 384 US 641 at 653–56 (1966) (asserting that it was for Congress to ‘weigh’ facts and considerations relating to *Voting Rights Act* provision at issue). But see e.g. *Shelby County v Holder*, 570 US 529 at 547–57 (2013).

102 See e.g. “Judicial Review of Congressional Factfinding”, Note, (2008) 122:2 Harvard Law Review 767 at 768; see also, e.g. Ruth Colker and James J Bradney, “Dissing Congress” (2001) 100:1 Michigan Law Review 80 at 116–20 (critiquing judicial ‘micromanaging’ of legislative factfinding as inconsistent with Congress’s access to informal information gathering and with Congress’s “democracy-based aspects of information gathering ... [its] political relationship to the electorate”). Cf. Daniel A Crane, “Enacted Legislative Findings and the Deference Problem” (2014) 102:3 Georgetown Law Journal 637 (arguing that Congress lacks comparative advantage in finding facts but that its enacted findings of fact have normative value that warrants deference in virtue of their being enacted).

are relatively small, and they have to focus on reelection. When they are described as “experts” – on environmental issues, health care, or foreign policy – it might be true, but it might also be hyperbolic. Within Congress, members are usually experts at one thing: doing what it takes to get reelected. But in terms of substantive issues, they tend to lack the bandwidth to become experts.¹⁰³

In other words, Professor Sunstein suggests, the electoral incentive, which plays so important a role in enhancing the democratic accountability and thus legitimacy of the Congress, is in tension with the development and application of technical, expert ‘competence’, including the competence to master complex bodies of knowledge.

I am skeptical that Congress should be regarded as a knowledge institution. It plainly is an ongoing, organized institution. But does it have as one of its principal purposes the production or dissemination of knowledge? That is unclear. The most basic responsibility of the legislature is to *act* — to act on behalf of the electorate towards the public good, whether in enacting legislation or in checking and exercising oversight of the executive and administrative parts of government. To be sure, doing these tasks well should depend on a sound epistemic base. And Congress has created entities — including the Congressional Research Service within the Library of Congress — to help provide this epistemic base. Moreover, Congressional hearings have elicited important knowledge that has informed the public, and at times legislation or oversight; the congressional speech and debate immunity has enabled Members of Congress to spread information, important to public oversight of the government, on the record.¹⁰⁴ But whether the production and dissemination of knowledge is a primary aim of Congress is, at best, debatable.

103 Sunstein, *supra* note 78 at 1616. There are, to be sure, several offices created by Congress to provide legislators with expert advice on matters relevant to the legislative process. See above, text at note 64.

104 See *e.g.* Norton *supra* note 89 at 219 (noting that Senator Mike Gravel read excerpts of the Pentagon Papers into the congressional record to make them more publicly accessible; and that Senators Wyden and Udall similarly announced their critique of Obama administration secret interpretations of

But even greater uncertainty surrounds the third criteria I have applied in identifying knowledge institutions — that facts are found or knowledge generated or selected by some form of disciplinary standards. To the extent that any such standards exist in the practice of the Congress, they are unclear and indeterminate. Congress need not include findings of facts to justify its legislation nor hear witnesses on important matters it decides.¹⁰⁵ And there is nothing in congressional procedures close to the standards of relevance, or other evidentiary or procedural standards, designed to enhance the reliability of factfinding, that exist with respect to judicial proceedings;¹⁰⁶ for example, judges and jurors must be present when relevant evidence in a case is presented; members of Congress — even of the relevant committee — need not. While the limits, if any, of Congress's power to investigate have been broad,¹⁰⁷ the lack

federal domestic surveillance law, leading to further investigation and disclosures).

¹⁰⁵ See e.g. *Heart of Atlanta Motel Inc v United States*, 379 US 241 at 252–53 (1963) (upholding 1964 Civil Rights Act notwithstanding absence of legislative findings); cf. Vicki C Jackson, “Federalism and the Uses and Limits of Law: Printz and Principle” (1998) 111:8 Harvard Law Review 2180 at 2238–39, n 255 (noting, in discussing the Gun Free School Zones Act at issue in *United States v Lopez*, 514 US 549 (1995), that “neither the committee reports nor the statute itself includes either findings or a jurisdictional nexus to the interstate commerce requirement that made palpable Congress's reliance on its authority under the Commerce Clause”). The Senate evidently need not even hear witnesses in ‘trying’ articles of impeachment. “Day in Impeachment: Senate Votes Against Calling Witnesses”, *The New York Times* (31 January 2020), online: <www.nytimes.com/live/2020/trump-impeachment-trial-01-31>.

¹⁰⁶ For an example of proposals that judicial deference should track the actual procedures for factfinding used, see e.g. Eric Berger, “Deference Determinations and Stealth Constitutional Decision Making” (2013) 98:2 Iowa Law Review 465 at 501–05.

¹⁰⁷ *McGrain v Daugherty*, 273 US 135 at 174–75 (1927); *Sinclair v United States*, 279 US 263 (1929); *Eastland v US Servicemen's Fund*, 421 US 491 at 504, n 15 (1975) (quoting *Barenblatt v United States*, 360 US 109 at 111 (1960)). But cf. *Trump v Mazars* 140 S Ct 2019 (2020) (USCS) (finding congressional subpoenas insufficiently justified).

of a regular, disciplined approach to factfinding in the Congress makes it difficult to identify it as, in general, serving as a knowledge institution.¹⁰⁸

III. Why Focus on Knowledge Institutions in Constitutional Democracies?

Knowledge institutions are central to any government's ability to govern effectively; even the most autocratic of governments will require some knowledge, to exercise and maintain their own powers.¹⁰⁹ But knowledge institutions are of especial importance in constitutional democracies. Indeed, philosophers have argued that truth itself is a democratic value, because “democracies have a political interest in promoting deliberative decision-making procedures such as rational legislating processes and participatory politics”, which requires that democracies specially value the means of pursuing true knowledge.¹¹⁰

108 This may not be true for all legislatures. Cf. German Federal Constitutional Court, 9 February 2010, ‘*Hartz IV Case*’ (2010), 125 BVerfGE 175 (Germany) (implying that a demanding empirical basis of legislative consideration would be required for laws limiting social welfare support).

109 See e.g. Melissa M Lee & Nan Zhang, “Legibility and the Informational Foundations of State Capacity” (2016) 79:1 *Journal of Politics* 118 (suggesting that all governments need knowledge and that, with better knowledge of local practices, views, and persons, the state will have improved ability to assess and collect taxes and produce or encourage the production of goods); see also Stephen Holmes, *Passion and Constraint: On the Theory of Liberal Democracy* (Chicago: University of Chicago Press, 1995) at 119 (describing Jean Bodin’s theory that monarchs enhance their own power by accepting limitations upon it, context of eliciting information: “A wise prince will realize that he can personally benefit from whatever freedom of speech he concedes. A king who repressed the Estates, for example, would deprive himself of a vital source of information. Appearing at the meeting of the Estates, a prince can acquire politically indispensable knowledge which would otherwise be unavailable”).

110 Michael Patrick Lynch, “Truth as a Democratic Value” (lecture delivered at the American Society of Political and Legal Philosophy, Princeton University, 27 September 2019), 2021 NOMOS YB [forthcoming in 2021] (arguing that “it is in a democrac[y’s] interest, *qua* democracy, to protect and fairly distribute the means by which citizens can pursue true beliefs”); Michael P Lynch, *In Praise of*

A. Why Constitutional Democracies as a Focus?

The *democratic* component of democratic constitutionalism contemplates the active involvement of citizens. On thin versions of democracy, voters' key role is in checking decisions of those in power by being able to vote them out.¹¹¹ On thicker versions, citizens participate more actively, influencing government bodies' agendas and policy outcomes not just by voting but by commenting, petitioning, proposing, and critiquing.¹¹² On either version, or others that lie between, knowledge relevant to evaluating representatives and to the policy choices confronted must be accessible to voters. Such knowledge would also include an understanding of the basic normative premises of a democratic republic.¹¹³

Reason: Why Rationality Matters for Democracy (Cambridge, Mass: MIT Press, 2012). On the role of deliberative democracy itself in tending to produce good decisions, see e.g. David Estlund & Hélène Landemore, "The Epistemic Value of Democratic Deliberation" in Andre Bächtiger et al, eds, *The Oxford Handbook of Deliberative Democracy* (New York: Oxford University Press, 2018).

111 See e.g. Joseph A Schumpeter, *Capitalism, Socialism, and Democracy* (New York: Harper & Brothers, 1942) at 250.

112 See e.g. Jane Mansbridge, "Recursive Representation in the Representative System" (2017) Harvard Kennedy School Working Paper No RWP17-045, online (pdf): *Harvard Kennedy School* <research.hks.harvard.edu/publications/getFile.aspx?Id=1603>.

113 These might encompass the presumed equality in public life of all adults; tolerance of those who are different; a norm of reciprocity of reasoning and conduct in public life; acceptance of peaceful mechanisms of constitutional disputing, such that those who lose in constitutionally specified dispute resolution processes — in elections, in legislative, judicial or administrative proceedings — accept their loss; and, perhaps, that elected representatives owe duties both to their particular constituents and to the country as a whole. There may be disagreement about some of these. But there are surely some norms that are necessary to secure the future of democratic republics, and some knowledge institutions — notably universities — are suitable sites to engage in reasoned discussion and analysis of these. See e.g. Ronald Daniels, "The University's Covenant with Liberal Democracy" in Mark Lasswell, ed, *Fight for Liberty: Defending Democracy in the Age of Trump*, (New York: PublicAffairs, 2018) at

Knowledge institutions are also central to the *constitutionalist* component of democratic constitutionalism. Constitutionalism here refers, in a simplified sense, to the application of the rule of law to the government itself.¹¹⁴ Any understanding of the rule of law demands that the laws and what they require be knowable, and laws to be enforced with some degree of consistency.¹¹⁵ Knowledge of the law, about what it is, how it is being applied, and how it can be improved, are necessary to securing the ‘constitutionalist’ part of constitutional democracy.

1. Knowledge Institutions and Constitutional Text

Some knowledge institutions receive special constitutional recognition in constitutional texts. The U.S. Constitution protects freedom of the press, and ‘academic freedom’ has been recognized by courts as protected by the First

263; Harold T Shapiro, *A Larger Sense of Purpose: Higher Education and Society* (Princeton: Princeton University Press, 2005) at 97–119; Ann Colby et al, *Educating Citizens: Preparing America’s Undergraduates for Lives of Moral and Civic Responsibility* (San Francisco: Jossey-Bass, 2003); but cf. Stanley Fish, *Save the World on Your Own Time* (New York: Oxford University Press 2008) at 67–72 (arguing that it is not the place of universities to cultivate civic or ethical values); Clark Kerr, *The Uses of the University*, 5th ed (Cambridge, Mass: Harvard University Press, 2001) at 65–68 (describing the modern university as a “prime instrument of national purpose” increasingly merged with industry in maximizing economic growth).

114 Cf. Charles H McIlwain, *Constitutionalism: Ancient And Modern* (Ithaca: Cornell University Press, 1947) at 21–22 (constitutionalism “is a legal limitation on government; … the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law”); see also András Sajó & Renáta Uitz, *The Constitution Of Freedom: An Introduction To Legal Constitutionalism* (Oxford: Oxford University Press, 2019) at 13.

115 See generally Lon Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964); Jeremy Waldron, “The Rule of Law” in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy*, Summer 2018 ed (Stanford: Metaphysics Research Lab, Stanford University, 2018), online: *Stanford Encyclopedia of Philosophy* <plato.stanford.edu/entries/rule-of-law/> (characterizing Fuller as arguing that rule of law principles require that laws be “general, public, prospective, coherent, clear, stable, and practicable”).

Amendment's 'speech' clause.¹¹⁶ The right of association, anchored by the free speech clause as well as the "the right of the people peaceably to assemble", also supports a wide range of private associations, including those that function as knowledge creators or disseminators. As for the courts, the tenure and salary protections of Article III enable federal judges to serve as relatively objective and impartial adjudicators — both as finders of fact in traditional party disputes and as evaluators of presumptive findings of "legislative" or "social facts" by other branches of government; and judges in the U.S. are immune from civil liability for their judicial rulings.¹¹⁷ (Congress's Speech and Debate Clause immunity might be understood as creating an autonomous space for discussion and the pursuit of knowledge,¹¹⁸ but, as argued earlier, Congress is not a knowledge institution, and the immunity can be misused to utter false and defamatory statements.)

Other national constitutions provide explicit protections to the press and to universities. Thus, South Africa's constitution (Section 16) protects "freedom of expression, which includes freedom of the press" as well as "academic freedom and freedom of scientific research". In addition, some constitutions explicitly recognize the institutional component of academic freedom, protecting the "autonomy" of institutions of higher education. Albania's (Article 57 Section 7) guarantees "the autonomy and academic freedom of higher education institutions".¹¹⁹ Brazil's constitution (Article 207) provides that "Universities

¹¹⁶ In other countries, specific constitutional protections may also extend to particular knowledge institutions. For example, see Eric Barendt, *Academic Freedom and the Law: A Comparative Study* (Oxford: Hart Publishing, 2010) at 117–8, 123 (describing how German Basic Law, Article 5, protects both a free press and 'freedom of research').

¹¹⁷ US Const art III; *Stump v Sparkman*, 435 US 349 (1978).

¹¹⁸ US Const art I, §6.

¹¹⁹ While Albania's Constitution guarantees "freedom of artistic creation and scientific research" (*The Constitution of the Republic of Albania*, 1998, CDL-REF(2016)064, art 58), in Armenia, Article 38(3) of the Constitution guarantees that "the institutions of higher education ... have the right to self-governance, including to academic and research freedom" (*The Constitution of the Republic of Armenia*, 1995 [amended 2015]), while another provision,

enjoy autonomy with respect to didactic, scientific and administrative matters, as well as autonomy in financial and patrimonial management". Croatia's (Article 68) likewise guarantees "the autonomy of universities".¹²⁰ Finland's constitution (Section 123) provides that "universities are self-governing".¹²¹ Peru's (Article 18) provides "guarantees [of] academic freedom and rejects intellectual intolerance", and states that "every university is autonomous in its regulations, governance, and academic, administrative and financial regimes". Of 194 constitutions surveyed, at least 106 included references either to academic freedom, university autonomy or both (or cognates).¹²² In addition to those constitutions already mentioned, a number of others provide explicit protection for the press, as in Italy (Article 21), Germany (Article 5), and Canada (*Charter of Rights and Freedoms*, Section 2). Argentina's Constitution prohibits federal statutes "that restrict the freedom of the press" (Section 32) and guarantees citizens the right "to publish their ideas through the press without previous censorship" (Section 14).¹²³

Texts alone do not determine levels of actual protection, nor do they explain why they address the institutions they do. But they are one data point suggesting

Article 43, gives "everyone ... freedom of literary or fine arts, scientific and technical creation".

- 120 This guarantee is extended as well to "freedom of scientific, cultural and artistic creativity" in Article 68 (*Constitution of the Republic of Croatia*, 1990, 28/2001).
- 121 And Section 16 of Finland's constitution guarantees "freedom of science, the arts and higher education" (*The Constitution of Finland*, 1999, 73/1999).
- 122 Research Memorandum on Global Constitutional Safeguards for Science to Professor Vicki C Jackson from Sam Stratton (June 13, 2020) supplemented by Email to Professor Vicki C Jackson from Sam Stratton (24 August 2020) (both on file with author) (research is on database of Constitute Project, at <www.constituteproject.org/search?lang=en>). The data gathered by this Research Assistant is still being analyzed; I am very grateful to Sam Stratton for his research assistance.
- 123 See also *Declaration of Rights of Man and Citizen*, 26 August 1789, art II (France); *Loi du 29 juillet 1881 sur la liberté de la presse*, 29 July 1881. (France) [Law of 29 July 1881 on Freedom of the Press].

that some knowledge institutions have been formally recognized as of importance in constitutional democracies.

Knowledge institutions may also be affected by general constitutional rights — such as rights of freedom of expression, or association, rights of contract, and rights to due process — that are not limited to institutions that produce knowledge.¹²⁴ Knowledge institutions may be helped, or hurt, by other legal regimes enacted by legislatures or regulators or developed by courts, across a range of areas including antitrust law, corporate law (including non-profits), internet regulation, tax laws, government spending and licensing programs, patents and copyrights, defamation law, and others. Together, these legal regimes regulate, in some respects constitute, and should protect the knowledge ecosystem.

2. Special Role of Knowledge Institutions in Constitutional Democracies

As noted above, even illiberal or totalitarian governments need knowledge. Moreover, universities and libraries predate modern notions of constitutions and democracy, and have existed and continue to exist in non-democratic countries.¹²⁵ But knowledge institutions, as organs of epistemic objectivity, play special roles in representative democracies.

Unlike in a monarchy or autocracy, where a single or a small number of rulers need to be well informed about the world, in a democracy the people as a whole — or at least a sufficient swathe of the people and their elected representatives — need access to information to be able to identify patterns of social and economic fact, as well as knowledge of relevant national and world history that bear on current issues. Knowledge is needed to help (individuals,

¹²⁴ See e.g. *Dartmouth College v Woodward*, 17 US (4 Wheat) 518 (1819). See also Ernest Young, “Dartmouth College v Woodward and the Structure of Civil Society” (2019) 18:1 University of New Hampshire Law Review 41.

¹²⁵ See e.g. McNeely & Wolverton, *supra* note 52 (discussing, *inter alia*, libraries in ancient Greece and Egypt; the development of universities between 1100 and 1500 in Bologna and Paris, etc.).

NGOs, and political parties) evaluate and develop policy positions and be able to distinguish claims that are well founded from those that are not. While this may be true for many forms of government, the role of such knowledge in representative democracies is to enable the people, and the different groups in which they are associated, to participate in the development of policies and make good decisions about public matters for their own lives and the lives of their community.

Knowledge is needed to evaluate the performance in office of elected officials and to engage in reasoned argument with one's fellow voters. Knowledge — not just substantive knowledge but also including certain habits of mind, including critical thinking, considering different sides of an issue where there is reasonable disagreement, and the like — is needed to be able to resist manipulations by those in high office, or those running for office, or by foreign powers, or by other interest groups, and to be able to evaluate arguments by opposing candidates for public office and for opposing positions on issues of policy. And knowledge is needed in order for the rule of law to be in effect and for the law to serve justice — so that laws, how they are enforced, and what their effects are, can be known, and evaluated and, where appropriate, changed.

Practitioners and theorists of representative democracy have emphasized the centrality of this epistemic base: Early U.S. Presidents argued for a national university to help educate young people (*inter alia*) about how to evaluate their representatives;¹²⁶ Alexander Meiklejohn, writing just after World War II, emphasized that self-governance requires wise voters with true knowledge of facts.¹²⁷ Courts in the post-World War II era, including the U.S. Supreme

126 See text, *supra* text at note 22 (quoting President George Washington's argument for a national university to help citizens learn "to distinguish between oppression and the necessary exercise of lawful authority; between burthens proceeding from a disregard to their convenience, and those resulting from the inevitable exigencies of society").

127 Alexander Meiklejohn, *Free Speech and its Relation to Self-Government* (New York: Harper Brothers Publishers, 1948) at 25, 62, 69, 87; see also Dewey, *supra* note 22; Gutmann, *supra* note 22. For a suggestion that democracy requires knowledge, and that the pursuit of knowledge in a democracy requires

Court, have concluded that “informed public opinion is the most potent of all restraints upon misgovernment”.¹²⁸ The right to education has been widely understood (*San Antonio School District v Rodriguez* notwithstanding¹²⁹) as fundamental in democratic societies.¹³⁰ Elections and referenda in democratic societies, then, require a knowledge base among voters or those from whom voters take their cues.

fair elections, see Rosenfeld, *supra* note 7 at 173, 165–166 (asserting that “democracy … cannot survive without any commitment to verifiable truth and truth-telling” and that combatting the “post-truth” phenomenon, as “symptom or cause of” democratic deterioration, requires protecting the integrity of elections).

128 *Pittsburgh Press Co v Pittsburgh Commission on Human Relations*, 413 US 376 at 382 (1973) (quoting *Grosjean v American Press Co*, 297 US 233 at 250 (1936)).

129 In *San Antonio Independent School District v Rodriguez*, 411 US 1 (1973) the US Supreme Court rejected a federal constitutional challenge to the financing of public education in Texas through local property taxes, notwithstanding plaintiffs’ argument that there was a fundamental right to education. Most U.S. states, by contrast, provide in their own constitutions for rights to public education. See Emily Zackin, *Looking for Rights in All the Wrong Places* (Princeton: Princeton University Press, 2013). For a recent decision finding a federal fundamental right to a basic minimum education including for literacy, see *Gary B v Whitmer*, 957 F (3d) 616 at 642–60 (6th Cir 2020), rehearing granted, 958 F (3d) 1216 (6th Cir 2020) (vacating panel decision).

130 See e.g. *Yated v Ministry of Education* (2002), HCJ 2599/00 (Supreme Court, Israel) Dorner J (affirming a fundamental right to education in Israel; noting that many national constitutions, as well as the constitutions of American states, recognize a fundamental right to education; and stating: “One cannot exaggerate the importance of education as a social tool. This is one of the most important functions fulfilled by the government and the State. Education is critical for the survival of a dynamic and free democratic society. It constitutes a necessary foundation for every individual’s self-fulfillment. It is essential for the success and flourishing of every individual. It is crucial to the survival of society, in which people improve their individual well-being and thus contribute to the well-being of the entire community”); *Unni Krishnan & Others v State of AP and Others* (1993), 1 SCC 645 (India Supreme Court, India) (inferring from the justiciable right to life, and from a nonjusticiable Directive Principle, a constitutional right to a free public education up to age 14).

Knowledge institutions collect information from which knowledge may be obtained; they generate knowledge, and they disseminate information and knowledge according to some form of disciplinary criteria. (Thus, much of social media should be viewed not as ‘knowledge institutions’ but rather as a new form of ‘communications’ technology, although some blogs facilitated by the internet might be viewed as part of academic or press institutions.)¹³¹ Knowledge institutions differ in both their institutional characteristics and in the kinds of knowledge they are expected to produce. In academic life, the quality of knowledge generated is evaluated according to the distinctive academic norms of different disciplines. And what makes for good legal, scientific, literary, or historical knowledge generated by university faculty is evaluated according to different norms than what makes for good journalistic reporting on the activities of government officials. Yet together, these multiple different institutions constitute a knowledge ecosystem within which voters, representatives, and policymakers act.

B. Why Institutions as a Focus?

Individuals are essential to the creation of knowledge. Protection of individual rights including freedom of thought, freedom of expression, freedom of research, and freedom of writing — are all essential to sustaining democratic constitutionalism. Indeed, despite the ‘institutional’ turn in some First Amendment scholarship,¹³² much writing about constitutional rights continues to focus on the protection of rights held and asserted by individuals. Yet institutions may make special contributions to the epistemic base of constitutional democracy, for the following reasons.

¹³¹ See *e.g.* Horwitz, *supra* note 33 at 168–71; cf. Yochai Benkler, “A Political Economy of Utopia?” (2019) 18 Duke Law & Technology Review 78, 82 (“Wikipedia has enough activated users … to overcome … efforts to distort information”).

¹³² See *e.g.* Schauer, “Principles, Institutions, and the First Amendment” *supra* note 33; Schauer, “Towards an Institutional First Amendment” *supra* note 33 at 1259–60; Horwitz, *supra* note 33.

1. Rights Exercised by or Within Institutions are More Likely to be Respected

Adam Chilton and Mila Versteeg's work suggests that when organizations are given, or are a special location for the exercise of rights, those rights may be better protected.¹³³ Such protection does not necessarily arise through judicial enforcement, nor through voting, they argue, but through other kinds of pressures those organizations can bring to bear on governments: Organizations can provide focal points and overcome collective action problems; they can thereby impose costs on governments for departures from rights more effectively than individuals acting on their own. To be sure, universities, the press, and government offices are not within their paradigm of the most effective organizations, which are organized membership entities like trade unions, political parties, and religious groups.

Nonetheless, as organized, ongoing entities they may well be able to contribute to the protection of individual rights of free speech, free research, free and informed voting and the like through the force of their ideas, norms, and cultures.¹³⁴ Academics who work in universities; civil servants who work in

133 Adam Chilton & Mila Versteeg, *How Constitutional Rights Matter* (Oxford: Oxford University Press, 2020).

134 Cf. Margo Schlanger, "Offices of Goodness: Influence without Authority in Federal Agencies" (2014) 36 Cardozo Law Review 53 (analyzing how offices that are advisory, value-infused, and internal to an agency can protect particular 'precarious values' not central to the agency's mission by, e.g. heightening internal awareness). While older sociological studies of institutions focused on their formal structural characteristics, the new institutionalism gives more attention to normative, cultural and ideational bases of institutional influence and legitimacy. See e.g. John W Meyer & Brian Rowan, "Institutionalized Organizations: Formal Structure as Myth and Ceremony" (1977) 83:2 American Journal of Sociology 340; Lynne G Zucker, "The Role of Institutionalization in Cultural Persistence" (1977) 42:5 American Sociological Review 726. For a useful synthesis, see W Richard Scott, *Institutions and Organizations. Ideas, Interests, and Identities*, 4th ed (Thousand Oaks: Sage Publications, 2014) at 55–85 (arguing that institutions rest on regulative, normative, and cultural-cognitive pillars). There is widespread agreement, he writes, that "[i]nstitutions constrain and regularize behavior". *Ibid* at 59.

knowledge-generating government offices; journalists employed by major publishers — may all be empowered and protected by working within the legal ambit of their entity. Universities, the press, and those leading government offices also typically have some incentives to maintain their existing functions, capacities, and stature.¹³⁵

Institutionalized norms and cultural ideals of knowledge-seeking and knowledge dissemination may be a mechanism — apart from coordination, reciprocity and asset specific investment, discussed by Chilton and Versteeg, *supra* note 133 and Levinson, *supra* note 17 — that may help reinforce their protective role. See above, Scott at 60 (suggesting that there are not only coercive but also ‘normative’ and ‘mimetic’ ways that institutions influence behavior). The role of norms is also central to Douglass North’s definition of ‘institutions’ — as distinct from organizations — in his Nobel Prize acceptance speech, Douglass C North, “Economic Performance through Time” (prize lecture delivered at the Nobel Prize, 9 December 1993), online: *The Nobel Prize* <www.nobelprize.org/prizes/economic-sciences/1993/north/lecture/>, where he stated: “Institutions are the humanly devised constraints that structure human interaction. They are made up of formal constraints (rules, laws, constitutions), informal constraints (norms of behavior, conventions, and self imposed codes of conduct), and their enforcement characteristics”.

135 Cf. Levinson, *supra* note 17 at 683–87, 711 (explaining that institutions endure because they provide useful coordination functions, reciprocal benefits, and represent a set of specific investments). These attributes help explain the continuity of universities; and may help explain both the longtime endurance of major sources of journalism and the increasing fragility of older newspapers as the internet has lowered the capital costs necessary for the physical production of newspapers and magazines. Well organized bureaucratic offices in government may have some of these attributes as well, including the reputational interests of current and former members of well-regarded government offices in seeing the office’s stature maintained. Whether more time-limited public commissions or task forces charged with reporting on particular occurrences could be viewed as knowledge institutions will be discussed in later work.

2. Institutions Can Advance the Search for ‘Truer Knowledge’ with Less Damage to Free and Open Inquiry Than Coercive Government Regulation

A second reason to focus on knowledge institutions is because of the dangers of invoking the coercive powers of government regulation to promote knowledge production and testing. As we have all too vividly seen in recent days, authoritarian governments have used the COVID-19 pandemic to assert coercive control over the reporting of “fake news” — often consisting of criticism of government responses to the epidemic.¹³⁶

136 See Jacob Mchangama & Sarah McLaughlin, “Coronavirus Has Started a Censorship Pandemic” (1 April 2020), online: *Foreign Policy* <foreignpolicy.com/2020/04/01/coronavirus-censorship-pandemic-disinformation-fake-news-speech-freedom/> (describing the use of laws targeting ‘fake news’ as “tools to suppress criticism and accurate information just as readily as misinformation”); “Would-be Autocrats are Using COVID-19 as an Excuse to Grab More Power”, *The Economist* (23 April 2020), online: <www.economist.com/international/2020/04/23/would-be-autocrats-are-using-covid-19-as-an-excuse-to-grab-more-power>; Lasse Schuldt, “Abstract Panic: On Fake News, Fear and Freedom in Southeast Asia” (14 April 2020), online (blog): *Verfassungsblog* <verfassungsblog.de/abstract-panic-on-fake-news-fear-and-freedom-in-southeast-asia/> (describing the measures taken by various governments in Southeast Asia to suppress “fake news”). On the potential for misuse of such laws against critics of the government, see Gábor Halmi & Kim Lane Scheppelle, “Orbán is Still the Sole Judge of his Own Law” (30 April 2020), online (blog): *Verfassungsblog* <verfassungsblog.de/orban-is-still-the-sole-judge-of-his-own-law/>; Kim Lane Scheppelle, “Orbán’s Emergency” (29 March 2020), online (blog): *Verfassungsblog* <verfassungsblog.de/orbans-emergency/> (on Hungary); see above, Schuldt (on the Philippines); Steve Rosenberg et al, “Coronavirus: Is pandemic being used for power grab in Europe?”, *BBC News* (18 April 2020), online: <www.bbc.com/news/world-europe-52308002> (on Russia). See generally Joel Simon, “Covid-19 is Spawning a Global Press-Freedom Crackdown” (25 March 2020), online: *Columbia Journalism Review* <www.cjr.org/analysis/coronavirus-press-freedom-crackdown.php> (describing governments around the world “cracking down on journalists and implementing sweeping restrictions under the guise of combating misinformation and ‘fake news’ in response to the pandemic).

Yet testing and authenticating justifications for beliefs that something is true are essential to advancing knowledge. Having institutions that, lacking power to put people in jail, have the soft power to decide what counts as good work — whether an editor questioning a journalist on fact checking, or one faculty member challenging another's work in her area — is a less dangerous way of trying to promote the search for knowledge, without suppressing that very search.¹³⁷

3. Disciplinary Norms Developed Through Knowledge Institutions Can Temper Government Decisions

When expert knowledge or truth claims can be evaluated by the disciplinary standards of an ongoing knowledge institution, it may be more manageable for courts, and other government bodies, to assess whether the exercise of individual rights to assert truth claims (challenged as defamatory or inaccurate) were based on a generally reliable methodology, and, if so, to protect their makers from adverse coercive consequences. Indeed, as Robert Post has argued, in order to take proper account of interests in what he calls “democratic competence”, courts in some circumstances will need “to apply the authoritative methods and truths of medical science [or other bodies of expert knowledge] in order to determine” what speech can be regulated.¹³⁸ The authority of particular methods is more easily established through institutional practices than by sole individuals.

137 Cf. Rosenfeld, *supra* note 7 at 160 (arguing the need for “small-bore ways of modeling (without legislating) truth-telling and lie-detecting as epistemological and ethical commitments in public life … [reinforcing them] as a fundamental form of democratic practice”). In the United States, moreover, government regulation of “public noncommercial factual falsity” is of doubtful constitutionality. Frederick Schauer, “Facts and the First Amendment” (2010) 57 UCLA Law Review 897 at 915.

138 See e.g. Post, *supra* note 72 at 54 (offering as examples what kind of medical advice constitutes malpractice, or whether astrologists can be prohibited from offering commercial services (at 51–56)); *infra* note 148.

For these three reasons, then, a focus on institutions is a useful supplement to more traditional foci on individuals in understanding the knowledge infrastructure of constitutional democracies. *A caveat:* Institutions and institutional design can only do so much. Almost any institution can be subverted if controlled by persons who do not have democratic constitutionalist temperaments or commitments. So the traits that are valued in society may bear on the likely success of its institutions. Civic and social education may be a partial response to this challenge.

C. Shared Principles?

Finally, there are some shared principles for thinking about knowledge institutions in constitutional democracies that can be identified to help inform a holistic, ‘knowledge ecosystem’ view of the epistemic foundations of democracy. I offer the following thoughts: (1) that the purpose of pursuing knowledge is to improve understandings of human and natural phenomena and, where possible, identify objectively verifiable understandings; (2) through the independent application of appropriate disciplinary standards; (3) with an attitude of epistemic humility and awareness that current understandings may be challenged or disproven; (4) in a decentralized system of sources of knowledge. These four principles are relevant in thinking about both public institutions and private institutions.

1. Objectivity and Improved Understandings

Despite recent attacks on the possibility of truth or objective knowledge — attacks that may spring from a healthy commitment to the legitimacy of multiple perspectives on the experiences of different groups over time in law, history, arts, or sciences; or from an appreciation of the ways in which science itself is socially situated or constructed;¹³⁹ or from a snarky contempt for truth

¹³⁹ There is considerable debate about the nature of scientific knowledge. For varying perspectives, compare e.g. Thomas Kuhn, *The Structure of Scientific Revolutions*, 3rd ed (Chicago: University of Chicago Press, 1996) at 52–53, 66–68, 126 (arguing that science progresses not through the accumulation of data but by discovering anomalies that lead to new paradigms and theories) and

captured by Steven Colbert's phrase, "truthiness"; or from Orwellian assertions, by high officials, of "alternative facts"¹⁴⁰ — government policies should be based on a well-informed understanding of the likely facts or likely ranges of consequences of differing actions and inactions, in order to fulfill basic constitutional purposes of advancing and protecting the well-being and rights of members of the polity.¹⁴¹ Of course, there will often be reasonable

Karin Knorr Cetins, *Epistemic Cultures: How the Sciences Make Knowledge* (Cambridge, Mass: Harvard University Press, 1999) at 3–5, 8–11 (arguing that different science cultures employ different methodologies and tools) with e.g. Robert K Merton, "The Normative Structure of Science" in Norman W Storer, ed, *The Sociology of Science: Theoretical and Empirical Investigations* (Chicago: University of Chicago Press, 1973) 267 at 270 (arguing that scientific knowledge develops through empirical confirmation of predictions and that the sciences reflect commitment to certain goals, including disinterestedness and skepticism) and Alexander Bird, "What is Scientific Progress?" (2007) 41:1 *Noûs* 64 at 64–67, 86–87 (arguing that science makes progress through the accumulation of knowledge, so that accumulating false or accidentally true solutions from false theories should not be viewed as scientific progress); and Karl Popper, *The Logic of Scientific Discovery*, translated by Karl Popper, Dr. Julius Freed & Lan Freed (New York: Routledge Classics, 2002) [Popper, *Scientific Discovery*] (arguing that falsifiability, or the ability of theories or beliefs to be disverified, is the key to empirical science). With thanks to Sam Weinstock, Harvard JD expected 2022, for analysis and descriptions of most of these works.

140 Joëlle Anne Moreno, "Extralegal Supreme Court Policy-Making" (2015) 24:2 *William & Mary Bill of Rights Journal* 451 at 451 (Colbert invented 'truthiness' in 2005); Jim Rutenberg, "'Alternative Facts' and the Costs of Trump-Branded Reality", *The New York Times* (22 January 2017), online: <www.nytimes.com/2017/01/22/business/media/alternative-facts-trump-brand.html> (noting assertion by Trump senior adviser Kellyanne Conway of 'alternative facts').

141 On the purpose of a state and of its constitution, see generally N W Barber, *The Principles of Constitutionalism* (Oxford: Oxford University Press, 2018) (purpose is to promote the well-being of its members). On objectivity: objectivity here depends at least in part on some ability to separate 'facts' from 'values'. See Michael Schudson, *Origins of the Ideal of Objectivity in the Professions: Studies in the History of American Journalism and American Law, 1830-1940* (New York: Garland Publishing, 1990) at 3 ("Facts ... are assertions about the world open to independent validation"); see also, Schudson

disagreement; aspiring to resolve those disagreements on the best available information — and with the humility to revisit decisions when new facts, new knowledge emerges — is all that can reasonably be expected.

Recognizing that objectivity may represent more of an aspiration than an attainable goal, given important differences in perspectives, it should nonetheless be possible to strive for more, rather than less, accurate understandings of facts about the world in the fields of the natural sciences, mathematics, economics, history, and the social sciences. There are “facts of the matter” on some topics and open-minded objective evaluation will discern them.¹⁴²

at 5–6 above (a dominant version of objectivity about facts being that they must be “submitted to established rules of intersubjective consensus, the ordered, collective criticism of a scientific community. Any statement must be tried before a jury of qualified observers or the rules they have established”). See also Jackson, “Thayer, Holmes, Brandeis”, *supra* note 100 at 2379, 2385 (discussing “intersubjective empirical verifiability” and arguing that “[f]acts have traditionally been understood to involve objectively ascertainable phenomena, about what has happened in the past and what is likely to happen in the future. The quality of being a ‘fact’ contemplates that persons with different values can nonetheless agree on the existence or likelihood of the phenomena denoted by the term ‘facts’”) [footnotes omitted].

142 Or so I believe, along with many other scholars. See e.g. Rosenfeld, *supra* note 7 at 143 (“[I]t ... remains entirely possible to believe that much of the world we experience is socially constructed without denying the existence of mind-independent facts and ... a mind-independent reality behind them”); Schauer, *supra* note 137, at 900-901 (to similar effect). On the emergence of an express commitment to ‘objectivity’ as a self-reflective goal in both journalism and the law in the 1920s, see Schudson, *ibid* at preface (attributing this phenomena to “intellectual life more broadly ... [making] reflective journalists aware of how strongly subjective journalistic judgment ordinarily is” with “legal realism [arising] in the same cultural atmosphere and [causing] a similar kind of shift in legal thinking”). Perhaps we are in the midst of another intellectual sea change in which, rather than ‘objectivity’, some other norm of professional judgment is emerging. Cf. Jill Lepore, “After the Fact”, *The New Yorker* (21 March 2016) at 91 (arguing that the role of ‘facts’ is being challenged by the role of ‘data’, or by ‘faith’, and that contemporary concerns for civil society require either “some epistemic principles other than empiricism on which everyone can agree or else

While some constitutional systems seem to recognize the value of governments aspiring to objectivity in determining the facts, others do not. The U.K. Cabinet Manual for example, lists “objectivity” as one of the seven “principles of public life”,¹⁴³ and it requires Ministers to respect the impartiality of the Civil Service.¹⁴⁴ Article 73 of the Kenya Constitution describes “objectivity and impartiality” as constitutionally required elements of leadership. No analogous, general commitment to objectivity and impartiality exists in the U.S. at the federal level.

Should constitutional democracies articulate a principled commitment to the institutional infrastructure to support gathering and disseminating reliable information? And promote aspirations towards objectivity or impartiality by government officials in evaluating facts and their implications? Can academics, many of us steeped in respect for the value of recognizing diversity of perspectives and viewpoints, find a way to embrace and articulate legal frameworks for promoting more reliable, rather than less reliable, understandings of important social and scientific facts? Promoting aspirations towards objectivity in identifying facts relevant to public decisions will also entail

... some method other than reason with which to defend empiricism”, possibly rooted in “common practical and ethical commitment” *ibid* at 94).

143 UK, Cabinet Office, *Cabinet Manual* (London: Cabinet Office, 2011) at 26, online (pdf): [Gov.UK <www.gov.uk/government/uploads/system/uploads/attachment_data/file/60641/cabinet-manual.pdf>](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/60641/cabinet-manual.pdf) [“UK, Cabinet Manual”].

144 *Ibid* at 4 (“15. Ministers hold office as long as they have the confidence of the Prime Minister. They are supported by impartial civil servants. *Civil servants are required to act with honesty, objectivity, impartiality and integrity. Ministers must uphold the political impartiality* of the Civil Service, and not ask civil servants to act in any way which would conflict with the Civil Service Code ...”) [emphasis added]. The ‘core’ civil service obligations of honesty, objectivity, integrity and impartiality are defined at Section 7.4: objectivity means “basing your advice and decisions on rigorous analysis of the evidence” (at 57); integrity means “putting the obligations of public service above your own personal interests” (at 57); impartiality means “acting solely according to the merits of the case and serving equally well governments of different political persuasions” (at 57).

articulating the grounds for respecting particular disciplinary — whether academic, journalistic, or judicial — norms of proper factfinding and understanding the purposes for which facts asserted in these different domains warrant respect in public decision-making domains.

2. Epistemic Humility

A commitment to objectivity in the pursuit of knowledge entails some degree of epistemic humility, or a willingness to consider empirical, reasoned challenges to current views of knowledge. Scientific or other academic methods may be revised, in pursuit of better understandings of how to develop and/or how to test knowledge of the world. As noted earlier, Peter Byrne argues that “we need academic freedom because all scholarship presupposes a goal of *truer knowledge* that may conflict with prevailing ideology”.¹⁴⁵ This idea of “truer knowledge” embraces the coexistence of knowledge — “those understandings of the world upon which we rely because they are produced by the best methods at our disposal” (AAUP) — and the possibility of revision or future correction, to “truer knowledge”. But epistemic humility is not the same

¹⁴⁵ Byrne, *supra* note 16 at 154; see also Popper, *Scientific Discovery*, *supra* note 139 (arguing that while the truth of empirical theories can never be fully verified, they can be falsified); cf. Karl Popper, *The Open Society and Its Enemies* (Princeton: Princeton University Press, 2020) at 466–67 (associating ‘open societies’, in contrast to totalitarianisms, as engaged in ‘rational and critical’ reflection and decision making). Whether scientific discovery is motivated more by efforts to dis-verify (per Popper), or by development of new theories or paradigms to account for anomalous observed phenomena (per Kuhn), a recent work argues that what ties science together is commitment to a procedure of presenting and arguing from empirical evidence. See Joshua Rothman, “How Does Science Really Work?”, *The New Yorker* (28 September 2020), online: <<https://www.newyorker.com/magazine/2020/10/05/how-does-science-really-work>> (reviewing and describing claims of Michael Strevens, *The Knowledge Machine: How Irrationality Created Modern Science* (New York: Liveright Publishing Corporation, 2020) (arguing that modern science is based on the “iron rule of explanation”, requiring scientific argument to be based only on empirical data)).

as epistemic relativism; it does not mean that any idea or claim is just as good as another.¹⁴⁶

3. Independence in Applying Disciplinary Standards

Two inter-related ideas are important. First, that knowledge institutions develop and apply standards for determining what counts as knowledge within their disciplines. Among different disciplines and in different institutions (*e.g.* academia, the press), there are differing standards, but a common commitment should exist to honesty in identifying and assessing information and to the kind

146 For example, epistemic humility does not mean that “climate change deniers” have a view deserving of as much respect and deference as the scientific consensus that climate change is a real and significant threat. See Naomi Oreskes, “Beyond the Ivory Tower: The Scientific Consensus on Climate Change” (2004) 306:5702 *Science* 1686. Indeed, epistemic humility in the context of aspirations to objectivity might instead imply that ideas outside of the scientific or learned consensus should be subject to rigorous review, skepticism and careful testing. Humility is an attitude that recognizes that the views of any group or individual, no matter how learned they might be, are possibly wrong. It is only through the testing, probing, and skeptical evaluation of others in the field that views outside the current consensus can emerge to become the basis for action. The consensus view on climate change went through that testing and probing to become the consensus view; it is my understanding that the scientific community has evaluated the evidence that doubters have raised, and if anything, the consensus view has been reinforced. See Earth Science Communications Team, “Scientific Consensus: Earth’s Climate is Warming” (last visited 16 December 2020), online: *NASA: Global Climate Change* <climate.nasa.gov/scientific-consensus/>; Peter Doran & Maggie Kendall Zimmerman, “Examining the Scientific Consensus on Climate Change” (2011) 90 *EOS* 22, online (pdf): *Advancing Earth and Space Science* <agupubs.onlinelibrary.wiley.com/doi/abs/10.1029/2009EO030002>. But epistemic humility does require defenders of a current consensus to continue to evaluate new evidence that is presented by doubters, and it requires those doubters to attempt to continue to put forward evidence and to engage in the scientific process of testing. Epistemic humility does not require treating the expressed views of politicians, not subject to knowledge-oriented disciplinary standards, as if they were scientists willing to engage in the truth-seeking processes of science.

of integrity of which rules against plagiarism are just one aspect. In some disciplines, replicability will be important to the reliability of information claimed to be true; in others, disclosure of the basis for the conclusion drawn will be necessary. The idea that claims about truth, or about a new understanding of a phenomenon, must be based on evidence and reasoning that others can evaluate seems common to most disciplines.¹⁴⁷

Second, knowledge institutions must enjoy some degree of autonomy in applying those standards. That is, when their application of standards is challenged before an outside body, they should receive some presumptive respect by courts or regulators. So, for example, it has been observed that in defamation cases findings of actual malice may be avoided where a press defendant has applied the ordinary methods of journalism, such as fact-checking and editorial supervision, characterized by the responsible press.¹⁴⁸ Likewise, courts in challenges to academic decisions by universities, whether they be expelling a student on academic grounds, or refusing tenure to a faculty member, typically (though not always) defer.¹⁴⁹

147 This methodological commitment is perhaps a manifestation of the idea that a claim that is true by coincidence cannot be treated as knowledge. See Blocher, *supra* note 10 at 463.

148 For suggestions that in applying the ‘actual malice’ standard of *New York Times v Sullivan*, 376 US 254 (1964) in defamation actions courts have looked to the application of journalist practices of professional verification, see Horwitz, *supra* note 33 at 152–53; see also Randall P Bezanson, “The Developing Law of Editorial Judgment” (1999) 78:4 Nebraska Law Review 754 at 830–38; Brian C Murchison et al, “Sullivan’s Paradox: The Emergence of Judicial Standards of Journalism” (1994) 73:1 North Carolina Law Review 7 at 30.

149 See e.g. *Board of Curators of University of Missouri v Horowitz*, 435 US 78 (1978); *Regents of University of Michigan v Ewing*, 474 US 214 (1985); see also *Vanasco v National-Louis Univ.* (7th Cir 1998). Perhaps in contrast to strongly ‘institutionalist’ positions, I do not think that recognizing reasons to defer to institutions’ independent judgments — for example, to universities’ autonomy in applying academic standards — necessarily rules out recognizing the need for independent judgment by, and respect for academic freedoms of, their individual faculty. See also Lazarus, *supra* note 20 at 492–95 (discussing

4. Decentralization

At the same time, another principle for the epistemic infrastructure of constitutional democracy is maintaining a diversity of sources generating knowledge by decentralized decisionmakers. The economic market operating on its own may not conduce to maintaining multiple private sources of information; positive action by governments may be required to prevent the conglomerization of news. Academic disciplines, too, may benefit from being shaken up by new competitors, to avoid too much confidence and too little humility about the limits of any one generation's knowledge and wisdom. What might be seen as 'merely' a form of statutory anti-trust or competition policy may, in fact, be closely related to the positive tasks of constitutional government in sustaining genuine freedom of the press,¹⁵⁰ or enabling both academic collaboration and competition in the development of academic disciplines.

Note on Some Tensions: These ideas — for example, aspiring towards objectivity through adherence to disciplinary methodologies and sustaining decentralized sources of knowledge — may come into tension with each other. Reliable data collection and findings are often promoted through standardization of procedures for the collection and production of knowledge within specific disciplines; homogenization, in these senses, may be beneficial to adherence to particular methodologies. Yet such homogenization may be in tension with maintenance of a diversity of knowledge producers in the area. But resolving or accommodating such tensions (or tensions between these ideas and other constitutional values) is something that law does. My goal here is not to attempt that resolution, especially at the high level of generality at which I have discussed these principles; but rather to work to identify leading principles, of which there may be others, that knowledge institutions should embody, serve or be characterized by.

scholars' duties of independence, self-awareness, intellectual honesty, and integrity).

150 See Minow, "Changing Ecosystem" *supra* note 6.

IV. Conclusion: Thoughts for Future Work

What does a framework accepting knowledge institutions as a critical component of democratic constitutionalism imply for further work? For one thing, citizens, scholars, and legal actors might recognize obligations, even if nonjusticiable, on the part of governments actively to protect institutional sources of knowledge, whether in private universities and libraries, public universities or government offices, or in the public or private press.¹⁵¹ If constitutional democracies recognize an obligation to promote — or at least not to hinder — the search for knowledge, might this imply obligations of competence and objectivity in lawmaking and rulemaking? Or presumptive obligations for governments and their officials to make government-held information available and not to lie about government matters?¹⁵² Should journalists who are associated with the ongoing institutional press be accorded privileges justified by the role of the press and by the accuracy-enhancing ethical norms of the organized press?¹⁵³ Should courts adjust their standards of review

151 See Vicki C Jackson, “Pro-constitutional Representation: Comparing the Role Obligations of Judges and Elected Representatives in Constitutional Democracy” (2016) 57:5 William & Mary Law Review 1717; see also Vicki C Jackson, “Legal Scholarship and Knowledge Institutions in Constitutional Democracy” (Summer 2019), online: *Association of American Law Schools* www.aals.org/about/publications/newsletters/summer2019/legal-scholarship-and-knowledge-institutions-in-constitutional-democracy/. (Knowledge institutions bridge the public-private boundary. Later work may explore the value of retaining some distinctions between rules applicable to public and to private entities, at the same time suggesting the need for a more functional analysis perhaps through ideas of public-private hybridity).

152 See Vicki C Jackson, *Governments as Knowledge Promoters and a Presumptive Duty Not To Lie* (August 2020) [unpublished, on file with author]; see also Helen Norton, “The Government’s Lies and the Constitution” (2015) 91 Indiana Law Journal 73.

153 See Vicki C Jackson, *Knowledge Institutions in Constitutional Democracy: For a Reinvigorated First Amendment Freedom of the Press* (August 2020) [unpublished, on file with author]. Hard questions will arise about defining the press, including about whether particular enterprises do or do not adhere to disciplinary norms of journalism especially in the context of highly

based on an evaluation of knowledge-based legislative or executive competency? Or modify judicial factfinding processes?¹⁵⁴ Should government employees be better protected from adverse employment decision for their job-related speech on matters of public concern?¹⁵⁵ Should administrative law recognize obligations conducive to an objective search for knowledge on which to base policy decisions?¹⁵⁶ And how might governments, universities, the legal profession, and others promote forms of civic education that foster respect for democracy, for reason, and for knowledge-based democratic decisions?¹⁵⁷

The frame of knowledge institutions helps enlarge the constitutional vision applied to particular doctrinal questions, as well as to broader questions of the role and purpose of government that lie at the heart of constitutionalism. It is

commercialized and highly polarized mass media. On the possible effects of public perception of press polarization, see Jisu Kim and Soojong Kim, “News organizations as fact-checkers: Any potential issue?” (17 December 2020), online (blog): *Balkin* <balkin.blogspot.com/2020/12/news-organizations-as-fact-checkers-any.html>.

- 154 See Vicki C Jackson, *Knowledge, Democratic Decisions and Judicial Review* (August 2020) [unpublished, on file with author].
- 155 Compare the U.S. approach in *Garcetti v Ceballos*, 547 US 410 (2006) with the arguably greater protection afforded under European law (see Council of Europe, “Whistleblowers and their Freedom to Impart Information” (May 2017) online (pdf): *Council of Europe* <rm.coe.int/factsheet-on-whistleblowers-and-their-freedom-to-impart-information-ma/16807178d9>).
- 156 Compare *Little Sisters of the Poor Saints Peter & Paul Home v Pennsylvania*, 140 S Ct 2367 at 2385–86 (2020) (holding that there is no basis in the Administrative Procedure Act to require ‘open-mindedness’ by decisionmakers) with UK, Cabinet Manual, *supra* note 143 and *supra* note 144 (setting forth ‘principles of public life’ including ‘objectivity’, ‘openness’, ‘integrity’, and ‘honesty’). I address such issues in Vicki C. Jackson, *Anti-constitutional Administrative Law* (February 2021) [unpublished, on file with author].
- 157 See Vicki C Jackson, *Knowledge Institutions and Civic Education in Constitutional Democracy* (August 2020) [unpublished, on file with author]; see also Vicki C Jackson, “Law Schools and Civic Education”, *Association of American Law Schools News* (Fall 2019), online: <www.aals.org/about/publications/newsletters/aals-news-fall-2019/law-schools-and-civic-education/>.

my hope that in my own subsequent work, and in the work of others,¹⁵⁸ these issues can be more deeply explored. Given the rise of illiberal hostility to knowledge-based decisions in contemporary democracies, the challenges are urgent.

158 Cf. Lazarus, *supra* note 20 (arguing, *inter alia*, that constitutional scholars can function as “integrity institutions” in constitutional democracy).

Press Freedom in Australia's Constitutional System

Keiran Hardy*

George Williams**

Freedom of the press remains a topic of significant public debate in Australia. A series of investigations into whistleblowers and journalists, combined with the continued expansion of Australia's counter-terrorism laws, has generated backlash against the federal government from media outlets, law reform groups and the wider public. In this article, we examine how Australia's counter-terrorism laws undermine press freedom and analyse the extent to which press freedom is legally protected in Australia's constitutional system. Part II outlines recent investigations into the conduct of Australian journalists and whistleblowers who have acted in the public interest. Part III explores counter-terrorism laws that threaten press freedom and freedom of speech. Part IV examines possible protections for journalists from criminal prosecution. To assess the strength of these protections, we analyse the Federal Court decision in Australian Broadcasting Corporation v Kane. This judgment confirms that legal protections for a free and independent media in Australia are sorely lacking. Short-term statutory and longer-term constitutional reform is needed before Australia can claim to be a democracy that provides adequate protection to freedom of the press.

* Dr. Keiran Hardy is a Lecturer in the School of Criminology and Criminal Justice at Griffith University and a Member of the Griffith Criminology Institute, k.hardy@griffith.edu.au.

** Dr. George Williams is the Deputy Vice-Chancellor, Anthony Mason Professor and a Scientia Professor at the University of New South Wales, george.williams@unsw.edu.au.

-
- I. INTRODUCTION
 - II. PROSECUTING WHISTLEBLOWERS AND JOURNALISTS
 - III. NATIONAL SECURITY LAWS AND PRESS FREEDOM
 - IV. PROTECTING JOURNALISTS AND WHISTLEBLOWERS
 - V. CONCLUSION
-

I. Introduction

In October 2019, a coalition of Australian news outlets printed their newspaper front pages with blacked-out text and the question: “When government keeps the truth from you, what are they covering up?”.¹ For the public broadcasters and private companies to join together in this way was a significant display of unity in a highly competitive media environment. The reason for the front-page protest was to raise awareness about ongoing criminal investigations into Australian whistleblowers and journalists, as well as the encroachment of national security laws on press freedom. It attracted international attention, with the *New York Times* reporting that “[n]o other developed democracy has as strong a stranglehold on its secrets as Australia”.²

Other western governments have also gone to great lengths to prosecute whistleblowers, including Julian Assange and Edward Snowden.³ Nevertheless,

1 Matthew Doran, “Media unites to rally for press freedom, taking campaign to front pages and airwaves” (20 October 2019), online: *ABC News* <www.abc.net.au/news/2019-10-21/media-unites-to-rally-for-press-freedom/11621806>; Jamie Tarabay, “Australian media redact their front pages to protest secrecy laws” (21 October 2019), online: *The New York Times* <www.nytimes.com/2019/10/21/world/australia/news-media-protest-secrecy-government-right-to-know.html>.

2 Tarabay, *ibid*.

3 See Ben Quinn, “US attorney general may be using Assange case for political ends, court told” (27 July 2020), online: *The Guardian* <www.theguardian.com/media/2020/jul/27/us-attorney-general-julian-assange-extradition-case-political-ends-uk-court-told>; Rob Evans, Ian Cobain & Nicola Slawson, “Government advisers accused of ‘full-frontal attack’ on whistleblowers” (12 February 2017), online: *The Guardian*

Australia's reputation as an open democracy has certainly been damaged in recent years. A low point for press freedom, examined in this article, was the police raids on the home of a News Corp journalist and the offices of the Australian Broadcasting Corporation ("ABC"), Australia's public broadcaster.⁴

Our aim in this article is twofold: we examine how Australia's national security and counter-terrorism laws undermine press freedom and analyse the extent to which press freedom is legally protected in Australia's constitutional system. While we focus on the freedom of journalists to publish information, we also consider the ability of government whistleblowers to pass inside information to journalists. As the examples discussed below demonstrate, it is impossible to separate the conduct of one of these groups from the other. Public interest reporting depends on a symbiotic relationship between whistleblowers and journalists who are committed to exposing wrongdoing, even in the face of criminal sanctions.

In Part II, we outline a series of recent investigations into the conduct of Australian journalists and whistleblowers. Several of these resulted in prosecutions that are ongoing at the time of writing.⁵ Part III explores a wide

<www.theguardian.com/uk-news/2017/feb/12/uk-government-accused-full-frontal-attack-prison-whistleblowers-media-journalists>; Peter Finn & Sari Horwitz, "U.S. charges Snowden with espionage" (21 June 2013), online: *The Washington Post* <www.washingtonpost.com/world/national-security/us-charges-snowden-with-espionage/2013/06/21/507497d8-dab1-11e2-a016-92547bf094cc_story.html>.

4 See John Lyons, "AFP raid on ABC reveals investigative journalism being put in same category as criminality" (14 July 2019), online: *ABC News* <www.abc.net.au/news/2019-07-15/abc-raids-australian-federal-police-press-freedom/11309810>; Amy Remeikis, "Police raid on Annika Smethurst shows surveillance exposé hit a nerve" (4 June 2019), online: *The Guardian* <www.theguardian.com/australia-news/2019/jun/05/police-raid-on-annika-smethurst-shows-surveillance-expose-hit-a-nerve>.

5 See Christopher Knaus, "Witness K lawyer Bernard Collaery to appeal against secrecy in Timor-Leste bugging trial" (10 July 2020), online: *The Guardian* <www.theguardian.com/australia-news/2020/jul/10/witness-k-lawyer-bernard-collaery-to-appeal-against-secrecy-in-timor-leste-bugging-trial> [Knaus, "Appeal Against Secrecy"]; Nassim Khadem, "Commonwealth dumps 42 charges

range of national security and counter-terrorism laws that threaten press freedom and freedom of speech. Since the 9/11 attacks in 2001, Australia has enacted more than 80 laws in response to terrorism.⁶ Many of these laws impact press freedom and freedom of speech more generally. Despite assurances from the federal government that journalists will not be “prosecuted for doing their job”,⁷ it is clear that Australia’s counter-terrorism laws can be used against journalists and whistleblowers who act in the public interest. These laws contain not only criminal offences but also intrusive powers of decryption and digital surveillance.

Part IV examines possible protections for journalists from criminal prosecution. It considers ethical codes for journalists, shield laws, statutory whistleblower protections and the implied freedom of political communication. The implied freedom is a constitutional restriction on the lawmaking power of parliaments with regard to political speech. As will be explored, it does not equate to a right to freedom of speech or explicit protection for press freedom.

To assess the strength of these protections, Part IV analyses the recent decision of the Federal Court in *Australian Broadcasting Corporation v Kane*

against ATO whistleblower Richard Boyle but threat of prison looms” (2 July 2020), online: *ABC News* <www.abc.net.au/news/2020-07-03/charges-against-ato-whistleblower-richard-boyle-dropped-dpp/12419800>; Jordan Hayne, “Investigation into Afghan Files that sparked ABC raids enters next phase with brief of evidence sent to prosecutors” (2 July 2020), online: *ABC News* <www.abc.net.au/news/2020-07-02/federal-police-seek-charges-abc-investigation-afghan-files-dpp/12415930> [Hayne, “ABC Raids”].

- 6 See Nicola McGarrity & Jessie Blackbourn, “Australia has enacted 82 anti-terror laws since 2001. But tough laws alone can’t eliminate terrorism” (29 September 2019), online: *The Conversation* <theconversation.com/australia-has-enacted-82-anti-terror-laws-since-2001-but-tough-laws-alone-can-t-eliminate-terrorism-123521>.
- 7 Lenore Taylor, “George Brandis: attorney general must approve prosecution of journalists under security laws” (30 October 2014), online: *The Guardian* <www.theguardian.com/australia-news/2014/oct/30/george-brandis-attorney-general-approve-prosecution-journalists-security-laws>.

(“*Kane*”).⁸ This case followed the ABC raid. It involved, among other issues, a dispute over whether the search warrant was valid and whether the implied freedom could protect journalists from criminal investigation. The court’s judgment confirms that legal protections for a free and independent media in Australia are sorely lacking. Short-term statutory and longer-term constitutional reform is needed before Australia can claim to be a democracy that provides adequate protection to freedom of the press.

II. Prosecuting Whistleblowers and Journalists

A concerning trend has developed recently in Australia in which whistleblowers and journalists are being investigated for disclosing classified information in the public interest. Several of these investigations have led to prosecutions for serious criminal offences. Certainly, criminal prosecution should be available for disclosing classified information where the person intends to undermine security or endanger life. However, in the cases outlined below, the circumstances are very different, creating serious doubts that the prosecutions are justified.

There are two main factors that distinguish the cases outlined below from what should be prosecuted as a crime. First, the information disclosed was of significant public interest. It has highlighted serious misconduct (including possible criminal offences and even war crimes) by employees of the Australian government. Second, the information has been disclosed responsibly by professional media organisations, with apparently little threat to human life or ongoing operations. In other words, the strong response to the leaks appears to have more to do with the embarrassment caused to the Australian government and its agencies than with threats to life or security. It is also important to distinguish these cases from the large-scale leaks led by Assange and Snowden. While debates about the morality of national security whistleblowing will continue, it is clear that these disclosures are more limited in scope.

One high-profile case surrounds Witness K, a former intelligence officer in the Australian Secret Intelligence Service (“ASIS”). ASIS is Australia’s foreign

8 *Australian Broadcasting Corporation v Kane (No 2)*, [2020] FCA 133 [*Kane*].

intelligence collection service and the equivalent of the United Kingdom's MI6. Witness K and his lawyer, Bernard Collaery, were both charged under section 39 of the *Intelligence Services Act*⁹ with a conspiracy to disclose information acquired or prepared by ASIS. Witness K pleaded guilty, but Collaery's prosecution continues in the courts.¹⁰ The charges resulted from revelations that, in 2004, ASIS officers bugged Cabinet offices of the Timor-Leste government during negotiations over oil and gas reserves in the contested Timor Sea. The bugging was deceptive and tainted the negotiations with bad faith, but more than that, it helped Australia derive commercial benefit for multinational oil companies at the expense of an impoverished neighbour.¹¹ Timor-Leste, still recovering from the impacts of Indonesian occupation, was deprived of substantial natural resources that could have aided its transition out of poverty.¹²

Witness K reported his concerns to the Inspector-General of Intelligence and Security ("IGIS"), who gave permission to seek legal advice from Collaery, a security-cleared lawyer. Collaery then helped the Timor-Leste government mount a challenge to the treaty's validity in The Hague. At that point, the media reported on the bugging scandal. Collaery's home and offices were raided by officers from the Australian Security Intelligence Organisation ("ASIO"), Australia's domestic intelligence agency, and Witness K was arrested. The prosecutions commenced in 2018 after the terms of the treaty concluded. Much of Collaery's trial has been conducted in secret, according to procedures set out

9 *Intelligence Services Act 2001* (Cth) (Austl), s 39 [ISA].

10 Knaus, "Appeal Against Secrecy", *supra* note 5.

11 See Bernard Collaery, *Oil Under Troubled Water* (Melbourne: Melbourne University Press, 2020) [Collaery]; Christopher Knaus, "Witness K and the 'outrageous' spy scandal that failed to shame Australia" (10 August 2019), online: *The Guardian* <www.theguardian.com/australia-news/2019/aug/10/witness-k-and-the-outrageous-spy-scandal-that-failed-to-shame-australia>.

12 Collaery, *ibid*. See also "Stop punishing Witness K for telling the truth on East Timor" (3 September 2019), online: *The Sydney Morning Herald* <<https://www.smh.com.au/politics/federal/stop-punishing-witness-k-for-telling-the-truth-on-east-timor-20190903-p52nkt.html>>.

in the *National Security Information Act* (“*NSIA*”).¹³ The *NSIA* was introduced after 9/11 to allow the successful prosecution of terrorists using summary and redacted evidence.¹⁴

Another high-profile case surrounds the police raid on the ABC. That case stems from “The Afghan Files”, a series of stories published by journalists Dan Oakes and Sam Clark. The headline refers to a collection of defence force documents that were leaked to the ABC by David McBride, an Australian Defence Force lawyer. The documents contain reports of incidents involving alleged unlawful killing and possible war crimes, including shooting unarmed children and severing the hands of dead Taliban fighters.¹⁵ After the stories were published, McBride admitted to the leak, claiming it was his duty to the Australian public.¹⁶ In 2019, two years after publication, the Sydney offices of the ABC were raided by the Australian Federal Police (“AFP”). McBride has been charged with a series of offences including breaches of the *Defence Act*¹⁷ and the theft of Commonwealth property. He is contesting the charges in the Australian Capital Territory’s (“ACT”) Supreme Court on the basis that he had a duty to report illegal conduct.¹⁸ The ABC journalists face the ongoing

13 *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (Austl).

14 Mark Rix, “Counter-terrorism and Information: The NSI Act, Fair Trials, and Open, Accountable Government” (2011) 25:2 *Continuum: Journal of Media & Cultural Studies* 285.

15 See Dan Oakes & Sam Clark, “The Afghan Files: Defence leak exposes deadly secrets of Australia’s special forces” (10 July 2017), online: *ABC News* <www.abc.net.au/news/2017-07-11/killings-of-unarmed-afghans-by-australian-special-forces/8466642?nw=0>.

16 David McBride, “‘My duty was to stand and be counted’: Why I leaked to the ABC” (9 July 2019), online: *The Sydney Morning Herald* <www.smh.com.au/national/my-duty-was-to-stand-and-be-counted-why-i-leaked-to-the-abc-20190608-p51vte.html>.

17 *Defence Act 1903* (Cth) (Austl).

18 Lyons, *supra* note 4.

possibility of prosecution.¹⁹ In *Kane*, discussed in Part IV, the Federal Court upheld the validity of the AFP search warrant, meaning that the digital material seized by the AFP during the raid can be used as evidence against them.²⁰

The ABC raid was sufficiently concerning on its own, but the discontent was amplified because it followed a police search on the home of a News Corp journalist. In 2018, Annika Smethurst published a story in the Sunday Telegraph, based on leaked information, that the Home Affairs and Defence departments discussed a proposal to give greater powers to the Australian Signals Directorate (“ASD”), Australia’s signals intelligence agency. The proposed powers would give ASD the power, with ministerial authorisation, to spy on Australian citizens by secretly accessing their emails, bank accounts and text messages.²¹ Rupert Murdoch called the search “outrageous and heavy-handed” and a “dangerous act of intimidation”.²² Another search was conducted on the house of a former intelligence officer who may have been Smethurst’s source,²³

19 Elizabeth Byrne, “Afghan Files leak accused David McBride faces ACT Supreme Court for first time” (13 July 2019), online: *ABC News* <www.abc.net.au/news/2019-06-13/abc-raids-afghan-files-leak-accused-court-canberra/11206682>.

20 Hayne, “ABC Raids”, *supra* note 5.

21 See Remeikis, *supra* note 4. Currently, ASD, like Australia’s other foreign intelligence agencies, cannot spy on Australian citizens.

22 *Ibid*; Rebecca Ananian-Welsh, “Why the raids on Australia media present a clear threat to democracy” (5 June 2019), online: *The Conversation* <theconversation.com/why-the-raids-on-australian-media-present-a-clear-threat-to-democracy-118334>; Paul Karp, “Federal police raid home of News Corp journalist Annika Smethurst” (4 July 2019), online: *The Guardian* <www.theguardian.com/australia-news/2019/jun/04/federal-police-raid-home-of-news-corp-journalist-annika-smethurst>.

23 Andrew Tillett, “Police raid home of senior federal bureaucrat” (4 September 2019), online: *The Australian Financial Review* <www.afr.com/politics/federal/police-raid-home-of-senior-federal-bureaucrat-20190904-p52nx3>.

though a plan to raid News Corp's Sydney headquarters was shelved amid the combined backlash from these and the ABC raid.²⁴

Charges against Smethurst were ruled out by the AFP after the High Court held that the search warrant used to raid her home was invalid.²⁵ This was because the warrant failed to meet its basic requirements: it misstated the offence and was not sufficiently specific.²⁶ However, despite finding the warrant invalid, the High Court held by a narrow majority that police were not required to destroy the information they seized or return it to Smethurst.²⁷ The court considered, among other issues, that there was no actionable right to require this, and there were public interest considerations in favour of the investigation and prosecution of crime.²⁸ In other words, under Australian law, journalistic material can be kept by police even if it is illegally obtained. This is a remarkable finding and further evidence that protections for freedom of the press are lacking. In contrast to the Federal Court in *Kane*, the High Court did not discuss wider questions as to whether the implied freedom of political communication or other relevant protections, such as shield laws, could protect journalists from criminal investigation.

The Witness K, Afghan Files and Smethurst cases all involved an intelligence or military insider. However, it is not only cases of national security whistleblowing that have been prosecuted. Richard Boyle, a former employee of the Australian Taxation Office ("ATO"), currently faces life in prison for blowing

24 Lyons, *supra* note 4.

25 Leo Shanahan & Richard Ferguson, "AFP won't charge News Corp journalist Annika Smethurst following raid" (27 May 2020), online: *The Australian* <www.afr.com/politics/federal/police-won-t-charge-news-corp-journalist-annika-smethurst-20200527-p54wwo>; Jordan Hayne, "AFP will not lay charges against Annika Smethurst over publishing of classified intelligence documents" (27 May 2020), online: *ABC News* <www.abc.net.au/news/2020-05-27/afp-will-not-lay-charges-annika-smethurst-raid/12291238>.

26 *Smethurst v Commissioner of Police*, [2020] HCA 14 at para 44.

27 *Ibid* at para 104.

28 *Ibid* at paras 85, 101.

the whistle on aggressive debt collection practices.²⁹ Similar to Witness K and McBride, Boyle initially raised the matter internally — in this case with his ATO supervisors — before taking his concerns to the media.³⁰ This is important procedurally, as it means these three insiders followed requirements outlined in the *Public Interest Disclosure Act* (“*PIDA*”),³¹ Australia’s federal whistleblowing legislation. The *PIDA* requires whistleblowers to first raise the matter internally and to disclose the information to an external source only if they reasonably believe the internal investigation to be inadequate.³² Despite following this process, and only going to the media after being “frustrated with inaction” by their employers and police,³³ the insiders have not been legally protected as whistleblowers. While the exact reasons for this are not known, it is likely that the information fell under exemptions for intelligence information,³⁴ or, according to the authorities, the insiders could not have reasonably believed the internal investigations were inadequate.

These cases suggest a willingness amongst government and law enforcement to prosecute genuine whistleblowers who report sensitive information in the public interest. In these cases, the information was communicated to a lawyer or journalist as a professional outsider. It is related to past operations or proposed policy changes, with apparently little ongoing threat to life or national security. In other words, there is a willingness to prosecute those who reveal sensitive information, even if the discloser’s intention is to promote transparency and

29 Khadem, *supra* note 5.

30 See Christopher Knaus, “Whistleblower protections ‘a sham’, says lawyer whose leaks led to ABC raids” (6 June 2019), online: *The Guardian* <www.theguardian.com/media/2019/jun/06/whistleblower-protections-a-sham-says-lawyer-whose-leaks-led-to-abc-raids>. It is not clear whether the Australian Signals Directorate insider who passed information to Annika Smethurst has sought whistleblower protections, as his or her identity is not publicly known.

31 *Public Interest Disclosure Act 2013* (Cth) (Austl) [*PIDA*].

32 *Ibid*, s 26.

33 Knaus, *supra* note 30.

34 *PIDA*, *supra* note 31, ss 33, 41.

accountability of government. The cases also suggest, as we confirm through the analysis in Part IV, that legal protections for whistleblowers and journalists are sorely lacking.

III. National Security Laws and Press Freedom

The risks of criminal prosecution to whistleblowers and journalists in Australia are aggravated by a wide range of national security offences and powers. Many of these laws were enacted recently in response to the threat of terrorism from Islamic State and foreign fighters but have more to do with keeping information secret than criminalising terrorism. This recent spate of lawmaking in response to terrorism is not a new phenomenon: since 2001, the federal Parliament has enacted more than 80 counter-terrorism laws.³⁵ Kent Roach dubbed this a form of “hyper-legislation”, meaning that Australia, with a comparatively low threat of terrorism, has outpaced other countries in the number and scope of its legal responses to terrorism.³⁶

Like other countries around the world, Australia responded strongly to the threat from the Islamic State with new and updated counter-terrorism laws. These laws supplemented more than 60 pieces of legislation passed by the Australian Federal Parliament in response to terrorism since 9/11.³⁷ The first legislative response to Islamic State, passed in October 2014, made further changes to the powers available to Australia’s intelligence agencies and a series of related offences. Disclosure offences in the *ISA* were strengthened, such that intelligence officers now face 10 years imprisonment for disclosing information obtained in the course of their duties,³⁸ or three years for “unauthorised dealing” with records, including copying or recording information.³⁹ The latter offences

35 See McGarry & Blackbourn, *supra* note 6.

36 Kent Roach, *The 9/11 Effect* (Cambridge: Cambridge University Press, 2011) at 309.

37 George Williams, “The Legal Legacy of the War on Terror” (2013) 12 *Macquarie Legal Journal* 3 at 7 (AustLII).

38 *ISA*, *supra* note 9, ss 39–40B.

39 *Ibid*, ss 40C–40M.

are clearly pre-emptive, designed to allow the prosecution of intelligence officers before they disclose information to an external source. Where that source would be a foreign government or intelligence agency, such pre-emptive action may well be justified, although separate espionage offences would also apply.⁴⁰ Copying information to pass it on to a journalist or member of Parliament is very different, as this could be intended to enhance rather than undermine the public interest, but the legislation makes no distinction between these two very different scenarios.

The unauthorised dealing offences do not include a requirement that the person intends to communicate the information to anyone. The penalty applies provided the information was copied outside the course of their duties, it was not done in accordance with a requirement of the Inspector-General of Intelligence and Security, and the information was not publicly available.⁴¹ This means that a whistleblowing intelligence officer could be imprisoned if they thought about passing the information on to a journalist but later changed their mind.

Another major change introduced at this time was to give ASIO, Australia's domestic intelligence agency, powers to conduct "Special Intelligence Operations" ("SIO"). An SIO is an undercover intelligence operation, approved by the federal Attorney-General, in which ASIO officers receive immunity from civil and criminal liability.⁴² This scheme was controversial for its own reasons, including the initial possibility that the laws might have authorised the use of torture.⁴³ However, the main controversy surrounding press freedom is related

40 *Criminal Code Act 1995* (Cth) (Austl), div 91 [*Criminal Code*].

41 *ISA, supra* note 9, ss 40C(1)(d), (2), (2A).

42 *Australian Security Intelligence Organisation Act 1979* (Cth) (Austl), ss 35C, 35K [ASIO].

43 See e.g. Paul Sheehan, "George Brandis' new anti-terror law allows ASIO to torture" (17 September 2014), online: *The Sydney Morning Herald* <www.smh.com.au/opinion/george-brandis-new-antiterror-law-allows-asio-to-torture-20140917-10i9hv.html>. An amendment was later included in the Bill to ensure this was not possible. See also Teneille Elliott, "Only in America? Australia needs safeguards against torture too" (12 December 2014), online:

to a new offence, found in section 35P of the *Australian Security Intelligence Organisation Act*.⁴⁴

Section 35P prohibits the disclosure of information about SIOs. In its original form, the offence provided five years' imprisonment where a person disclosed any information about an SIO. Similar to the unauthorised dealing offences, this was an offence of strict liability: it applied regardless of the person's intention. The penalty doubled if the disclosure endangered health or safety, or prejudiced an SIO, or the person intended one of those consequences.

This new offence was heavily criticised by media organisations, as it would prevent them from reporting on misconduct by ASIO officers, even where they did so responsibly in the public interest. The Media, Arts and Entertainment Alliance called it "an outrageous attack on press freedom" that was "not worthy of a healthy, functioning democracy".⁴⁵ In a public address, Lachlan Murdoch claimed that "we do not need further laws to jail journalists who responsibly learn and accurately tell".⁴⁶ Many of these criticisms came after the law was already enacted, but they were sufficient for the government to request an inquiry into the law by Roger Gyles QC, at that time the Independent National

The Conversation <theconversation.com/only-in-america-australia-needs-safeguards-against-torture-too-35376>.

44 ASIO, *supra* note 42, s 35P.

45 "MEAA Says National Security Law an Outrageous Attack on Press Freedom in Australia" (26 September 2014), online: *Media, Entertainment and Arts Alliance* <www.meaa.org/mediaroom/meaa-says-national-security-law-an-outrageous-attack-on-press-freedom-in-australia/>; Christopher Warren & Mike Dobbie, "Surveillance state seizes its chance" (October 2014), online (pdf): *The Walkley Magazine* <www.meaa.org/wp-content/uploads/2014/02/ebook_walkleys81web.pdf>.

46 Rachael Brown, "Lachlan Murdoch hits out at new anti-terror laws saying they threaten press freedom" (23 October 2014), online: *ABC News* <www.abc.net.au/news/2014-10-24/lachlan-murdoch-hits-out-at-new-anti-terror-laws/5838030>; Michael Bradley, "Murdoch's Belated Stand for Press Freedom" (23 October 2014), online: *The Drum* <www.abc.net.au/news/2014-10-24;bradley-murdochs-belated-stand-for-press-freedom/5839584>.

Security Legislation Monitor (“INSLM”). INSLM is an independent statutory review office modelled on the UK’s Independent Reviewer of Terrorism Legislation.

Following recommendations by INSLM,⁴⁷ section 35P was amended so that it now distinguishes between “entrusted persons” (intelligence agency employees) and any other person. For entrusted persons, the offences remain the same,⁴⁸ but the offences for all other persons (including journalists and lawyers) have been amended. A penalty of five years’ imprisonment now applies where the disclosure will endanger the health or safety of any person or prejudice an SIO, and the penalty doubles where the person intends those results.⁴⁹

The amendments to section 35P were a welcome improvement, but the offences remain problematic. Strict liability offences still apply to intelligence insiders,⁵⁰ and there are no exemptions across any of the offences for disclosing information in the public interest. In addition, the offences do not require that the person even knows that the information relates to an SIO: the person need only be reckless as to that connection. This is not a significant issue for insiders, who are likely to know what the information relates to, but it is problematic for journalists. Journalists reporting on counter-terrorism raids or other common aspects of national security reporting are not likely to know if the stories they are telling relate to an SIO or not. This is likely to have a chilling effect on the ability of Australia media organisations to report more widely on national security matters in the public interest. In 2018, the United Nations Special Rapporteur on the Situation of Human Rights Defenders reported as much, warning that Australian journalists may engage in self-censorship due to fears about section 35P:

⁴⁷ Independent National Security Legislation Monitor, *Report on the Impact on Journalists of Section 35P of the ASIO Act* by the Hon Roger Gyles (Canberra: Independent National Security Legislation Monitor, 2015) at 3.

⁴⁸ *ASIO*, *supra* note 42, ss 35P(1), 35(1B).

⁴⁹ *Ibid*, ss 35P(2), 35(2A).

⁵⁰ *Ibid*, ss 35P(1A), 35(1C).

Given the overall secrecy of intelligence operations and without confirmation from ASIO, it is challenging for journalists to determine if an activity of interest would be a special intelligence operation. Due to high sanctions, the provision may lead to self-censorship by the media, which may take a more cautious approach to reporting on ASIO's activities.⁵¹

These concerns were compounded when new metadata laws were introduced the following year. In early 2015, the federal Parliament enacted laws requiring communications service providers to retain metadata — including the time, date, location, sender and recipient of all telephone calls, emails and messages — for two years.⁵² These metadata can be accessed by ASIO and enforcement agencies without a warrant.⁵³ Enforcement agencies include police and other criminal investigative bodies,⁵⁴ though in practice, a much wider range of organisations — including local councils — have been able to gain access to metadata under the new laws.⁵⁵

In addition to wider privacy issues, the metadata laws raised specific concerns that journalists' metadata could be accessed by ASIO or law enforcement to identify their confidential sources. In response, a Journalist Information Warrant ("JIW") scheme was introduced. Under this scheme, a journalist's metadata can be accessed only if a judge determines that the public interest in issuing the warrant outweighs the public interest in protecting the source.⁵⁶ This is a welcome addition, although journalists cannot make submissions to contest the

51 *Report of the Special Rapporteur on the Situation of Human Rights Defenders on his Mission to Australia*, UNHRC, 37th Sess, UN Doc A/HRC/37/51/Add.3 (2018) at 7.

52 *Telecommunications (Interception and Access) Act 1979* (Cth) (Austl), s 186A [*Telecommunications Act 1979*].

53 See *ibid*, ss 175, 178–179.

54 *Ibid*, s 176A.

55 See Melissa Clarke, "Metadata laws under fire as 'authority creep' has more agencies accessing your information" (19 October 2018), online: *ABC news* <www.abc.net.au/news/2018-10-19/authority-creep-has-more-agencies-accessing-your-metadata/10398348>.

56 *Telecommunications Act 1979*, *supra* note 52, ss 180L, 180T.

warrants before a judge. Indeed, they need not be notified that an application is being made, or that a warrant has been issued. The first time a journalist is likely to suspect their metadata has been accessed is when they become aware of an investigation (for example, through a raid on their home or offices). Even then, they would not necessarily be able to confirm that fact. The investigation need not relate to a serious crime, as metadata can be accessed by ASIO for intelligence gathering purposes, or by enforcement agencies to enforce the criminal law, find a missing person, or protect the public revenue.⁵⁷

The JIW scheme also does not prevent the misuse of the laws. In 2018, the Commonwealth Ombudsman reported that metadata had been accessed repeatedly without proper authorisation.⁵⁸ This was done more than 3000 times by the Australian Capital Territory police alone, suggesting it had become common practice.⁵⁹ In at least one case, an AFP officer accessed a journalist's metadata to identify a source without applying for a JIW.⁶⁰ Journalists' metadata has also been accessed according to the warrant scheme. Under two JIWs, which were likely related to the ABC raids, journalists' metadata was accessed 58 times.⁶¹

57 *Ibid*, ss 178–179.

58 Commonwealth Ombudsman, *A Report on the Commonwealth Ombudsman's Monitoring of Agency Access to Stored Communications and Telecommunications Data Under Chapters 3 and 4 of the Telecommunications (Interception and Access) Act 1979*, (2018) at 10 [Commonwealth Ombudsman].

59 *Ibid* at 10 (initially it was reported by the Commonwealth Ombudsman that ACT police had access metadata without authorisation 116 times); Paul Karp, “ACT police admit they unlawfully accessed metadata more than 3,000 times” (26 July 2019), online: *The Guardian* <www.theguardian.com/australia-news/2019/jul/26/act-police-admit-unlawfully-accessed-metadata-more-than-3000-times>. ACT police later admitted that the actual number was more than 3000.

60 Commonwealth Ombudsman, *ibid* at 9.

61 Bevan Shields, “Federal police accessed the metadata of journalists nearly 60 times” (8 July 2019), online: *The Sydney Morning Herald* <www.smh.com.au/politics/federal/federal-police-accessed-the-metadata-of-journalists-nearly-60-times-20190708-p52598.html>.

Following section 35P and the metadata laws, a further expansion of national security powers threatened journalists once more. Through the *National Security Legislation Amendment Act*⁶² the federal government sought to address growing foreign influence in Australia. This included a foreign influence transparency register, which requires foreign entities to identify their political interests, as well as expanded espionage offences. While the government has not said so explicitly, the laws are widely recognised as targeting the influence of the Chinese Communist Party in Australia.⁶³

The new espionage laws include an offence punishable by 25 years imprisonment where a person “deals” with information that “concerns Australia’s national security” and they are reckless as to whether they will prejudice national security as a result.⁶⁴ Similar to the unauthorised dealing offences, the definition of “dealing” includes not only communicating or publishing information but also receiving, possessing, copying, or making a record of it.⁶⁵ The definition of “national security” is also exceptionally broad, as it extends beyond matters concerning defence or terrorism to include Australia’s “political, military or economic relations” with other countries.⁶⁶ A penalty of up to 20 years’ imprisonment is available even if the information itself does not have a security classification or relate to national security.⁶⁷

62 *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (Cth) (Austl).

63 See David Wroe & National Security Correspondent, “What took you so long? Experts predict China’s reaction to foreign influence laws” (5 December 2017), online: *The Sydney Morning Herald* <www.smh.com.au/politics/federal/what-took-you-so-long-experts-predict-chinas-reaction-to-foreign-influence-laws-20171205-gzzdiu.html>.

64 *Criminal Code*, *supra* note 40, s 91.1(2).

65 *Ibid*, s 90.1.

66 *Ibid*, s 90.4(1)(e).

67 *Ibid*, s 91.2(2).

The information must be “made available” to a foreign principal,⁶⁸ suggesting it involves collaboration with a foreign government or intelligence agency and would not apply to public-interest journalism. However, the definition of the foreign principal includes any entity owned, directed or controlled by a foreign government.⁶⁹ In theory, this could include passing (or preparing to pass) information to public broadcasters in other countries, such as the British Broadcasting Corporation. The meaning of ‘make available’ includes placing the information somewhere it can be accessed or describing how to access it.⁷⁰ These do not directly describe publishing the information online or in a newspaper but appear broad enough to capture those scenarios. Certainly, even if the espionage offences are directed towards other harms, there is sufficient risk for journalists to fear prosecution. Under these updated laws, a newsroom could plausibly be raided on suspicion that journalists possessed information relating to Australia’s economic relations with other countries. This is an extraordinary expansion of the traditional concept of espionage, which involves communicating sensitive information to an enemy power.⁷¹

Yet another piece of legislation during this period of counter-terrorism lawmaking was the *Telecommunications and Other Legislation Amendment Act* (“*TOLA*”),⁷² also referred to as the “encryption laws”. *TOLA* creates a scheme whereby Australian police and intelligence agencies can request technical assistance from “designated communications providers” (“DCPs”). The primary aim of the legislation is to address the problem of terrorist organisations ‘going dark’ by using encrypted messaging services, such as WhatsApp, Telegram and

68 *Ibid.*

69 *Ibid*, s 90.2(d).

70 *Ibid*, s 90.1.

71 See Sarah Kendall, “Australia’s New Espionage Laws Another Case of Hyper-Legislation and Over-Criminalisation” (2019) 38:1 The University of Queensland Law Journal 125.

72 *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* (Cth) (Austl).

Signal.⁷³ ASIO and law enforcement can now require Facebook and other technology companies to assist in decrypting secure messages sent over their servers. Companies that refuse to comply face fines of up to AUD \$10 million.⁷⁴ However, the potential scope of the law is much broader. The definition of a DCP is exceptionally broad, extending to essentially any type of technology company anywhere in the world,⁷⁵ and the types of technical assistance available extend beyond decryption to include substituting part of any service or modifying any product.⁷⁶ Again, these laws are controversial for wider reasons, including how quickly they were rushed through Parliament and the risks they create to cyber-security,⁷⁷ but they raise specific concerns around journalists and their confidential sources. In response to concerns about the metadata laws, journalists increased their use of encrypted messaging,⁷⁸ but then TOLA meant this strategy would not necessarily protect their sources' identities.

Concerns over these wide-ranging national security powers, as well as the ongoing investigations surrounding Witness K, the Afghan Files and Annika Smethurst, led to the front-page protest mentioned in the introduction. The backlash also triggered two parliamentary inquiries, including one by the Parliamentary Joint Committee on Intelligence and Security ("PJCIS"). It remains to be seen what will come out of these inquiries in terms of recommendations and amendments, but it is clear they will need to address

73 See Nicola McGarrity & Keiran Hardy, "Digital Surveillance and Access to Encrypted Communications in Australia" (2020) 49:1 Common Law World Review 1.

74 *Telecommunications Act 1997* (Cth) (Austl), 1997/47, ss 317ZA-317ZG [*Telecommunications Act 1997*].

75 *Ibid*, s 317C. See McGarrity & Hardy, *supra* note 73.

76 *Telecommunications Act 1997*, *supra* note 74, s 317E.

77 See Ariel Bogle, "'Outlandish' encryption laws leave Australian tech industry angry and confused" (6 December 2018), online: *ABC News* <www.abc.net.au/news/science/2018-12-07/encryption-bill-australian-technology-industry-fuming-mad/10589962>.

78 See "Digital security for journalists" (10 June 2019), online: *Digital Rights Watch* <digitalrightswatch.org.au/2019/06/10/digital-security-for-journalists>.

widespread discontent amongst Australia's media organisations. In evidence to the PJCIS, the ABC news director captured the seriousness of these powers. He explained that journalists working in Australia could no longer provide the core promise of their profession:

When we talk to a source we have always been able to say to them: 'You can provide us with information and we will absolutely protect your identity and protect your wellbeing by doing that.' That is a crucial part of so many stories that have shaped policy in this country. We can't say that now because we don't know whether, in telling that story, the Federal Police are going to come and take those files away ... We simply can't say to a source anymore that we absolutely can guarantee that they will be protected here. That is what is at risk and that is what is at stake.⁷⁹

It is not only recently introduced powers that threaten press freedom and freedom of speech. Secrecy offences attach to other counter-terrorism laws, including ASIO's special questioning powers and Preventative Detention Orders.⁸⁰ The NSIA, which was introduced in 2004 to assist in terrorism prosecutions, has meant that much of Collaery's trial will be conducted in secret.⁸¹ The espionage offences have a much longer history,⁸² as do secrecy

79 Austl, Commonwealth, House of Representatives, *Parliamentary Debates* (13 August 2019) at 20 (Mr Morris, ABC News Director).

80 ASIO, *supra* note 42, s 34ZS; *Criminal Code*, *supra* note 40, s 105.41.

81 Christopher Knaus, "Court rules parts of Bernard Collaery trial to be held in secret" (26 June 2020), online: *The Guardian* <www.theguardian.com/australia-news/2020/jun/26/court-rules-key-parts-of-bernard-collaery-trial-to-be-held-in-secret>; Keiran Hardy, "Australia's quest for national security is undermining the courts and could lead to secretive trials" (1 October 2019), online: *The Conversation* <theconversation.com/australias-quest-for-national-security-is-undermining-the-courts-and-could-lead-to-secrective-trials-122638>.

82 Kendall, *supra* note 71.

offences for government officers.⁸³ Longstanding offences in the *Crimes Act*⁸⁴ prohibited Commonwealth officers from disclosing information obtained in the course of their duties, or disclosing official secrets. David McBride, the defence lawyer who passed the Afghan Files to the ABC, has been charged with one of those offences, although they have now been repealed by the 2018 foreign interference laws, with new versions introduced.⁸⁵ It is the cumulation of these new and updated offences, combined with expanded powers of digital surveillance and an appetite for prosecuting journalists and whistleblowers acting in the public interest, that have contributed to the current low point for freedom of the press in Australia.

In response to concerns about these national security laws and the ongoing prosecutions, senior members of the government have said that journalists will not be “prosecuted for doing their job”.⁸⁶ This assurance was provided by George Brandis, Attorney-General when section 35P was introduced, and both he and his successor, Christian Porter, issued directives to the federal prosecution office that journalists must not be prosecuted without their consent.⁸⁷ Home Affairs Minister Peter Dutton also issued a similar directive to the AFP.⁸⁸ However, while these directives are promising, they merely reinforce that the

83 Keiran Hardy & George Williams, “Terrorist, Traitor or Whistleblower?” (2014) 37:2 *The University of New South Wales Law Journal* 784 at para 799.

84 *Crimes Act 1914* (Cth) (Austl) [*Crimes Act*].

85 *Criminal Code*, *supra* note 40, div 122.

86 Taylor, *supra* note 7.

87 *Ibid*; Max Mason, “Porter Declares No Prosecution of Journalists without His Consent” (30 September 2019), online: *The Australian Financial Review* <<https://www.afr.com/companies/media-and-marketing/porter-declares-no-prosecution-of-journalists-without-his-consent-20190930-p52wbe>>.

88 See Jade Macmillan, “Peter Dutton orders AFP to consider importance of press freedom before investigating reporter” (9 August 2019), online: *ABC News* <www.abc.net.au/news/2019-08-09/peter-dutton-orders-fpa-press-freedom-investigating-journalists/11401108>; Denis Muller, “Dutton directive gives journalists more breathing space, but not whistleblowers” (11 August 2019), online: *The Conversation* <theconversation.com/dutton-directive-gives-journalists-more-breathing-space-but-not-whistleblowers-121730>.

choice to prosecute relies on executive discretion; they cannot prevent a journalist from being prosecuted for acting in the public interest, nor do they provide wider protection for freedom of the press. When asked whether he was concerned that journalists were being tried in the courts, the Prime Minister responded only that “no one in this country is above the law”.⁸⁹ Such statements, uttered similarly by Porter and Dutton before issuing their directives,⁹⁰ do not breed confidence that Australian journalists will be able to report freely in the public interest. Under Australia’s wide-ranging national security powers, the investigation and prosecution of journalists remain not only a possibility but a reality.

IV. Protecting Journalists and Whistleblowers

Freedom of the press is “one of the cornerstones of a democratic society”.⁹¹ It is closely related to the freedom of expression, found in article 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (“ICCPR”). According to article 9(2) of the ICCPR:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds,

89 Fergus Hunter, “‘Common sense changes’: Media companies reject claim they want to be ‘above the law’” (22 October 2019), online: *The Sydney Morning Herald* <www.smh.com.au/politics/federal/common-sense-changes-media-companies-reject-claim-they-want-to-be-above-the-law-20191022-p5334u.html>.

90 Bianca Hall, “Press freedom is a necessary and important part of a democracy” (26 October 2019), online: *The Sydney Morning Herald* <www.smh.com.au/politics/federal/press-freedom-is-a-necessary-and-important-part-of-a-democracy-20191025-p5347p.html>; Bevan Shields, “‘Nobody is above the law’: Journalists committed a crime, says Peter Dutton” (12 July 2019), online: *The Sydney Morning Herald* <www.smh.com.au/politics/federal/nobody-is-above-the-law-journalists-committed-a-crime-says-peter-dutton-20190712-p526il.html>.

91 *General Comment No. 34, Article 19: Freedom of opinion and expression*, UNHRC, 102nd Sess, UN Doc CCPR/C/GC/34 (2011) at 3.

regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.⁹²

For media organisations to report freely in the public interest is essential to achieving this freedom. Press freedom also has wider significance, as a free and independent media contributes to transparency and accountability of government. It is therefore essential not only for free speech as a public good but also for the enjoyment of other human rights.⁹³ It is important not only to media organisations, which publish the information but also to citizens, who have a right to access information from a diversity of sources.⁹⁴ This is essential to ensuring the proper election of the people's representatives to Parliament. Press freedom is both a human right and a democratic one.

Australia has ratified the ICCPR and indicated its ongoing support for the instrument.⁹⁵ However, Australia lacks domestically enforceable protection for freedom of speech and freedom of the press. Indeed, Australia remains the only democratic country without some form of nationally enforceable human rights instrument.⁹⁶ Three of its states — the ACT, Victoria and more recently Queensland — have enacted statutory rights instruments,⁹⁷ but human rights remain absent from the federal Constitution. The Australian Constitution does include some limited rights, including those to trial by jury and freedom of religion, but it does not mention freedom of speech or freedom of the press.

92 *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 art19(2) (23 March 1976).

93 *Supra* note 91 at 1.

94 *Ibid* at 4.

95 “International human rights system”, online: Attorney-General’s Department <www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/international-human-rights-system>.

96 See George Williams & Daniel Reynolds, *A Charter of Rights for Australia*, 4d (Sydney: University of New South Wales Press, 2018).

97 *Charter of Human Rights and Responsibilities Act 2006* (Vic) (Austl); *Human Rights Act 2004* (ACT) (Austl); *Human Rights Act 2019* (Qld) (Austl).

This differs from the other Five Eyes partners, which have either constitutional or national statutory protection for freedom of speech.

With one exception, there are also no explicit protections for journalists or whistleblowers in the offences themselves. Of all the national security disclosure offences, only one includes a defence for public interest reporting. This is a new offence introduced in 2018 when the secrecy offences in the *Crimes Act* were updated. Section 122.4A of the *Criminal Code Act* makes it an offence for any person to communicate information that they obtained from a government employee, where the information has a security classification or the communication would damage security or defence, health or safety, or prejudice a criminal investigation.⁹⁸ It is a defence if the person dealt with the information “as a person engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news media”, and the person reasonably believed they acted in the public interest.⁹⁹

Australia does have federal whistleblowing laws, which can provide immunity from the other disclosure offences. However, these only apply to government employees,¹⁰⁰ and so provide no protection for journalists. The scheme requires a valid public interest disclosure, meaning that the employee must first raise their concerns to their supervisor or a recognised oversight body, such as the IGIS.¹⁰¹ If the person reasonably believes that the internal investigation was adequate, they can then disclose that information externally, provided the disclosure is limited to the information necessary to expose some specific wrongdoing.¹⁰² However, the scheme includes exemptions for intelligence information and information related to intelligence agencies.¹⁰³

98 *Criminal Code*, *supra* note 40, s 122.4A.

99 *Ibid*, s 122.5.

100 *PIDA*, *supra* note 31, ss 26, 69.

101 *Ibid*, s 26.

102 *Ibid*.

103 *Ibid*, ss 33, 41.

These render the prospect of an intelligence officer or military insider receiving immunity for national security whistleblowing virtually non-existent.¹⁰⁴

In the absence of these explicit protections, there are four remaining possibilities in Australia's legal system for protecting journalists from criminal investigation. First are ethical guidelines and codes, which require journalists to ensure the confidentiality of their sources.¹⁰⁵ Second is a common law "newspaper rule", which protects source confidentiality during discovery processes.¹⁰⁶ Third are shield laws,¹⁰⁷ which provide stronger legal protections for source confidentiality. Fourth is a possibility that the implied freedom of political communication, derived by the Australian High Court from the text of the Constitution,¹⁰⁸ could invalidate or limit the scope of laws that enable criminal investigations into media reporting.

In *Kane*,¹⁰⁹ the Federal Court examined each of these possibilities. That case involved a challenge to the validity of the search warrant executed by the AFP on the ABC offices. Much of the initial discussion surrounded whether the warrant was sufficiently specific. The ABC argued that the warrant did not set "real and meaningful parameters", as it referred to news programs (such as the "7:30 Report") in their entirety, and it relied on vague terms like "military information". A similar challenge was that the warrant was "legally unreasonable" although this test sets a very high bar and would essentially require the investigation to be vexatious or irrational.¹¹⁰ In contrast to the High Court's decision in *Smethurst*, the Federal Court found that the ABC warrant was sufficiently specific. It held that the warrant did not need to be "precisely or

¹⁰⁴ See Hardy & Williams, *supra* note 83.

¹⁰⁵ "MEAA Journalist Code of Ethics", online: *Media, Entertainment & Arts Alliance* <www.meaa.org/meaa-media/code-of-ethics/> [MEAA Code].

¹⁰⁶ *John Fairfax & Sons Ltd v Cojuangco* (1988), 165 CLR 346 [*Cojuangco*].

¹⁰⁷ *Evidence Act 1995* (Cth) (Austl), s 126K [*Evidence Act*].

¹⁰⁸ *Lange v Australian Broadcasting Corporation* (1997), 189 CLR 520 [*Lange*].

¹⁰⁹ *Kane*, *supra* note 8.

¹¹⁰ *Minister for Immigration and Border Protection v Stretton*, (2016) 237 FCR 1 (Austl).

exactly drawn”, as warrants are necessarily based on suspicion rather than knowledge, and this one was, in any case, adequately tied to a series of offences.¹¹¹

The Federal Court then considered the four possibilities above, finding no relevant protections for the ABC. First, unsurprisingly, it found that journalists’ ethical codes and guidelines do not have the legal force necessary to protect journalists from a police search warrant or other legal order. For example, the Media, Entertainment and Arts Alliance’s *Journalist Code of Ethics*, first issued in 1944, requires that source confidentiality be respected “in all circumstances”¹¹². Similarly, Principle 5 in the Australian Press Council’s *Privacy Principles* provides that “the identity of confidential sources should not be revealed”.¹¹³ The court held that these do not provide an absolute guarantee of source confidentiality and “must be read subject to the law of the land”.¹¹⁴

Second, the court considered the common law “newspaper rule”. This rule recognises the “special position of those publishing and conducting newspapers … and the desirability of protecting those who contribute to their columns from the consequences of unnecessary disclosure of their identity”¹¹⁵. However, this is not an absolute privilege, as it must be balanced against the need for individuals to launch defamation proceedings against media organisations that malign their reputations. As the High Court explained in *John Fairfax & Sons Ltd v Cojuangco*, there must be some possibility of identifying journalists’ sources in order to encourage responsible reporting, or else journalists could hide behind fictitious sources:

¹¹¹ *Kane*, *supra* note 8 at para 368.

¹¹² *MEAA Code*, *supra* note 105.

¹¹³ “Statement of General Principles”, online (pdf): *Australian Press Council* <www.presscouncil.org.au/uploads/52321/ufiles/GENERAL_-_PRIVACY_PRINCIPLES_-_July_2014.pdf>.

¹¹⁴ *Kane*, *supra* note 8 at para 196.

¹¹⁵ *McGuinness v Attorney-General*, (1940) 63 CLR 73 at 104 (Austl) [McGuinness].

The liability of the media and of journalists to disclose their sources of information in the interests of justice is itself a valuable sanction which will encourage the media to exercise with due responsibility its great powers which are capable of being abused to the detriment of the individual. The recognition of an immunity from disclosure of sources of information would enable irresponsible persons to shelter behind anonymous, or even fictitious, sources.¹¹⁶

In *McGuiness v Attorney-General*,¹¹⁷ Dixon J had earlier explained that the newspaper rule is not a rule of evidence but rather a practice by which journalists may refuse to reveal the identity of their sources in discovery proceedings. It is not strictly a privilege but rather a procedural limitation, which may be upheld, depending on the interests of justice in the circumstances of the case.¹¹⁸ In *Kane*, the Federal Court followed this line of reasoning, holding that the newspaper rule “is not a principle of broader application and it does not assist in this case”.¹¹⁹

Third, the Federal Court considered the relevance of statutory shield laws. For example, section 126K of the *Evidence Act* provides that a journalist who has promised not to disclose an informant’s identity is not “compellable to answer any question or produce any document that would disclose the identity of the informant”.¹²⁰ Section 131A explains that this protection applies in relation to certain processes or orders, including a summons or subpoena, pre-trial or non-party discovery, interrogatories, or notices to produce.¹²¹ In considering the applicability of these protections to the ABC warrant, the court reasoned, firstly, that refusing to answer questions or produce a document does not describe

116 *Cojuangco*, *supra* note 106 at para 15.

117 *McGuinness*, *supra* note 115.

118 *Ibid.*

119 *Kane*, *supra* note 8 at para 186.

120 *Evidence Act*, *supra* note 107, s 126K(1).

121 *Ibid.*, s 131A.

“what occurs in the execution of a search warrant”,¹²² and secondly, that the list of legal processes clearly did not extend to police investigations.¹²³ In addition, the court considered, the protection is not absolute, as the court can hold that it does not apply if the public interest in identifying the source outweighs the likely adverse impact on the informant and the public benefit in media reporting.¹²⁴ Similar to the newspaper rule, shield laws establish a presumption that source identity will be protected, but this is not an absolute privilege, and it only applies during discovery and other specific legal processes. They do not provide any general immunity that would prevent police from searching for and seizing information that would identify a journalist’s confidential source.

This lack of protections for journalistic materials in police search warrants differs from the situation in the other Five Eyes partners. In New Zealand, journalistic sources are treated as privileged information, and journalists must be given an opportunity to claim that opportunity, firstly to police and then, if needed, before a judge.¹²⁵ In the UK, a special procedure involving contested hearings and a public interest test applies before journalistic information can be seized by police.¹²⁶ In the United States, due to the 1st and 4th amendments to the US Constitution, the starting point is that newsroom raids are unlawful, and a search is permissible only if the information is security classified or the seizure of documents is necessary to prevent death or serious bodily injury.¹²⁷ In Canada, journalistic documents seized by police may be kept in the custody of the court, and journalists may make submissions to have the documents returned.¹²⁸ In Australia, no such explicit protections exist to protect journalistic material from being seized by police in the exercise of search warrants.

¹²² *Kane, supra* note 8 at para 204.

¹²³ *Ibid* at para 205.

¹²⁴ *Evidence Act, supra* note 107, s 126K(2).

¹²⁵ *Search and Surveillance Act 2012* (NZ), s 145.

¹²⁶ *Police and Criminal Evidence Act 1984* (UK), s 60(1).

¹²⁷ USC 42 § 2000aa.

¹²⁸ *Journalistic Sources Protection Act*, SC 2017, c 22.

Finally, the Federal Court considered the possibility that the implied freedom of political communication could partially invalidate the legislation that provides the police search warrant power. The warrant in the ABC case was issued under section 3E of the *Crimes Act*, which provides, similar to other search warrant powers, that a magistrate can issue a warrant if there are reasonable grounds that for suspecting there will be evidential material on the premises in the next 72 hours.¹²⁹ The ABC argued that section 3E should be invalid in some of its operations if it was capable of issuing the warrant that led to the raids on its offices.

The ABC based this argument on the implied freedom, which derives from the requirement in sections 7 and 24 of the Australian Constitution that members of the federal Parliament be “directly chosen by the people”. In two cases in 1992,¹³⁰ the Australian High Court implied from those words a restriction on the lawmaking of Parliaments with regard to political communication. The court reasoned that the Constitution creates a system of representative government, and this necessarily implies that Australians should be free to communicate about political matters, such as the conduct of candidates for parliamentary elections. In *Lange v Australian Broadcasting Corporation*,¹³¹ the High Court set out a two-limb test for determining whether a law is invalid due to the implied freedom. That test has since been amended to include three questions, structured as follows:

1. Does the law effectively burden freedom of communication about government or political matters in its terms, operation or effect?
2. If yes to 1, is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

129 *Crimes Act*, *supra* note 84, s 3E.

130 *Nationwide News Pty Ltd v Wills* (1992), 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992), 177 CLR 106.

131 *Lange*, *supra* note 108.

3. If yes to 2, is the law reasonably appropriate and adapted to advance that legitimate purpose?¹³²

A law will be invalid if the answer to the first question is yes and the answer to the second or third question is no.

The first question means that the implied freedom does not provide general protection for freedom of speech, as it is limited to speech about political matters. This was confirmed recently in *Comcare v Banerji*,¹³³ and followed by the Federal Court in *Kane*. The court drew a clear distinction between the implied freedom and wider protections for free speech in the 1st amendment to the US Constitution. It held that “the notion of speech as an affirmative value has no role to play”.¹³⁴ The court further confirmed that the implied freedom is not strictly a right or privilege at all, but rather “operates solely as a restriction” on the lawmaking power of Parliament.¹³⁵ The second and third questions involve compatibility testing and a structured proportionality analysis, which requires consideration of whether the law is suitable, necessary, and adequate in its balance.¹³⁶ This means that laws can limit political speech, provided they do so in a way that is proportionate to achieving a legitimate aim which is needed to maintain Australia’s system of representative and responsible government.

In considering the validity of section 3E, the Federal Court held that the question should be determined on the face of the provision as a matter of interpretation, and not by reference to a specific outcome in the case at hand.¹³⁷ It recognised that section 3E could burden political speech, but held that the law had a legitimate purpose — to investigate crime — and the means it adopted were proportionate to achieving that aim. Consequently, it found that

¹³² *McCloy v New South Wales*, (2015) 257 CLR 178 at 194–195; *Brown v Tasmania*, [2017] HCA 43 at 82 [*Brown*].

¹³³ [2019] HCA 23.

¹³⁴ *Kane*, *supra* note 8 at para 193.

¹³⁵ *Ibid*.

¹³⁶ *Brown*, *supra* note 132.

¹³⁷ *Kane*, *supra* note 8 at para 264.

the “power in section 3E for a warrant to be issued is a validly conferred power across the whole range of its operations”.¹³⁸

The court also discussed the conduct of the AFP, which had liaised with the ABC before executing the warrant and conducted their search on a computer in one room rather than raiding the offices intrusively.¹³⁹ To some degree, these facts might leave open a challenge if police conduct a newsroom raid less sensitively and appropriately in the future. However, it remains clear from the Federal Court’s judgment that there are essentially no valid grounds —in guidelines, codes, legislation or the Australian Constitution — for protecting journalistic sources or documents during the exercise of a police search warrant. Now that the warrant has been upheld, it remains to be seen whether the ABC journalists who published the Afghan Files stories will be prosecuted. At the time of writing, more revelations about possible war crimes committed by Australian soldiers in Afghanistan continue to rise to the surface.¹⁴⁰

V. Conclusion

Freedom of the press remains a topic of significant public debate in Australia. Recent high-profile prosecutions of whistleblowers and journalists, combined with the ongoing expansion of national security and counter-terrorism laws, has generated backlash from Australian media outlets, law reform groups and the wider public. Two main factors — one contemporary, one historical — have allowed these recent encroachments. First, the ongoing threat of terrorism has enabled stricter controls on the publication of sensitive information. This dates back to Australia’s first legal responses to 9/11 but has accelerated in recent years in response to the rise of the Islamic State and the threat of returning foreign fighters. Many new offences and powers have been enacted in response to that

138 *Ibid* at para 271.

139 *Ibid* at paras 382–383.

140 See Mark Willacy & Alexandra Blucher, “Witnesses say Australian SAS soldiers were involved in mass shooting of unarmed Afghan civilians” (13 July 2020), online: *ABC News* <www.abc.net.au/news/2020-07-14/australian-special-forces-killed-unarmed-civilians-in-kandahar/12441974>.

threat, many of which directly or indirectly undermine the ability of whistleblowers and journalists to report on national security matters in the public interest.

Second, Australia has a permissive constitutional environment that allows rights-infringing legislation to be enacted, without a realistic possibility of judicial review. Australia's Constitution contains only limited express rights and no explicit protections for free speech or freedom of the press. As the Federal Court's decision in *Kane* demonstrates, legislative protections, the common law, and journalistic codes and guidelines do not fill this gap. Nor does the implied freedom of political communication, which is the closest Australia comes to having constitutional protection of freedom of speech. The implied freedom protects only political speech, and even then, it is only a restriction on the lawmaking powers of Parliament; it cannot act to protect journalists or whistleblowers from police investigations. Further, due to a series of exemptions for intelligence information,¹⁴¹ Australia's federal whistleblowers laws do not provide adequate protection for national security disclosures.

Statutory change is needed to better protect Australian whistleblowers and journalists who act in the public interest. Such changes could be introduced through a '*Media Freedom Act*',¹⁴² which could provide two main protections. First, a general public interest exemption should provide immunity from criminal prosecution where a government officer or professional journalist discloses information with the intention of advancing the public interest. The immunity could be limited to situations where the disclosure revealed serious misconduct or illegal behaviour committed by the Australian government. Additional protections for sensitive information could be included, such as a

¹⁴¹ *PIDA*, *supra* note 31, ss 33, 41.

¹⁴² See Peter Greste, "A media freedom Act" (3 May 2019), online (blog): *Peter Greste* <pressfreedom.org.au/a-media-freedom-act-37ff9856dc02>; Rebecca Ananian-Welsh, "Australia needs a Media Freedom Act. Here's how it could work" (22 October 2019), online: *The Conversation* <theconversation.com/australia-needs-a-media-freedom-act-heres-how-it-could-work-125315>.

requirement that the journalist took all reasonable steps to prevent harm to Australia's national security or defence. These could be inserted into individual disclosure offences, though a general exemption would be simpler to enact and provide greater clarity. It would also apply to any future national security disclosure offences without the need for further debate or repetition.

Second, a *Media Freedom Act* should provide explicit protection for journalists in the exercise of investigative powers. Contested hearings should be required before search warrants are executed on newsrooms or journalists' homes, and before their metadata is accessed. Currently, there are no protections for journalists in the exercise of police search warrants, and the JIW process in the metadata laws does not go far enough, as applications for journalists' metadata remain secret. Contested hearings would give journalists and law enforcement an opportunity to make submissions before a judge. The judge could then decide whether the public interest in reporting the story and protecting source confidentiality outweighs the public interest in exposing the source for criminal investigation. This is a more independent and fairer process than police catching journalists by surprise in the execution of a warrant or conducting surveillance in secret. There is, of course, a risk that journalists, if advance warning of an investigation is given, could destroy information that would identify their sources. However, the importance of press freedom as a human and democratic right justifies a special approach. This risk can also be limited by a requirement, on fear of penalty from the court, that journalists do not destroy any relevant data while a judicial determination is being made. These procedures would put Australia more closely in line with Canada, the UK and New Zealand, which all require contested hearings to protect journalistic documents from a police investigation.

Ultimately, constitutional change is required to ensure that freedom of speech for whistleblowers, journalists, and all Australians is adequately protected. Compared to statutory change, this is more difficult to achieve. The change would need to be approved by the Australian people voting at a referendum, with no such vote on any topic succeeding nationally in Australia since 1977. As with other proposals, the prospects of achieving constitutional

change for human rights remain remote. Three states now have statutory protection, and if more join, there may be greater momentum and appetite for constitutional change at the national level. For now, a *Media Freedom Act* presents a viable interim solution that would provide urgently needed protections for freedom of the press.

A Critical Analysis of the *Case of Prorogations*

Paul Daly*

R (Miller) v Prime Minister is a landmark case about the scope of prerogative power and judicial review in common law systems. In this article, I critically analyze the seminal decision of the UK Supreme Court in what will no doubt come to be known as the Case of Prorogations, focusing on its likely importance, its reasoning, its doctrinal and historical coherence. In Part II, “Prorogation”, I set the scene for the Supreme Court’s decision, describing the run-up to Prime Minister Boris Johnson’s ill-fated prorogation of Parliament as a ‘Hard Brexit’ beckoned. Part III, “The UKSC Decision” is devoted to detailing the Supreme Court’s analysis, setting out in a few dozen crisp and clear paragraphs penned by Lady Hale and Lord Reed. In Part IV, “The Case of Prorogations”, I move to consider the decision in a broader historical setting, noting that it is broadly consonant with trends in relation to the prerogative and judicial review. Part V — “Critical Analysis” — contains an assessment of the Supreme Court’s reasoning: tackling justiciability, doctrinal coherence, historical coherence, and remedy; in turn, I raise a number of concerns about the decision which, in a nutshell, turned doctrine and history on their heads. Although the Case of Prorogations will take its place in the pantheon of great common law decisions, Lady Hale and Lord Reed’s analysis is problematic. Lastly, in Part VI, I conclude by offering some observations on “democratic decay”, further the mission of this volume, arguing that the UK Supreme Court’s decision was unnecessary and liable to provoke a political backlash.

* Paul Daly (BCL, LLM, University College Cork; LLM, University of Pennsylvania Law School; PhD, University of Cambridge) holds the University Research Chair in Administrative Law & Governance at the University of Ottawa (Faculty of Law, Common Law Section) and is also a part-time member (Review Officer) of the Environmental Protection Tribunal of Canada.

- I. INTRODUCTION
 - II. PROROGATION
 - III. THE UKSC DECISION
 - IV. THE CASE OF PROROGATIONS
 - V. CRITICAL ANALYSIS
 - A. Justiciability
 - B. Doctrinal Coherence
 - C. Historical Coherence
 - D. Remedy and Parliamentary Privilege
 - E. Summary
 - VI. CONCLUSION: THE *CASE OF PROROGATIONS AND DEMOCRATIC DELAY*
-

I. Introduction

On the advice of Boris Johnson, whom she had appointed as Prime Minister on 24 July 2019, Queen Elizabeth II signed an Order in Council in late August of the same year, proroguing Parliament from 9th September and 12th September 2019 until 14th October 2019. A political storm immediately erupted in the United Kingdom, and three court challenges were launched or accelerated in response. These culminated in the decision of the United Kingdom Supreme Court in *R (Miller) v Prime Minister*.¹ The decision is commonly called *Miller 2*, reflecting the fact that the claimant was the same Gina Miller who succeeded in attacking the lawfulness of a previous Brexit-related use of the prerogative,² or “*Miller/Cherry*” in recognition of the two streams of litigation, English and Scottish, which flowed into the Supreme Court. As explained in Part IV below, I am going to call it the *Case of Prorogations*.

My primary focus is on this decision and, in particular, its likely importance, its reasoning, its doctrinal and historical coherence. In Part II, “Prorogation”, I

1 [2019] UKSC 41 [*Case of Prorogations*].

2 *R (Miller) v Secretary of State for Exiting the European Union*, [2017] UKSC 5 [*Miller 2017*].

set the scene for the Supreme Court's decision. Part III, "The UKSC Decision" is devoted to detailing the Supreme Court's analysis. In Part IV, "The *Case of Prorogations*", I move to consider the decision in a broader historical setting, noting that it is broadly consonant with trends in relation to the prerogative and judicial review. Part V — "Critical Analysis" — contains an assessment of the Supreme Court's reasoning: tackling justiciability, doctrinal coherence, historical coherence, and remedy; in turn, I raise a number of concerns about the decision which, in a nutshell, turned doctrine and history on their heads. I conclude by offering some general thoughts on "Democratic Decay" in keeping with the overall mission of this volume.

II. Prorogation

Prorogation is the "formal end of a [parliamentary] session".³ In recent times, parliamentary sessions in the United Kingdom have typically lasted a year. A prorogation clears the decks for a new Queen's Speech in which the government of the day announces its legislative agenda for the next parliamentary session. Prorogation is a prerogative power: "Just as Parliament can commence its deliberations only at the time appointed by the Queen, so it cannot continue them any longer than she pleases".⁴ As with most other prerogative powers, the prerogative of prorogation is exercised today on the advice of ministers.

The effect of prorogation is to shut down Parliament: "During the period of prorogation neither House, nor any committee, may meet".⁵ This is because "[t]he effect of a prorogation is at once to suspend business, including committee proceedings, until Parliament shall be summoned again, and to end the sittings of Parliament", with the result that "[m]ost proceedings still pending

³ Robert Rogers & Rhodri Walters, *How Parliament Works*, 7d (Abingdon: Routledge, 2015) at 128.

⁴ David Natzler & Mark Hutton, eds, *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 25d (London: Markham, Ont.: LexisNexis, 2019) at para 8.5.

⁵ Rogers & Walters, *supra* note 3 at 129.

at a prorogation are quashed . . .”.⁶ Parliament cannot legislate and Members of Parliament cannot hold Ministers to account.

The Johnson Prorogation was controversial. Britain was at that point in the midst of a political crisis triggered by the 2016 referendum on membership of the European Union. A majority of voters —52% — expressed a desire to LEAVE the EU. In March 2017, after a reversal in the courts caused a delay, the then-Prime Minister, Theresa May formally notified the EU of the United Kingdom’s departure.⁷ This notification was made under Article 50 of the *Treaty on European Union*,⁸ which provides for a two-year period — modifiable by consent of the EU and the departing member state —within which terms of departure may be negotiated and ratified.⁹ If no terms are reached, the legal default is a ‘No-Deal Brexit’, with the departing member state immediately assuming the status of a ‘third country’ in the eyes of EU law; it would be as if Great Britain and Northern Ireland had dropped from the sky off the coast of Western Europe.¹⁰

But the Brexit process was long and arduous. Prime Minister May sought a fresh electoral mandate shortly after sending the Article 50 notification but her Conservative Party lost ground at the polls.¹¹ Her slim majority became a minority and she held onto her office only by virtue of a confidence and supply

6 Natzler & Hutton, *supra* note 4 at para 8.6.

7 See “Article 50: UK set to formally trigger Brexit process”, *BBC News* (29 March 2017), online: <www.bbc.com/news/uk-politics-39422353>.

8 Consolidated Version of the *Treaty on the European Union*, 26 October 2012, OJC 326/1.

9 *Ibid.*

10 See “What is a No-Deal Brexit?” (14 March 2019), online: *BBC News* <www.bbc.com/news/uk-politics-47559490>; Yuliya Kaspiarovich & Nicolas Levrat, “After a No-Deal Brexit, Would the UK Remain in the EEA by Default?” (8 October 2018), online: *Brexit Institute News* <dcbrexitinstitute.eu/2018/10/after-a-no-deal-brexit-would-the-uk-remain-in-the-eea-by-default/>.

11 See “UK election 2017: Conservatives lose majority” (9 June 2017), online: *BBC News* <www.bbc.com/news/election-2017-40209282>.

agreement with the Democratic Unionist Party.¹² From this position of weakness she was harried, hassled and harassed by enemies on all sides. Her hard-line Brexiteer Conservative Party backbenchers (and a handful of likeminded politicians on the opposition benches) urged her to set a ‘No-Deal Brexit’ as her course, either to terrify the EU into concessions or — for the hardest of the hard-core Brexiteers — as an end in itself. Her more moderate backbenchers were horrified at the prospect of a ‘No-Deal Brexit’ and allied themselves with opposition MPs who were also opposed to a ‘Hard Brexit’.¹³ May succeeded in negotiating a withdrawal agreement under Article 50¹⁴ but she could not ratify it: on the three occasions it was put to the House of Commons, the agreement was rejected by a majority of MPs.¹⁵

In Parliament, the anti-No-Deal forces were stronger than the pro-No-Deal forces. Backbenchers seized control of the legislative agenda and succeeded in passing legislation compelling the Prime Minister to ask the EU for an extension to the two-year Article 50 period. Prime Minister May complied (perhaps, secretly, happily), asking in the end for two extensions, the second of which set a deadline of 31st October, 2019. But her compliance was seen as defiance of her hawkish backbenchers and led to her ousting as a leader. Johnson was the ultimate beneficiary — that he had resigned as Foreign Secretary when he could not countenance a compromise May crafted to chart a course between the Hard

12 See Alex Hunt, “Theresa May and the DUP deal: What you need to know” (26 June 2017), online: *BBC News* <www.bbc.com/news/election-2017-40245514>.

13 See “Theresa May’s Brexit Deal Is Rejected by U.K. Parliament” (29 March 2019), online: *New York Times* <www.nytimes.com/2019/03/29/world/europe/theresa-may-brexit.html> [“Brexit Deal Rejected”].

14 See Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 TEU, *Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community* (2018) online (pdf): *European Commission* <ec.europa.eu/commission/sites/beta-political/files/draft_withdrawal_agreement_0.pdf>.

15 “Brexit Deal Rejected”, *supra* note 13.

and Soft Brexiteers to a negotiated resolution with the EU was proof of his purity as far as the hardliners were concerned.

Prime Minister Johnson inherited, however, the same parliamentary arithmetic which had led to his predecessor's downfall. The anti-No-Deal alliance soon manifested itself against him. In the leadership campaign, Johnson's Brexiteer rival, Dominic Raab, suggested that as Prime Minister he would prorogue Parliament in order to put a stop to the march of the anti-No-Dealers. If parliamentary business ground to a halt, the clock would run down to 31st October, and Britain would crash out of the EU without a deal. The idea, first floated by Professor John Finnis earlier in the year,¹⁶ was immediately popular. But the anti-No-Dealers soon punctured the hopes of the Hard Brexiteers. Tenacious use of parliamentary procedures — aided and abetted by a compliant Speaker¹⁷ — allowed them to ensure that the *Northern Ireland (Executive Formation etc) Act 2019* ("NIA")¹⁸ contained hard legislative limits on the power to prorogue. The effect of this innocuously titled statute was that Parliament had to be sitting — to consider ministerial reports on the situation in Northern Ireland — during the critical period in which the Johnson Government might run down the clock and achieve a 'No-Deal' Brexit.¹⁹ The thinking was that this would allow the anti-No-Deal alliance to legislate once again to compel the Prime Minister to seek another extension to the Article 50 negotiating period.

Bloodied but unbowed, Johnson ploughed ahead with prorogation anyway. His motivation may well have been to provoke the opposition into a vote of no

16 John Finnis QC, "Only one option remains with Brexit – prorogue Parliament and allow us out of the EU with no-deal", *Daily Telegraph* (1 April 2019), online: <www.telegraph.co.uk/politics/2019/04/01/one-option-remains-brexit-prorogue-parliament-allow-us-eu/>.

17 See Asif Hameed, Proroguing Parliament (1 August 2019), online (blog): *UK Constitutional Law Association* <ukconstitutionallaw.org/2019/08/01/asif-hameed-proroguing-parliament>.

18 (UK) [NIA].

19 See "Brexit: MPs back bid to block Parliament suspension" (18 July 2019), online: *BBC News* <www.bbc.com/news/uk-politics-49030225>.

confidence and a general election.²⁰ Because of the *Fixed-term Parliaments Act 2011* ("FTA"),²¹ Johnson could not advise the Queen to dissolve Parliament and send the country to the polls.²² And with Johnson facing such unfriendly parliamentary arithmetic, the opposition parties had little incentive to oblige by providing the two-thirds majority the FTA²³ required for a general election. Even if prorogation could not trigger a 'No-Deal' Brexit perhaps it could trigger a 'No-Deal' Brexit election in which Johnson could campaign as the champion of those who had voted to LEAVE the EU.²⁴ This, in any event, seems to be why Johnson advised the Queen to prorogue Parliament for six weeks whilst a political storm was raging and a momentous policy decision — the terms of Britain's departure from the EU — had to be taken with the clock ticking ominously down towards October 31, 2019.

The litigation relating to Johnson's power to advise the Queen to prorogue Parliament had, in fact, begun not long after Johnson was appointed as Prime Minister. In late July, a cross-party group of MPs led by Joanna Cherry, members of the House of Lords and a lawyer launched proceedings in the Scottish Court of Session, seeking a declaration and an interdict to the effect that prorogation designed to achieve a 'No-Deal' Brexit would be unlawful. Politicians opposed to Brexit had previously had significant success in the Scottish courts²⁵ and presumably perceived as a result that they had a better chance of getting a prophylactic remedy in advance of any attempt to prorogue Parliament. In the

20 See Jonathan Clark, "Can They Block Brexit? Law v Convention" (23 August 2019), online: *Briefings for Britain* <briefingsforbritain.co.uk/can-they-block-brexit-law-v-convention>.

21 (UK) [FTA].

22 Clark, *supra* note 20.

23 FTA, *supra* note 21.

24 See Tom Kibasi, "Ignore Boris Johnson's bluster about Brexit. He wants a general election" (12 June 2019), online: *The Guardian* <www.theguardian.com/commentisfree/2019/jun/12/boris-johnson-brexit-general-election>.

25 *Wightman v Secretary of State for Exiting the European Union*, [2018] CSIH 62 (Scot).

Outer House of the Court of Session, the petitioners' application for an interim interdict was refused²⁶ before their application was dismissed on the merits, on the basis that it was non-justiciable.²⁷ But on appeal to the Inner House — by which time the Johnson prorogation had been announced — the petitioners succeeded in persuading the court that their application was justiciable and that the prorogation was unlawful.²⁸ Unsurprisingly, the government appealed to the United Kingdom Supreme Court.

Parallel proceedings had been launched in England upon the announcement of the prorogation. The Divisional Court, however, took the view that the application for judicial review brought by Gina Miller was non-justiciable.²⁹ But the Divisional Court granted an application for a 'leapfrog' appeal enabling the matter to proceed directly to the United Kingdom Supreme Court.

Lastly, proceedings were commenced in Northern Ireland but did not proceed to a hearing. The United Kingdom Supreme Court heard the appeals (and argument from the Northern Ireland parties) over three days in September 2019.

A critically important consequence of these legal proceedings was that the government released three documents that were prepared in the lead-up to the prorogation. The first was a memorandum prepared by the Prime Minister's Director of Legislative Affairs. The "key points"³⁰ she made were as follows:

- This had been the longest session since records began. Because of this, they were at the very end of the legislative programme of the previous administration. Commons and Lords business managers were asking for new Bills to ensure that Parliament was using its time gainfully. But if new Bills were introduced, the session would

²⁶ *Cherry v Advocate General for Scotland*, [2019] CSOH 68 at para 10.

²⁷ *Cherry v Advocate General for Scotland*, [2019] CSOH 70.

²⁸ *Cherry v Advocate General for Scotland*, [2019] CSIH 49 [*Cherry* CSIH].

²⁹ *R (Miller) v Prime Minister*, [2019] EWHC 2381 (QB) at para 68 [*Miller* 2019].

³⁰ *Case of Prorogations*, *supra* note 1 at para 17.

have to continue for another four to six months, or the Bills would fall at the end of the session.

- Choosing when to end the session — *i.e.* prorogue was a balance between “wash up” — completing the Bills which were close to Royal Assent - and “not wasting time that could be used for new measures in a fresh session”. There were very few Bills suitable for “wash-up”, so this pointed to bringing the session to a close in September. Asking for prorogation to commence within the period 9th to 12th September was recommended.
- To start the new session with a Queen’s Speech would be achievable in the week beginning 14th October but any earlier “is extremely pressured”.
- Politically, it was essential that Parliament was sitting before and after the EU Council meeting (which is scheduled for 17th - 18th October). If the Queen’s Speech were on 14th October, the usual six-day debate would culminate in key votes on 21st and 22nd October. Parliament would have the opportunity to debate the government’s overall approach to Brexit in the run-up to the EU Council and then vote on it once the outcome of the Council was known.
- It must be recognised that “prorogation, on its own and separate of a Queen’s Speech, has been portrayed as a potential tool to prevent MPs intervening prior to the UK’s departure from the EU on 31st October”. The dates proposed sought to provide reassurance by ensuring that Parliament would sit for three weeks before exit and that a maximum of seven days was lost apart from the time usually set aside for the conference recess.
- The usual length of a prorogation was under ten days, though there had been longer ones. The present proposal would mean that Parliament stood prorogued for up to 34 calendar days but, given the conference recess, the number of sitting days lost would be far less than that.

- The Prime Minister ticked “Yes” to the recommendation that his [Parliamentary Private Secretary] approach the Palace with a request for prorogation to begin within the period Monday 9th to 12th September and for a Queen’s Speech on Monday 14th October.

The second document consisted of the Prime Minister’s hand-written comments on the memorandum:

“(1) The whole September session is a rigmarole introduced [words redacted] t [sic] show the public that MPs were earning their crust.

(2) So I don’t see anything especially shocking about this prorogation.

(3) As Nikki notes [sic], it is OVER THE CONFERENCE SEASON so that the sitting days lost are actually very few”.³¹

The third document was a further memorandum from the Director of Legislative Affairs. Also, in the materials considered by the Supreme Court were the minutes of a cabinet meeting held after the advice to prorogue had been given to Her Majesty.³² The contents of these documents, especially the first memorandum from the Director of Legislative Affairs, proved to central to the Supreme Court’s decision and the outcome of the litigation.

III. The UKSC Decision

In a judgment written by Lady Hale and Lord Reed, the Court held that Prime Minister Johnson’s advice to prorogue Parliament was unlawful and that the prorogation was a nullity. Lady Hale and Lord Reed relied on first principles to determine the scope of the power to prorogue Parliament. As they emphasized, “the boundaries of a prerogative power relating to the operation of Parliament are likely to be illuminated, and indeed determined, by the fundamental principles of our constitutional law”.³³ They went on to identify “[t]wo fundamental principles of our constitutional law [as] relevant to the present

31 *Ibid* at paras 17–8.

32 *Ibid* at paras 19–20.

33 *Ibid* at para 38.

case”, namely parliamentary sovereignty and ministerial accountability to Parliament.³⁴ Having regard to these fundamental constitutional principles, Lady Hale and Lord Reed set out the test for adjudicating on the lawfulness of exercises of the prorogation prerogative:

[A] decision to prorogue Parliament (or to advise the monarch to prorogue Parliament) will be unlawful if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive.³⁵

The advice to prorogue Parliament, in this case, did not meet this test for two reasons. Lady Hale and Lord Reed first noted the drastic consequences this particular prorogation would have had, given the “quite exceptional”³⁶ circumstances relating to Britain’s departure from the EU.³⁷ Shutting down Parliament, including the committees which could scrutinize negotiations and preparations for October 31, was a radical step. By contrast, if Parliament had simply been put into recess, it would still have been able to exercise these critical scrutiny functions.³⁸ Accordingly, there was no doubt that “the Prime Minister’s

34 *Ibid* at para 41.

35 *Ibid* at para 50.

36 *Ibid* at para 57.

37 See also Paul Craig, “The Supreme Court, Prorogation and Constitutional Principle” [2020] 1:2 Public Law 248, at 257 [Craig, “Prorogation”]:

The effect of prorogation in the instant case was more far-reaching, since it constituted a pre-emptive strike that took Parliament out of play for the crucial period during which it was prorogued. It affected not merely one piece of legislation, but its capacity to exercise the totality of its legislative authority, and authority to scrutinize government action, thereby severely curtailing the opportunity for parliamentary voice on an issue that, whatsoever one’s views about Brexit, is of major importance for the UK’s future.

38 As Lady Hale and Lord Reed explained in the *Case of Prorogations*, *supra* note 1 at para 56:

This was not a normal prorogation in the run-up to a Queen’s Speech. It prevented Parliament from carrying out its constitutional role for five out of a possible eight weeks between the end of the summer recess and exit day on

action had the effect of frustrating or preventing the constitutional role of Parliament in holding the Government to account".³⁹

Lady Hale and Lord Reed then considered whether there was a reasonable justification for "taking action which had such an extreme effect upon the fundamentals of our democracy".⁴⁰ Even granting a "great deal of latitude" to the government,⁴¹ Lady Hale and Lord Reed were not satisfied that there was a reasonable justification underpinning the advice to prorogue Parliament. The desire for a new Queen's Speech in mid-October did not provide a justification "for closing down Parliament for five weeks".⁴² Given that the "typical time" for the preparation of a Queen's Speech is "four to six days", a five-week prorogation required justification.⁴³ But none could be found in the materials before the Court:

The memorandum has much to say about a new session and Queen's Speech but nothing about why so long was needed to prepare for it. The only reason given for starting so soon was that "wash up" could be concluded within a few days. But that was totally to ignore whatever else Parliament might have wanted to do during the four weeks it might normally have had before a prorogation. The proposal was careful to ensure that there would be some Parliamentary time both before and after the European Council meeting on 17th - 18th October. But it does not explain why it was necessary to curtail what time there would otherwise have been for Brexit related business. It does not discuss what

the 31st October. Parliament might have decided to go into recess for the party conferences during some of that period but, given the extraordinary situation in which the United Kingdom finds itself, its members might have thought that parliamentary scrutiny of government activity in the run-up to exit day was more important and declined to do so, or at least they might have curtailed the normal conference season recess because of that. Even if they had agreed to go into recess for the usual three-week period, they would still have been able to perform their function of holding the government to account. Prorogation means that they cannot do that.

39 *Ibid* at para 55.

40 *Ibid* at para 58.

41 *Ibid*.

42 *Ibid*.

43 *Ibid* at para 59.

Parliamentary time would be needed to approve any new withdrawal agreement under section 13 of the *European Union (Withdrawal) Act 2018* and enact the necessary primary and delegated legislation. It does not discuss the impact of prorogation on the special procedures for scrutinising the delegated legislation necessary to make UK law ready for exit day and achieve an orderly withdrawal with or without a withdrawal agreement, which are laid down in the *European Union (Withdrawal) Act 2018*. Scrutiny committees in both the House of Commons and the House of Lords play a vital role in this. There is also consultation with the Scottish Parliament and the Welsh Assembly. Perhaps most tellingly of all, the memorandum does not address the competing merits of going into recess and prorogation. It wrongly gives the impression that they are much the same.⁴⁴

Accordingly, Lady Hale and Lord Reed could not identify “any reason - let alone a good reason - to advise Her Majesty to prorogue Parliament for five weeks”, with the consequence that the advice was unlawful.⁴⁵

As to the remedy, the Court concluded that because the advice given to the Queen was unlawful, everything founded on that advice fell away. In law, there was no prorogation. When the Royal Commissioners conducted the prorogation ceremony at the Queen’s behest, it was as if they “had walked into Parliament with a blank piece of paper”.⁴⁶ Accordingly, “as Parliament is not prorogued … the Speaker of the House of Commons and the Lord Speaker can take immediate steps to enable each House to meet as soon as possible to decide upon a way forward”.⁴⁷

IV. The Case of Prorogations

Professor Poole of the London School of Economics, one of the world’s leading experts on the history of prerogative power, has described the UK Supreme

44 *Ibid* at para 60 [emphasis added].

45 *Ibid* at para 61.

46 *Ibid* at para 69.

47 *Ibid* at para 70.

Court decision in the *Case of Prorogations* as “quite possibly the most significant judicial statement on the constitution in over 200 years”.⁴⁸

Clear and concise in its use of first principles, the *Case of Prorogations* will find a prominent place in the pantheon of great constitutional decisions, along with the *Case of Proclamations*,⁴⁹ *Case of Prohibitions*,⁵⁰ *Entick v Carrington*⁵¹ and others. That it is undoubtedly a decision of the greatest significance is evidenced by the volume of scholarly commentary it immediately provoked⁵² and its reception by the judiciary. Indeed, the *Case of Prorogations* has already been cited as far and wide as Ontario⁵³ and Ireland.⁵⁴

In addition, the *Case of Prorogations* fits seamlessly into two broad patterns in the development of the common law. First, it is a further example of the prerogative being limited by judicial interpretation and legislative action.⁵⁵ As to

48 Thomas Poole, “Understanding what makes ‘Miller & Cherry’ the Most Significant Judicial Statement on the Constitution in over 200 years” (September 25, 2019), online: *Prospect Magazine* <www.prospectmagazine.co.uk/politics/understanding-what-makes-miller-2-the-most-significant-judicial-statement-on-the-constitution-in-over-200-years>.

49 [1610] EWHC KB J22 [*Case of Proclamations*].

50 [1607] EWHC KB J23 [*Case of Prohibitions*].

51 [1765] EWHC KB J98.

52 See e.g. Craig, “Prorogation”, *supra* note 37; Martin Loughlin, “A note on Craig on Miller; Cherry” [2020] 1:2 Public Law 278; Aileen McHarg, “The Supreme Court’s Prorogation Judgment: Guardian of the Constitution or Architect of the Constitution?” (2020) 24:1 The Edinburgh Law Review 88; Stefan Thiel, “Unconstitutional Prorogation of Parliament” [2020] 1:3 Public Law 529; Stephen Tierney, “R v Prime Minister; Cherry v Advocate General of Scotland” (2019) 40 Scots Law Times 170.

53 *Canadian Federation of Students v Ontario*, 2019 ONSC 6658 at para 83; *Duffy v Canada (Senate)*, 2020 ONCA 536 at para 88.

54 *O'Doherty v The Minister for Health*, [2020] IEHC 209 at para 63 (albeit that the reliance on it was “misplaced” at para 73).

55 See generally Paul Craig, “Prerogative, Precedent and Power” in Christopher Forsyth and Ivan Hare, eds, *The Golden Metwand and the Crooked Cord: Essays*

judicial interpretation, it has, of course, been clear since the *Case of Proclamations* that “the King hath no prerogative, but that which the law of the land allows him”⁵⁶ and, more recently, it has been said that there is “no reason why prerogative legislation should not be subject to judicial review on ordinary principles of legality, rationality and procedural impropriety in the same way as with any other executive action”.⁵⁷ And as to the prerogative’s place in the constitutional firmament, as Lord Browne-Wilkinson observed in *R v Secretary of State for the Home Department, Ex Parte Fire Brigades Union*, “[t]he constitutional history of this country is the history of the prerogative powers of the Crown being made subject to the overriding powers of the democratically elected legislature as the sovereign body”.⁵⁸

Second, it is an example of the increased intensity of judicial review of executive decision-making. The focus on whether the Prime Minister had provided a reasonable justification for the advice to prorogue Parliament is entirely consistent with recent trends in substantive review, where courts in England and beyond focus on whether decisions fall within a range of reasonable outcomes.⁵⁹ Consider, moreover, the remarkable level of disclosure made by the Johnson Government in response to the litigation. Cabinet minutes were produced for the court, as was highly politically sensitive advice circulated within the Prime Minister’s Office. This is a consequence of an important procedural development in contemporary public law, namely the imposition of a ‘duty of candour’ on the respondent to a judicial review claim. Even the Prime Minister must, when faced with an arguable claim of unlawful action, put “all

for Professor Sir William Wade QC (Oxford: Oxford University Press, 1998)
[Craig, “Prerogative”].

56 *Case of Proclamations*, *supra* note 49 at para 9.

57 *R (Bancoult) v Secret of State for Foreign and Commonwealth Affairs (No. 2)*, [2008] UKHL 61 at para 35, per Lord Hoffmann [*Bancoult (No.2)*].

58 [1995] UKHL 3 at 10.

59 See generally Paul Craig, “The Nature of Reasonableness Review” (2013) 66:1 Current Legal Problems 131.

the cards face upwards on the table".⁶⁰ This procedural development has had substantive consequences: when judges are provided with written reasons for decisions, there is an irresistible temptation for them to scrutinize the record closely for any errors.⁶¹ The *Case of Prorogations* would have been unimaginable in previous eras, partly because the procedural law of judicial review would not have compelled Prime Minister Johnson to release internal records of his deliberations about how to advise Her Majesty.

V. Critical Analysis

Notwithstanding the analytical clarity of Lady Hale and Lord Reed's approach, the immediate impact of the *Case of Prorogations* and the extent to which the Supreme Court's decision is consistent with broader trends in relation to the prerogative and judicial review of administrative action, critical analysis is entirely appropriate. For this high-profile litigation about the prorogation power is likely to have long-term consequences, both for relations between politicians and the judiciary in the United Kingdom, and for the development of the procedural and substantive law of judicial review in the common law world. In this section, I critically analyze the treatment of justiciability and the burden shift consequent on Lady Hale and Lord Reed's justiciability analysis; the doctrinal coherence of the Supreme Court's 'reasonable justification' analysis; and the historical coherence of the *Case of Prorogations*.

A. Justiciability

Justiciability is, in essence, about the appropriateness of subjecting disputes to resolution by the courts.⁶² For example, Professor Sossin defines justiciability as

60 *R v Lancashire County Council, ex parte Huddleston*, [1986] 2 All ER 941 (CA) at 945, per Sir John Donaldson.

61 See e.g. Michael Taggart, "Deference, Proportionality, *Wednesbury*" [2008] 1:3 *New Zealand Law Review* 423 at 463–64.

62 See generally Geoffrey Marshall, "Justiciability", in Anthony Gordon Guest, ed, *Oxford Essays in Jurisprudence. A Collaborative Work*, 2d (London: Oxford University Press, 1961) at 265.

“a set of judge-made rules, norms and principles delineating the scope of judicial intervention in social, political and economic life”.⁶³ One set of rules, norms and principles relates to so-called ‘political’ questions thought to be inapt for judicial resolution because of their inherently sensitive nature.⁶⁴ Such considerations were, for obvious reasons, to the fore in respect of the Johnson prorogation.

In discussing justiciability and the *Case of Prorogations*, it is helpful to begin with the analysis of the Divisional Court in *Miller*, 2019.⁶⁵ On the Divisional Court’s view, the decision to prorogue Parliament was not justiciable, because it was a political matter beyond the ken of judges:

The Prime Minister’s decision that Parliament should be prorogued at the time and for the duration chosen and the advice given to Her Majesty to do so in the present case were political. They were inherently political in nature and there are no legal standards against which to judge their legitimacy... [The claimants’ arguments] face the insuperable difficulty that it is impossible for the court to make a legal assessment of whether the duration of the prorogation was excessive by reference to any measure. There is no legal measure of the length of time between Parliamentary sessions.⁶⁶

The approach here is analytically suspect. When does a matter become too ‘political’ for judicial resolution? This invites a line-drawing exercise which is inherently arbitrary. Just as courts struggle to define ‘jurisdictional’ questions in judicial review cases so too do they struggle with ‘political’ questions. Furthermore, as a matter of constitutional principle, very good reasons are required to wall executive decisions off from judicial oversight. Accordingly, it is

⁶³ Lorne Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2d (Toronto: Carswell, 2012) at 7.

⁶⁴ See generally Paul Daly, “Justiciability and the ‘Political Question’ Doctrine” [2010] Public Law 160.

⁶⁵ *Miller* 2019, *supra* note 29.

⁶⁶ *Ibid* at paras 51, 54.

necessary to identify a sound constitutional basis for non-justiciability; invoking the ‘political’ nature of a decision is insufficient.⁶⁷

As to justiciability, as Professor Elliott persuasively argued in the run-up to the Supreme Court’s decision, the scope of a prerogative power is pre-eminently a *legal* question, not a political one.⁶⁸ Coke CJ held long ago in the *Case of Proclamations* that “the King hath no prerogative, but that which the law of the land allows him”.⁶⁹ Stating the law of the land — including the scope of the prerogative power to prorogue Parliament — is an uncontroversial part of the judicial function in the United Kingdom. Lord Drummond Young put the point forcefully in *Cherry CSIH*:

The boundaries of any legal power are necessarily a matter for the courts, and the courts must have jurisdiction to determine what those boundaries are and whether they have been exceeded. That jurisdiction is constitutionally important, and in my opinion the courts should not shrink from exercising it.⁷⁰

Lady Hale and Lord Reed thus properly rejected the Divisional Court’s approach. Nevertheless, the approach they adopted raises its own analytical problems. Lady Hale and Lord Reed insisted that in respect of prerogative powers “it is necessary to distinguish between two different issues”. One, “whether a prerogative power exists, and if it does exist, its extent” and two,

67 Daly, *supra* note 64.

68 Mark Elliott, “Prorogation and Justiciability: Some thoughts ahead of the Miller II case in the Supreme Court” (12 September 2019), online (blog): *Public Law for Everyone* < publiclawforeveryone.com/2019/09/12/prorogation-and-justiciability-some-thoughts-ahead-of-the-cherry-miller-no-2-case-in-the-supreme-court/>. See also Craig, “Prorogation”, *supra* note 37.

69 *Case of Proclamations*, *supra* note 49. See also *Elgizouli v Secretary of State for the Home Department*, [2020] UKSC 10 (“[t]his court is required by long-established law to examine the nature and extent of the prerogative power and to determine whether the respondent has transgressed its limits particularly where the prerogative power may be being used to infringe upon an individual’s rights”, per Lord Kerr at para 161).

70 *Cherry CSIH*, *supra* note 28 at para 102.

whether “the exercise of the power is open to legal challenge on some other basis”.⁷¹ Justiciability, the Court held, arises only in respect of the second issue, the first falling squarely within the judicial domain; matters might be non-justiciable for various reasons when it comes to the application of the grounds of review (legality, rationality and procedural propriety) but not in determining the scope of a prerogative power.

Despite the neatness of the distinction, however, it broke down in the *Case of Prorogations*. As discussed above, Lady Hale and Lord Reed’s analysis of the ‘extent’ of the prorogation prerogative led them to impose a ‘reasonable justification’ standard.⁷² But the language of justification is the language of rationality review. To put the point another way, the prorogation prerogative seems to contain a ground of review. Review for rationality — and the modern, substantive review variety, not old-fashioned *Wednesbury*⁷³ unreasonableness — seeps into the determination of the scope of the prerogative.⁷⁴

There is no reference to Dicey’s definition of the prerogative as the “residue of *discretionary or arbitrary authority*” held by the Crown,⁷⁵ nor of the definition offered in *Miller*, 2017: “the residue of powers which remain vested in the Crown,...exercisable by ministers, *provided that the exercise is consistent with Parliamentary legislation*”.⁷⁶ Far from the prorogation prerogative being arbitrary, or existing as a broad discretionary power within fixed statutory parameters (such as the *NIA*),⁷⁷ it comes in fact with a built-in limitation of reasonable justification. That the prerogative is limited “by statute and the common law, *including, in the present context, the constitutional principles with*

71 *Case of Prorogations*, *supra* note 1 at para 35.

72 *Ibid* at para 50.

73 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*, [1948] 1 KB 223.

74 See also McHarg, *supra* note 52.

75 *Introduction to the Study of the Law of the Constitution*, 10th ed. (London: Macmillan, 1959) at p. 424.

76 *Miller* 2017, *supra* note 2 at para 47 [emphasis added].

77 *NIA*, *supra* note 18.

which it would otherwise conflict" is an innovation which belies the neat analytical distinction offered by the Court.⁷⁸

Indeed, the existence/exercise distinction seems to be inherently malleable. *Anything* could be said, on Lady Hale and Lord Reed's approach to the prerogative, to go to the *existence* of a power rather than to its exercise. Why 'reasonable justification'? Why not the higher standard of 'proportionate'? Why not the lower standard of 'rational basis'? On Lady Hale and Lord Reed's approach, the *scope* of the prerogative becomes an empty vessel into which any substantive limitations on the prerogative can be poured. Just as the Divisional Court followed an analytically suspect approach in relying on an unstable distinction between 'law' and 'politics', the Supreme Court relied on an inherently malleable distinction between 'existence' and 'exercise'.⁷⁹

There is more than a hint of the doctrine of jurisdictional error here. Pursuant to the doctrine of jurisdictional error, where a statutory provision states that a decision-maker can do Y only if X is present, then the presence of X is a pre-condition to the doing of Y. For example, where a tribunal is empowered to make findings of discrimination in respect of the letting of self-contained dwelling units, that a given premises is a self-contained dwelling unit (X) is a pre-condition to making a finding of discrimination (Y).⁸⁰ An error as to X would deprive the tribunal of jurisdiction. The analytical difficulty with the doctrine of jurisdictional error is that every statutory provision takes the form if X then the decision-maker may Y: "[t]he distinction ... was impossible to draw precisely because the two matters [X and Y] were inextricably interwoven".⁸¹ As

78 Case of *Prorogations*, *supra* note 1 at para 49 [emphasis added].

79 Cf. Loughlin, *supra* note 52 ("[o]ne cannot infer from the fact that prerogative power is *recognised* by common law that it must be *exercised* in accordance with (so-called) common law principles. The court should surely have explained how it managed to draw this conclusion from those premises" at 279).

80 See *Bell v Ontario Human Rights Commission*, [1971] SCR 756.

81 Paul Craig, "Jurisdiction, Judicial Control, and Agency Autonomy", in Ian Loveland, ed, *A Special Relationship? American Influences on Public Law in the United Kingdom* (Oxford: Clarendon Press, 1995) at 173, 177.

the Father of modern administrative law — SA de Smith — observed: “No satisfactory test has ever been formulated for distinguishing findings which go to jurisdiction from findings which go to the merits”.⁸² I fear the same is true of the existence/exercise distinction relied upon by Lady Hale and Lord Reed in the *Case of Prorogations*. This does not augur well. As Professor Craig has observed about the history of the doctrine of jurisdictional error in administrative law:

There was no predictability as to how a case would be categorised before the court pronounced on the matter. There was also no *ex post facto* rationality that could be achieved by juxtaposing a series of cases and asking why one case went one way and another was decided differently.⁸³

Given that any *exercise* of a prerogative power can be impugned on the basis that a prerogative to act in such a way does not *exist*, counsel will certainly attempt to manipulate the existence/exercise distinction. If courts entertain such attempts, it will be very difficult to predict in advance to what standard the use of the prerogative will be held in a given situation.

Of course, the existence/exercise distinction is so well entrenched in the law relating to judicial review of the prerogative that excising it would be difficult, if not impossible. Nonetheless, the existence/exercise distinction should thus be used with caution, to avoid issues properly addressed as exercises of a power being dealt with as going to the existence of a power; it is doubtful that Lady Hale and Lord Reed exercised appropriate caution here. Moreover, the analytical problem with Lady Hale and Lord Reed’s approach leads to two other problems,

82 SA De Smith et al, *Judicial Review of Administrative Action*, 5d (London: Sweet and Maxwell, 1995) at 255; see similarly Louis Jaffe, “Judicial Review: Constitutional and Jurisdictional Fact” (1957) 70:6 Harvard Law Review 953 at 959. For a more modest account of the difficulties, see David Mullan, “The Jurisdictional Fact Doctrine in the Supreme Court of Canada – a Mitigating Plea” (1972) 10:2 Osgoode Hall Law Journal 440.

83 Paul Craig, *Administrative Law*, 6d (London: Sweet and Maxwell, 2008) at 441. See similarly William Wade, “Constitutional and Administrative Aspects of the Anisminic Case” (1969) 85 Law Quarterly Review 198 at 210–11. Thanks to David Mullan for prompting this thought.

which I will discuss in turn: a problem of doctrinal coherence and a problem of historical coherence.

B. Doctrinal Coherence

In considering doctrinal coherence, it is useful to begin with the Scottish appellate decision. The Inner House of the Court of Session (“Inner House”) unanimously held in *Cherry CSIH*⁸⁴ that Prime Minister Johnson’s advice to prorogue Parliament was unlawful.

The judges of the Inner House reasoned in slightly different ways to the conclusion that the prorogation advice was unlawful. The length of the prorogation — five weeks, much longer than prorogations in recent decades, with the clock ticking down towards a No-Deal Brexit on October 31 — was a particular concern for each of the judges. For Lord Carloway:

The circumstances demonstrate that the true reason for the prorogation is to reduce the time available for Parliamentary scrutiny of Brexit at a time when such scrutiny would appear to be a matter of considerable importance, given the issues at stake. This is in the context of an anticipated no deal Brexit, in which case no further consideration of matters by Parliament is required. The Article 50 period, as extended, will have expired and withdrawal will occur automatically.⁸⁵

In support of this conclusion, Lord Carloway pointed to the “clandestine manner” in which the prorogation was sought; that prorogation was “mooted specifically as a means to stymie any further legislation regulating Brexit”; the fact that the respondent had provided “remarkably little” justification for the prorogation in the materials before the court; and the absence of any “practical reason” for the “extraordinary length of time” of the prorogation.⁸⁶

In Lord Brodie’s view, based on the material in the record (and, indeed, in the public record), the petitioners were “entitled to ask the court to infer” that

⁸⁴ *Cherry CSIH*, *supra* note 28.

⁸⁵ *Ibid* at para 53.

⁸⁶ *Ibid* at paras 54–56.

the Prime Minister's goal was to shut down Parliament, ultimately "to allow the Executive to pursue a policy of No-Deal Brexit without further Parliamentary interference".⁸⁷ This contributed to Lord Brodie's conclusion that the prorogation decision in the instant case was so outrageous as to be unlawful as a matter of public law (based, ultimately, on impropriety of purpose).⁸⁸

Lastly, of particular importance for Lord Drummond Young was the absence of any reason in the documents provided to the court which was capable of justifying the length of this particular prorogation,⁸⁹ which led him to infer that the Prime Minister "wished to restrict debate in Parliament for as long as possible".⁹⁰ But this was not a proper use of the prorogation prerogative.

The Inner House's analysis sidestepped some doctrinal fundamentals completely. To begin with, as the Supreme Court emphasized just a year earlier in *R (Gallaher Group) v Competition and Markets Authority*,⁹¹ reversing the Court of Appeal, language such as "‘abuse of power’ ... adds nothing to the ordinary principles of judicial review", such as rationality, which are the criteria against which the lawfulness of administrative action must be addressed.⁹² Indeed, "[l]egal rights and remedies are not usually defined by reference to the visibility of the misconduct".⁹³ Egregious behaviour, on its own, is not a basis for judicial review. Yet the egregiousness of the Prime Minister's conduct was a central concern for the Inner House.

Moreover, where improper purpose is claimed, it is important to identify the dominant purpose: "If the dominant purpose of those concerned is unlawful, then the act done is invalid, and it is not to be cured by saying that they had

⁸⁷ *Ibid* at para 89. See also at para 117, per Lord Drummond Young.

⁸⁸ *Ibid* at para 91.

⁸⁹ See especially *ibid* at paras 120–22.

⁹⁰ *Ibid* at paras 123–24.

⁹¹ [2018] UKSC 25 [*Gallaher*].

⁹² *Ibid* at para 41, per Lord Carnwath, critiquing [2016] EWCA Civ 719.

⁹³ *Ibid* at para 31, per Lord Carnwath.

some other purpose in mind which was lawful".⁹⁴ Relatedly, courts will not lightly impute impropriety to executive officials.⁹⁵ But no consideration was given by the Inner House to this point.

The approach taken by Lady Hale and Lord Reed allowed them to avoid these problems, or at least, allowed them to manipulate the exercise/existence distinction to avoid these problems. Their generation of an evidently justiciable standard of reasonable justification avoided the *Gallaher*⁹⁶ problem. Meanwhile, Lady Hale and Lord Reed did not need to address whether Prime Minister's Johnson's dominant purpose was unlawful (or whether, rather, the desire to shut down Parliament was only one of a number of competing purposes): the focus on justification permitted by their treatment of the exercise/existence distinction meant that they had no need to consider propriety of purpose.

Another doctrinal fundamental was, however, entirely sidestepped by Lady Hale and Lord Reed. It is trite law that a claimant for judicial review must make out her case, on the balance of probabilities. There is no free-standing burden on administrative officials to justify the lawfulness (including rationality or proportionality) of their actions.⁹⁷

Yet the effect of rationality review seeping into the determination of the extent of the prorogation prerogative is to place a free-standing burden on the Prime Minister to justify the exercise of the prorogation power.⁹⁸ Rather than

94 *Earl Fitzwilliam's Wentworth Estates Co v Minister of Town and Country Planning*, [1951] 2 KB 284 (CA (Eng)) at 307, per Denning LJ. But see *Westminster Corporation v London and North Western Railway Company*, [1905] AC 426 (HL) at 432, per Lord Macnaughten.

95 *CREEDNZ Inc v Governor-General*, [1981] 1 NZLR 172 (CA) at 200, per Cooke J (on irrelevant considerations); see also *R (Bancoult) v Foreign and Commonwealth Secretary (No. 3)*, [2018] UKSC 3.

96 *Gallaher*, *supra* note 91.

97 See e.g. *R v Inland Revenue Commissioners, ex parte Rosminster Ltd*, [1980] AC 952 (HL(Eng)) at 1013, per Lord Diplock and at 1022–23 per Lord Scarman [*Rosminster*]. Rosminster was doubted in *Haralambous v Crown Court at St Albans*', [2018] UKSC 1 but not on this point.

98 See also McHarg, *supra* note 52.

the onus being placed — as it ordinarily is in judicial review cases — on the applicant to ‘make her case’, the burden of justification is shouldered by the respondent. It will then be for the courts “to decide whether the Prime Minister’s explanation for advising that Parliament should be prorogued is a reasonable justification for a prorogation” having regard to the “extent to which prorogation frustrates or prevents Parliament’s ability to perform its legislative functions and its supervision of the executive”.⁹⁹ It is true that an applicant has to identify such an inability on the part of Parliament, but the mere fact of prorogation will surely suffice to place a burden of justification on the Prime Minister, even in respect of a “short period” designed to end one parliamentary session and begin another.¹⁰⁰ All prorogations necessarily interfere with Parliament’s legislative and scrutiny functions. Given, further, the obligations imposed on judicial review respondents by the duty of candour, any Prime Minister wishing to justify a prorogation will have to produce extensive (and persuasive) contemporaneous reasons, the failure to do so here having doomed the legality of Mr Johnson’s advice to the Queen. To put it mildly, this is a significant doctrinal departure.

There are echoes here of the decision of the Ontario Court of Appeal in *Lalonde v Ontario*.¹⁰¹ Here the Court struck down a discretionary decision to shut a hospital because the decision contravened an unwritten principle of the Canadian constitution, namely the protection of minorities. Justice Sharpe and Weiler wrote, for example:

The Commission offered no justification for diminishing Montfort’s important linguistic, cultural, and educational role for the Franco-Ontarian minority. It said that matter was beyond its mandate. The Commission failed to pay any attention to the relevant constitutional values, nor did it make any attempt to justify departure from those values on the ground that it was necessary to do so to achieve some other important objective. While the Commission is entitled to deference, deference does not protect decisions,

99 *Case of Prorogations*, *supra* note 1 at para 51.

100 *Ibid* at para 51.

101 (2001), OJ No 4767 (CA) [*Lalonde*].

purportedly taken in the public interest, that impinge on fundamental Canadian constitutional values without offering any justification.¹⁰²

There is a clear analogy between *Lalonde* and the *Case of Prorogations*: the Johnson prorogation interfered with a fundamental constitutional principle, the sovereignty of Parliament, by shutting down Parliament (and its committees) for several weeks at a critical juncture to prevent parliamentarians from holding government to account and from legislating to prevent a No-Deal Brexit.¹⁰³ Yet there is also an important distinction between *Lalonde* and the *Case of Prorogations*. In the former case no reasons at all were provided,¹⁰⁴ but in the *Case of Prorogations*, a justification was provided. The issue then becomes whether the justification offered for the Johnson prorogation was adequate. In this regard, doctrinal coherence would demand a high degree of deference to the sensitive policy choices involved in setting the appropriate length of a prorogation, as it is settled law that where matters involving political judgement are justiciable, administrative decision-makers should benefit from a wide margin of appreciation.¹⁰⁵

But Lady Hale and Lord Reed did not mention deference at all. Their focus on the absence of any reasons justifying a six-week prorogation might be thought to obviate the need for any discussion of deference. With respect, however, in any judicial review of policy decisions, reasons could be cast in a similarly poor light. All a court would ever need to do is ask whether there were reasons relating to a particular point of concern, which could be identified with great exactitude. In the *Case of Prorogations*, the reasons given for the six-week prorogation were that time would be required to prepare a Queen's Speech and that Parliament would not be sitting for several weeks in any event. Reviewed

¹⁰² *Ibid* at para 184.

¹⁰³ *Case of Prorogations*, *supra* note 1.

¹⁰⁴ As a government lawyer involved in the case remarked to me, still frustrated many years after the fact: "How could we have anticipated the requirement to write reasons in respect of an unwritten constitutional principle?".

¹⁰⁵ See e.g. *R (Lord Carlile) v Home Secretary*, [2014] UKSC 60 at para 32, per Lord Sumption.

deferentially, given the highly sensitive political judgements underpinning them, these reasons should have been considered to be sufficient.¹⁰⁶

C. Historical Coherence

There are two reasons to doubt the historical coherence of the *Case of Prorogations*. First, Lady Hale and Lord Reed's manipulation of the existence/exercise distinction was unprecedented. There is no doubt, of course, that it is the role of the courts to determine the scope or existence of a prerogative power. Moreover, there is no doubt that the courts may, in determining the scope or existence of a prerogative power, rely on constitutional first principles. In *Edward Darcy Esquire*,¹⁰⁷ for instance (better known as the *Case of Monopolies*), the impact on personal economic liberty and property rights helped to support the conclusion that the Crown could not grant a monopoly.¹⁰⁸ However, in every previous case delineating the limits of prerogative power, the courts treated the question as essentially binary: either the prerogative extends to cover a particular instance, or it does not; it is either lawful, or unlawful. There has never, prior to the *Case of Prorogations*, been any hint that the *reasonableness* of a particular use of the prerogative may form part of the inquiry into the existence or scope of the prerogative. The *Case of Prohibitions*¹⁰⁹ stands for the proposition that the Crown may not adjudicate — such matters are for the “artificial reason and judgment of the law”;¹¹⁰ the *Case of Monopolies* prevented the Crown from granting monopolies in trade;¹¹¹ and the *Case of Proclamations* establishes that the Crown may not legislate.¹¹² In each of these instances, the

¹⁰⁶ *Case of Prorogations*, *supra* note 1 at paras 58–60. See also Tierney, *supra* note 52.

¹⁰⁷ *Edward Darcy Esquire v Thomas Allin of London Haberdasher*, (1602) 74 ER 1131 (QB) [*Case of Monopolies*].

¹⁰⁸ See further Craig, “Prerogative”, *supra* note 55 at 65, 69.

¹⁰⁹ *Case of Prohibitions*, *supra* note 50.

¹¹⁰ *Ibid.*

¹¹¹ *Case of Monopolies*, *supra* note 107.

¹¹² *Case of Proclamations*, *supra* note 49.

question put was binary: does the power exist or not? And the answer was either ‘yes’ or ‘no’, not at all contingent on whether the Crown had complied with an obligation of reasonableness. The *Case of Prorogations*, therefore, marks an important departure: Lady Hale and Lord Reed did not treat the power to prorogue as binary but imported instead substantive limitations on its exercise: ‘yes’, the power to prorogue exists, as long as it is backed by a reasonable justification. There is no historical precedent for Lady Hale and Lord Reed’s approach.¹¹³

113 There are two potential counterpoints to address here. First, in *R v Secretary of State for the Home Department, Ex parte Northumbria Police Authority*, [1989] QB 26 (CA), a question arose as to whether the Home Secretary could provide for the supply of tear gas to Chief Constables (without going through police authorities) in reliance on the royal prerogative to keep the peace. Lord Justice Purchas characterized this prerogative as the prerogative “to do all that is reasonably necessary to preserve the peace of the realm” (at 53 [emphasis added]). However, neither Lord Justice Croom-Johnson nor Lord Justice Nourse characterized the prerogative in this way. Moreover, for all three members of the Divisional Court, the key question was whether this prerogative (however characterized) had been ousted by legislation (at 45, 51–52 and 59). Indeed, Purchas LJ noted that it was an “open” question “whether once the power is held to exist the courts will interfere with its exercise” (at 47). In holding that the prerogative continued to subsist, the Divisional Court focused on its existence, not on its manner of exercise. Second, in *Laker Airways Ltd. v Department of Trade*, (1976) [1977] QB 643 [*Laker Airways*] at 705, Lord Denning commented as follows:

The prerogative is a discretionary power exercisable by the executive government for the public good, in certain spheres of governmental activity for which the law has made no provision, such as the war prerogative (of requisitioning property for the defence of the realm), or the treaty prerogative (of making treaties with foreign powers). The law does not interfere with the proper exercise of the discretion by the executive in those situations: but it can set limits by defining the bounds of the activity: and *it can intervene if the discretion is exercised improperly or mistakenly*. That is a fundamental principle of our constitution. It derives from two of the most respected of our authorities. In 1611 when the King, as the executive government, sought to govern by making proclamations, Sir Edward Coke declared that: ‘the King hath no prerogative, but that which the law of the land allows him’: see the (1611) 12 Co.Rep. 74, 76. In 1765 Sir William Blackstone added his authority, *Commentaries*, vol. I, p.252: ‘For prerogative consisting (as Mr. Locke has well defined it) in the discretionary power of acting for the public good, where the positive laws are silent, if that discretionary power be abused

Second, Lady Hale and Lord Reed's standard of reasonable justification fits uneasily with the historical evidence. A striking feature of the classic cases on the prerogative — *Proclamations*, *Prohibitions* and *Monopolies* — is that the analyses therein draw heavily on history. Precedent plays a dominant, perhaps determinative, role in assessing whether a particular prerogative power exists. Yet it is difficult to accept the proposition that previous prorogations would satisfy Lady Hale and Lord Reed's "reasonable justification" test.¹¹⁴ Leaving aside the obviously contentious issue of prorogations designed by minority governments to avoid votes of confidence,¹¹⁵ there are other prorogations which are difficult to reconcile with the standard set by Lady Hale and Lord Reed.¹¹⁶ Fearful of opposition to his nationalisation policies, Clement Attlee prorogued Parliament to create a pro forma session to satisfy the requirements of the *Parliament Act 1911*.¹¹⁷ What eventually became the *Parliament Act 1949*¹¹⁸ halved the length

to the public detriment, such prerogative is exerted in an unconstitutional manner'.

With respect, Lord Denning's citations do not support the highlighted proposition. The point in the *Case of Proclamations*, *supra* note 49 was that the existence of the prerogative was a matter for the courts; the exercise of the prerogative was not in issue. And Blackstone's reference to unconstitutionality should not be taken to be a reference to invalidity: it can be quite improper — or unconstitutional — for a prerogative power to be used in a particular way without the courts having the power to declare the use invalid; rather, any sanction for impropriety would be handed out in a political forum, not a court. In any event, *Laker Airways* was a case about the existence of the prerogative, not its exercise. See Robert Craig, "Casting Aside Clanking Medieval Chains: Prerogative, Statute and Article 50 after the EU Referendum" (2016) 79 *Modern Law Review* 1041.

114 *Case of Prorogations*, *supra* note 1 at para 49.

115 See generally Anne Twomey, *The Veiled Sceptre* (Cambridge: Cambridge University Press, 2018) at chapter 8.

116 See generally Loughlin, *supra* note 52.

117 (UK), 1 & 2 Geo V [PA 1911].

118 (UK), 12, 13 & 14 Geo VI.

of the House of Lords' suspensory veto over bills passed by the House of Commons, despite the objections of the Lords. Indeed, Attlee received internal advice (which a present-day Prime Minister would presumably be bound to disclose in judicial review proceedings) that a pro forma session would frustrate the spirit of the *Parliament Act 1911*.¹¹⁹ A more recent example comes from Canada. In 2009, Canadian Prime Minister Stephen Harper's prorogation of Parliament frustrated a parliamentary committee's inquiry into the alleged mistreatment of detainees by Canadian armed forces. The prorogation took effect for the period of the 2010 Winter Olympics in Vancouver. The official justification offered was that a prorogation would allow the government time to consult with Canadians on its policy programme.¹²⁰ Constitutional scholars did not consider this prorogation to be problematic (as Harper had, at the time, the confidence of the House of Commons¹²¹) but it is difficult to see how it would survive the imposition of a 'reasonable justification' test.

Of course, any exercise of the prerogative *today* will be subject to greater judicial scrutiny than past exercises of the prerogative, as it is now uncontroversial that the legality, rationality and procedural propriety of exercises of the prerogative may now be examined by the courts.¹²² It would have been perfectly proper for Lady Hale and Lord Reed to conclude that the Johnson prorogation was illegal, irrational or procedurally improper, but that would have

¹¹⁹ Chris Ballinger, "The Parliament Act 1949" in David Feldman, ed, *Law in Politics, Politics in Law* (Oxford: Hart Publishing, 2016) at 181–82. The existence of such internal advice casts some doubt on Professor Craig's view that the 1948 prorogation would have survived the reasonable justification test: Paul Craig, "Response to Loughlin's note on Miller; Cherry" [2020] 1:2 Public Law 282.

¹²⁰ "PM shuts down Parliament until March" (30 December 2009), online: *CBC News* <www.cbc.ca/news/politics/pm-shuts-down-parliament-until-march-1.829800>.

¹²¹ Peter Hogg, "*Prorogation* and the Power of the Governor General" (2009) 27 *National Journal of Constitutional Law* 193.

¹²² *Council of Civil Service Unions v Minister for the Civil Service*, [1985] AC 374; *Bancoult (No.2)*, *supra* note 57.

required them to scale the doctrinal hurdles set out in the preceding subsection. Rather than scale the hurdles, though, they circumnavigated them: Lady Hale and Lord Reed proceeded on the basis that they were simply defining the scope of the prorogation prerogative, as courts have done in respect of prerogative powers for centuries. But if they were simply defining the scope of the prorogation prerogative, their definition should have accorded with historical practice.

D. Remedy and Parliamentary Privilege

In the *Case of Prorogations*, the Prime Minister argued that the most the courts could offer the applicant by way of remedy was a declaration that the advice to the Queen to prorogue Parliament was unlawful, leaving the consequences of any such declaration to be worked out by the political branches of government. To go any further, the Prime Minister argued, would be contrary to parliamentary privilege as partially codified in Article 9 of the *Bill of Rights, 1689*¹²³ because it would involve the courts interfering in “proceedings in Parliament”.¹²⁴

Lady Hale and Lord Reed roundly rejected this assertion. As they explained, the prorogation ceremony “is not the core or essential business of Parliament” but rather the act which “brings that core or essential business of Parliament to an end”.¹²⁵ As a consequence, a judicial finding of unlawfulness did not compromise parliamentary privilege:

This court is not...precluded by article 9 or by any wider Parliamentary privilege from considering the validity of the prorogation itself. The logical approach to that question is to start at the beginning, with the advice that led to it. That advice was unlawful. It was outside the powers of the Prime Minister to give it. This means that it was null and of no effect...It led to the Order in Council which, being founded on unlawful advice, was likewise unlawful, null

123 (UK), (1 William and Mary Sess 2 c 2) (1688).

124 *Case of Prorogations*, *supra* note 1 at para 65.

125 *Ibid* at para 68.

and of no effect and should be quashed. This led to the actual prorogation, which was as if the Commissioners had walked into Parliament with a blank piece of paper. It too was unlawful, null and of no effect.¹²⁶

Three points follow from this important passage. First, judicial remedies as to lawfulness do not necessarily compromise parliamentary privilege. A judge must look closely at the consequences of a judicial finding before concluding that a remedy would interfere with parliamentary privilege.

Second, where a remedy granted by a court has *indirect* consequences in Parliament or for parliamentary business, this is not an interference with parliamentary privilege. The granting of Royal Assent is undoubtedly a ‘proceeding in Parliament’ protected by parliamentary privilege from direct judicial interference.¹²⁷ Part of the prorogation ceremony considered in the *Case of Prorogations* involved the giving of Royal Assent to the *Parliamentary Buildings (Restoration and Renewal) Act 2019*.¹²⁸ When Parliament reconvened after the UK Supreme Court’s decision in the *Case of Prorogations*, Royal Assent was given *again* to the same legislation. Indeed, the date of Royal Assent is now officially recorded as 8 October 2019 (not the original date of 10 September 2019).¹²⁹ Plainly, the analysis of Parliament was that the remedy granted in the *Case of Prorogations* had the effect of nullifying a Royal Assent ceremony and nullifying legislation along with it. Nonetheless, given that this was an *indirect* consequence of a judicial remedy, the remedy itself did not interfere with parliamentary privilege. There is no doubt that *direct* judicial interference with Parliament’s control of its own proceedings or freedom of speech within Parliament would violate parliamentary privilege, as held by a majority of the Supreme Court of Canada in *Mikisew Cree First Nation v Canada (Governor General in Council)*.¹³⁰

126 *Ibid* at para 69.

127 *R (Barclay) v Secretary of State for Justice*, [2014] UKSC 54.

128 (UK).

129 UK, HL Deb (09 September 2019), vol 664, col 645 (Mr. Speaker). See also Loughlin, *supra* note 52.

130 2018 SCC 40.

But in light of the analysis of Lady Hale and Lord Reed, it is much less clear that the *indirect* consequences of a judicial remedy invariably interfere with parliamentary privilege.

Third, it normally follows from a finding that an official acted unlawfully (or *ultra vires*) that any decisions taken by the official or flowing from the official's decisions are nullities and *void ab initio* as a matter of law. However, the proposition that unlawful advice to prorogue Parliament 'should' lead to the quashing of the Order in Council and the conclusion that Parliament has not been prorogued¹³¹ is too confident. Common law courts often make a distinction between a finding of illegality and its effect or consequences.¹³² Judicial review remedies are discretionary, which allows judges to manage the effect or consequences of relief in any given case.¹³³ When the effect or consequences of relief would interfere with, for instance, the interests of third parties or cause administrative chaos, judges tend to be very careful as to the choice of remedy.¹³⁴ Judges can withhold a remedy altogether, but issuing a declaration is typically a better way of proceeding carefully: the effect is to leave an instrument tainted by illegality in place and allow other actors to decide best how to proceed. Furthermore, when courts are faced in subsequent cases by applicants 'piggybacking' on a remedy granted in a previous case they have an inveterate tendency to refuse to accept that illegal action was a nullity incapable

131 *Case of Prorogations*, *supra* note 1 at paras 69–70.

132 Jeff King, "Miller/Cherry and Remedies for Ultra Vires Delegated Legislation" (19 September 2019), online (blog): *UK Constitutional Law Blog* <ukconstitutionallaw.org/2019/09/19/jeff-king-miller-cherry-and-remedies-for-ultra-vires-delegated-legislation/>.

133 See variously *Dr Astley McLaughlin v A-G of the Cayman Islands*, [2007] UKPC 50 at para 16; *Seal v Chief Constable of the South Wales Police*, [2007] 1 WLR 1910 at para 33 (HL (Eng)); *Walton v Scottish Ministers*, [2012] UKSC 44, [2013] Env LR 16 at para 81, per Lord Reed; paras 103, 112, per Lord Carnwath; and paras 155–56, per Lord Hope.

134 See e.g. *R v Monopolies and Mergers Commission, ex parte Argyll Group plc*, [1986] EWCA Civ 8 (Eng); *MiningWatch Canada v Canada (Fisheries and Oceans)*, [2010] 1 SCR 6 at para 52; *R (New London College) v Secretary of State for the Home Department*, [2013] 1 WLR 2358 (UKSC (Eng)) at paras 45–46.

of having legal consequences.¹³⁵ My point here is that the observations about nullity should not be taken too seriously and certainly not to disturb the settled position that a court may carefully fashion public law remedies in response to contextual considerations.

Some uncertainty is bound to arise in future cases in respect of these three points. Just how closely parliamentary proceedings can be scrutinized, just how many indirect consequences can be created without compromising parliamentary privilege and whether any unlawful advice to the Crown is a nullity incapable of justifying subsequent actions are difficult questions. To be clear, apart from my doubts about the automaticity of a finding of invalidity, I do not consider that Lady Hale and Lord Reed were wrong in their analysis of parliamentary privilege,¹³⁶ only that their analysis is likely to provoke harder questions in future cases.

E. Summary

To sum up the critical analysis in this section, Lady Hale and Lord Reed rightly concluded that the exercise of the prorogation prerogative is justiciable. But in setting out the scope of the power to prorogue they manipulated the distinction between the existence and exercise of the prerogative. Of course, one lawyer's sleight of hand is another's craftsmanship. Here, however, the manipulation of the existence/exercise distinction created problems of doctrinal and historical coherence. Lady Hale and Lord Reed's approach allowed them to circumnavigate doctrinal fundamentals and, indeed, turn settled doctrine on its head by effectively imposing a free-standing obligation to justify *any* prorogation to the satisfaction of the courts. And in terms of historical coherence, Lady Hale and Lord Reed's standard is difficult to reconcile with existing understandings of the scope of the prorogation prerogative, a significant problem in an area where history weighs heavily. Lastly, Lady Hale and Lord Reed probably overstated the inevitability of their conclusion that the unlawfulness of Prime

¹³⁵ See generally David Feldman, “*Error of Law* and Flawed Administrative Acts” (2014) 73:2 *Cambridge Law Journal* 275.

¹³⁶ See also Craig, “Prorogation”, *supra* note 37.

Minister Johnson's advice to prorogue Parliament meant that it was a nullity incapable of having further legal consequences. Nonetheless, their analysis of remedy is persuasive.

Given the likely impact of the *Case of Prorogations* on judicial review of prerogative powers around the Commonwealth, how future courts deal with justiciability and issues of doctrinal and historical coherence, as well as remedy, will be extremely important.

VI. Conclusion: The *Case of Prorogations* and Democratic Delay

So far, I have set the *Case of Prorogations* in its immediate context, explained Lady Hale and Lord Reed's reasoning and subject the decision to a critical analysis. In this concluding section, I turn to the more general matter of democratic decay, consistent with the overall vision for this special issue.

On one view of the *Case of Prorogations*, Prime Minister Johnson and his advisors could be seen as playing constitutional hardball, pushing the limits of constitutional propriety.¹³⁷ The Court's decision not to simply declare that the advice was unlawful and leave the next steps up to the Prime Minister and Parliament suggests a striking lack of trust in Mr. Johnson and his advisors and thus a desire to deliver a high-profile reprimand. If so, the Supreme Court's decision was a laudable attempt to push politics back onto safe constitutional ground.

There is, however, another view, one which I find more plausible and which casts the Supreme Court in less heroic light. Prime Minister Johnson and his advisors seem to have been engaged in a cynical game, the goal of which was to set up a general election — either immediately or in the near future — in which Johnson could campaign as a died-in-the-wool Brexiteer seeking to be freed from the shackles of an anti-No Deal Parliament. Prorogation, on this view, was simply a device to provoke an election or a legislative response. Successfully, as

¹³⁷ *Mark Tushnet*, "Constitutional Hardball" (2004) 37 John Marshall Law Review 523.

it turned out, as Parliament passed the *European Union (Withdrawal) (No. 2) Act 2019*¹³⁸ on September 9 mere hours before the prorogation took effect; this Act obliged the Prime Minister to seek a further extension of the Article 50 period until 31 January 2020. In the event, Johnson did seek an extension but when he finally managed to achieve a general election — held on 12 December 2019 — he did indeed portray himself as a Brexiteer champion (albeit one who had also negotiated a withdrawal agreement¹³⁹ which gained parliamentary backing).¹⁴⁰ The electorate plainly appreciated the portrait, as they returned Conservative Party MPs to Westminster with a thumping majority and thus Johnson to Downing Street.¹⁴¹

If this view is more accurate — and I think, even acknowledging the risk of falling into the *post hoc ergo propter hoc* trap, it chimes with the available evidence — the Supreme Court did not need to act at all. Johnson was attempting to provoke Parliament and, by the time the Supreme Court heard the *Case of Prorogations*, he had already succeeded. The No-Deal Brexit that parliamentarians were concerned to scrutinize and legislate against had already been ruled out. Worse, on this view the Supreme Court was not reasserting the boundaries of constitutional propriety so much as playing into Johnson's hands. Like the anti-No Deal Brexit coalition in Parliament, the Supreme Court formed part of the establishment against which Johnson campaigned — the Conservative Party manifesto for the December 2019 election contained a pledge to form a Constitution, Democracy & Rights Commission to investigate a range of issues including “the functioning of the Royal Prerogative” and

138 2019, c. 26 (UK).

139 “Brexit: EU and UK reach deal but DUP refuses support” (17 October 2019), online: *BBC News* <www.bbc.com/news/uk-politics-50079385>.

140 See generally Conservative and Unionist Party, *Get Brexit Done: Unleash Britain’s Potential: The Conservative and Unionist Party Manifesto 2019* (London: Paragon Customer Communications Company, 2019) [Conservative Party].

141 “Election results 2019: Boris Johnson returns to power with big majority” (13 December 2019), online: *BBC News* <www.bbc.com/news/election-2019-50765773>.

ensuring that judicial review “is not abused to conduct politics by another means or to create needless delays”.¹⁴² Accordingly, the decision in the *Case of Prorogations* can be seen to have unnecessarily aggravated the relationship between the courts and the executive, precipitating future conflicts over the role of the judiciary.

On the whole, then, my view of the *Case of Prorogations* is a sceptical one. I am dubious about the analytical robustness of Lady Hale and Lord Reed’s reasoning and apprehensive about the tensions the decision seems to have provoked. But in the greater scheme of things, these are quibbles or disagreements at the margins; they might influence how the *Case of Prorogations* is applied and received but in the long-run the *Case of Prorogations* is sure to take its place in the pantheon of momentous common law decisions.

142 Conservative Party, *supra* note 140 at 48.

“Constitutional Risk”, Disrespect for the Rule of Law and Democratic Decay

Anne Twomey*

One indicator of democratic decay is a lack of respect for the rule of law. This can be seen when the Government dismisses strict compliance with the rule of law and instead opts for an assessment of ‘constitutional risk’ – whether it is likely that anyone with the standing to do so will challenge the constitutionality or legality of its conduct. While this approach may be pragmatic, it reveals an underlying acceptance of failure to comply with the law as long as one is not called to account for doing so. This article discusses how a scandal in Australia concerning the allocation of grants to local bodies for sporting activities revealed failures to comply with the Constitution, act within legal power, comply with financial rules and meet ministerial standards. Political benefit was placed above the need for strict compliance with the rule of law. This is how democratic decay begins.

* Anne Twomey is a Professor of Constitutional Law at the University of Sydney, Australia. She has previously worked for the Parliament of Australia and The Cabinet Office of New South Wales.

- I. INTRODUCTION
 - II. THE CONSTITUTION AND THE COMMONWEALTH'S POWER TO SPEND
 - A. The Pape Case
 - B. The Williams (No 1) Case
 - C. The Financial Framework (Supplementary Powers) Act 1997
 - D. Williams v Commonwealth (No 2)
 - III. GOVERNMENT GRANTS AND 'PORK-BARRELLING'
 - IV. COMMUNITY SPORT INFRASTRUCTURE GRANT PROGRAM
 - A. Constitutional Validity of the Grants
 - B. Legislative Power to Make the Grants
 - C. Financial Legislation
 - D. Commonwealth Grants Rules and Guidelines 2017
 - E. Administrative Law Breaches
 - F. The Statement of Ministerial Standards
 - V. CONCLUSION
-

I. Introduction

In Australia, like most countries, there is a huge temptation for politicians in government to use public money for partisan purposes to influence voting at elections. This is particularly notable in the exercise of ministerial discretion in the making of grants of public money to community groups, especially in marginal seats, in the period prior to an election.¹ Such action is commonly known as 'pork-barrelling'.

1 See e.g. David Denemark, "Partisan Pork Barrel in Parliamentary Systems: Australian Constituency-Level Grants" (2000) 62:3 *The Journal of Politics* 896; Clive Gaunt, "Sports Grants and the Political Pork Barrel: An Investigation of Political Bias in the Administration of Australian Sports Grants" (1999) 34:1 *Australian Journal of Political Science* 63 (regarding the analysis of the original 'sports-rorts affair' involving the Hawke Labor Government engaging in pork-barrelling through the distribution of community sports grants in 1993).

‘Pork-barrelling’ undermines the fairness of elections² and aids democratic decay by heightening public distrust of politicians and the efficacy of the system of government. Making grants on the basis of political advantage, rather than merit and need, results in the unfair distribution of public funds, the funding of unworthy or unviable projects, the inefficient allocation of scarce resources, poor planning and a lack of coordination with other levels of government in providing appropriate local facilities.

In addition to being morally corrupt,³ economically inefficient and destructive of democracy, an additional ill has been evidenced in Australia. That is the disrespect for the rule of law shown by persistent breaches of the Constitution of the Commonwealth of Australia (“*Constitution*”)⁴, statutes, guidelines and ministerial standards when it comes to the allocation of grants to community groups. The constitutional breaches arise from the federal distribution of power in Australia. Unsurprisingly, the *Constitution* was not drafted in a way that permitted federal politicians to make grants to resurface a local playing field or build change-rooms at a local sporting club. Such matters fall within the jurisdiction of state and local governments.

The primary focus of the Commonwealth Government, however, has been on managing ‘constitutional risk’, rather than strict compliance with the rule of law. It involves evaluating the risk that someone who has standing to do so will challenge the making of the grant in court, resulting in it being struck down. As

2 See Andrew Leigh, “Bringing Home the Bacon: An Empirical Analysis of the Extent and Effects of Pork-Barreling in Australian Politics” (2008) 137:1/2 Public Choice 279 (regarding the analysis by Leigh of grant distribution prior to the 2004 Commonwealth election, in which he found “robust evidence that additional funding increased the swing towards the Coalition government, and suggestive evidence that a larger number of grants delivered to an electorate also helped the government” at 297).

3 Tim Prenzler, Bricklyn Horne & Alex McKean, “Identifying and Preventing Gray Corruption in Australian Politics” in Peter C Kratcoski & Maximilian Edelbacher, eds, *Fraud and Corruption – Major Types, Prevention and Control* (New York: Springer International Publishing, 2018) 61 at 68–70.

4 *Commonwealth of Australia Constitution Act* (UK), 1900 c 12, s 9 [*Constitution*].

most people do not object to receiving a grant, and others do not have standing to challenge it, the ‘constitutional risk’ is very low indeed. Even if it does arise, the political cost to the Government is low because it can blame the courts for the loss of funding or find another way to provide it.⁵ Hence there has been a proliferation of grant schemes in recent decades that have no obvious constitutional basis, on the ground that any challenge to them is unlikely.

This notion of ‘constitutional risk’ is at odds with the fundamental principle of the rule of law. Governments are obliged to obey the law and comply with the *Constitution*. Government lawyers should not be assessing whether or not the Government is at ‘risk’ of being caught. Instead, they should be advising the Government to be rigorous in its compliance with the law, regardless of whether anyone would have the standing, and be likely, to sue. But as the examples discussed below show, either they are not doing so, that advice is not getting through, or ministers and public servants are deliberately not seeking necessary legal advice, as it might prove inconvenient.

The first part of this article discusses the constitutional constraints upon the Commonwealth Government validly making grants, including the history of the Commonwealth Government turning a blind eye to court rulings.

The second part provides a major case study of the legal problems arising in relation to the making of grants under the Community Sport Infrastructure Grants program. These grants were awarded by an independent statutory corporate entity to community sporting bodies in the lead up to a federal election in 2019. At every level, from the *Constitution*, to legislative authority, to ministerial standards, there were major failings in this process. It is a classic study of democratic decay.

The article concludes with observations about how the various failures to comply with the *Constitution*, statutes, legislative instruments and

⁵ For example, after the Commonwealth lost twice in the High Court in relation to the validity of its funding of a school chaplaincy scheme, it instead validly funded the scheme by making conditional grants to the States under section 96 of the Commonwealth Constitution.

administrative standards evince a worrying disrespect for the rule of law and the beginnings of democratic decay.

II. The Constitution and the Commonwealth's Power to Spend

Australia is a federation with an entrenched Constitution which distributes legislative power amongst the Commonwealth and the States. The subjects of Commonwealth legislative power include matters most appropriately dealt with at the national level, such as external affairs, defence and currency, and matters that cross state borders, such as interstate trade and commerce and industrial disputes that extend beyond one state.⁶ Those powers do not extend to dealing with local community matters, such as sporting clubs and local facilities.

The Commonwealth's power in section 81 of the *Constitution* to appropriate money is confined to appropriations for the 'purposes of the Commonwealth'.⁷ It appears that this was intended to confine the Commonwealth's spending to those subjects about which it could legislate.⁸ But the Commonwealth later became frustrated by this limitation on its powers and began to take the view that the 'purposes of the Commonwealth' were whatever purposes it chose to identify as the purpose of the appropriation, regardless of whether the spending would fall within its heads of legislative power.

Whether this was so remained unresolved until recent times, as legal challenges to appropriations were rare. There were only two cases where the

6 See *Constitution, supra* note 4 (the concurrent heads of Commonwealth legislative power listed in section 51 of the *Constitution*. States retain full power to legislate on matters not withdrawn from them by the Commonwealth Constitution. Where there is an inconsistency between valid Commonwealth and State laws, section 109 of the *Constitution* provides that the Commonwealth law prevails).

7 *Ibid*, s 81.

8 See e.g. Austl, Melbourne, *Official Record of the Debates of the Australasian Federal Convention* (14 February 1898) at 898 (Sir John Downer).

validity of appropriations was considered by the High Court of Australia,⁹ in 1945¹⁰ and 1975.¹¹ In neither case was the scope of the Commonwealth's spending power clearly determined. However, in the 1975 case, known as the *AAP Case*,¹² an appropriation beyond the scope of the Commonwealth's legislative power was upheld because the fourth member of the majority, Stephen J, held that the States had no standing to challenge a Commonwealth appropriation.¹³

Upon this shaky foundation, the Commonwealth built a complex web of spending programs, intervening in areas in which it otherwise had no legislative power and using its capacity to spend and contract to exercise power and win electoral favour. Those persons directly affected by the grants – the recipients – were unlikely to object to receiving the money, and there was doubt as to whether anyone else would have standing to challenge, including the States.

9 The High Court of Australia is Australia's highest court. It hears appeals from State Supreme Courts and has an original jurisdiction, which includes determining matters involving the interpretation of the Constitution.

10 *Attorney-General (Vic) ex rel Dale v The Commonwealth* (1945), 71 CLR 237 (HCA) (in this case both a regulatory scheme and an appropriation were involved. The law establishing the regulatory scheme was held invalid as the regulatory scheme did not fall within a head of Commonwealth legislative power. The validity of the appropriation was not finally determined, with different positions being taken by some judges and others finding it unnecessary to decide).

11 *Victoria v The Commonwealth* (1975), 134 CLR 338 (HCA) (in this case there was no legislation involved other than an appropriation. The Court split with three upholding the appropriation, two finding the appropriation invalid, one finding the executive action to implement the scheme invalid, and the final judge deciding there was no standing to challenge the appropriation) [*AAP Case*].

12 *Ibid* (the case concerned the establishment of the Australian Assistance Plan which involved a non-statutory scheme to fund newly established Regional Councils for Social Development to provide social welfare services in each region).

13 *Ibid* at 390, Stephen J.

Hence, the ‘constitutional risk’ of such action was low, despite the significant doubts about its validity.

This position changed in 2009. In response to the global financial crisis, the Commonwealth Government decided to make payments of money to taxpayers to stimulate the economy. It is an extraordinary person who will sue the government for giving him or her money, but the Commonwealth was unlucky that one of the recipients of its largesse, Bryan Pape, was such a man. Pape had long been concerned about the Commonwealth spending beyond its constitutional powers but had previously had no standing to bring legal proceedings. As a recipient of this Commonwealth payment, however, he now had standing to bring legal proceedings. He therefore sued the Commonwealth, objecting to the constitutional validity of the payment he had received.

A. The Pape Case

In *Pape v Federal Commissioner of Taxation*,¹⁴ the High Court treated separately the validity of an appropriation and the authority to spend the appropriated sum. It regarded the appropriation as the earmarking or ‘setting aside’ of public money.¹⁵ But the Commonwealth could only spend that money if it had legislative or executive power to do so. This shifted the debate from “purposes of the Commonwealth” in section 81 of the *Constitution* and the problem of standing in challenging an appropriation, to the question of whether the Commonwealth had the constitutional authority to spend on a particular subject.¹⁶ The consequence was that the Commonwealth could no longer claim that it could spend money on any subject that it decided was a purpose of the Commonwealth. It now had to be able to identify a head of constitutional power to support that expenditure.

¹⁴ (2009), 238 CLR 1 (HCA) [*Pape*].

¹⁵ *Ibid* at para 79, French CJ, 177, Gummow, Crennan & Bell JJ, 292, Hayne & Kiefel JJ, 601–02, Heydon J.

¹⁶ *Ibid* at paras 111, French CJ, 178, 183, Gummow, Crennan & Bell JJ, 320, Hayne & Kiefel JJ, 601–02, Heydon J.

In *Pape*, the expenditure had been supported by authorising legislation. A bare majority of the High Court accepted that the Commonwealth did have the legislative authority to enact the law. It considered that there was a ‘nationhood’ power¹⁷ to deal with “short-term fiscal measures to meet adverse economic conditions affecting the nation as a whole, where such measures are on their face peculiarly within the capacity and resources of the Commonwealth Government”.¹⁸ *Pape*, therefore lost the case, but won on the more significant point that all Commonwealth expenditure must fall within an identified Commonwealth head of power.

In response, the Commonwealth Government took no action to review its expenditure to identify those payments that did not fall within a Commonwealth head of power so that they could be authorised in a valid manner, such as by a conditional grant to the States.¹⁹ Officers of the Department of the Prime Minister and Cabinet told a Senate Select Committee in 2011 that the Department had received advice from the Attorney-General’s Department “that we should continue with current arrangements unless a demonstrated need arises to change them”.²⁰ As it was unlikely that anyone else with standing would object to receiving a Commonwealth grant, the ‘constitutional risk’ was low, so the Commonwealth continued to spend on hundreds of programs with no legislative authority and in many cases no obvious constitutional head of power.

17 *Ibid* (this power is supported by ss 61 and 51(xxxix) of the *Constitution* and is based upon a test set out by Mason J in the *AAP Case*, *supra* note 11 at 397).

18 *Ibid* at para 133, French CJ; See also paras 241–43, Gummow, Crennan & Bell JJ.

19 Under section 96 of the *Constitution*, the Commonwealth can make grants to the States on such terms and conditions as the Commonwealth Parliament considers fit. This can include a condition that the money be passed on to individuals, schools, sporting clubs or local government bodies, for specific uses.

20 Austl, Commonwealth, Senate Select Committee on the Reform of the Australian Federation, *Australia’s Federation: An Agenda for Reform* (Canberra: Senate Printing Unit, June 2011) at 91 [footnotes omitted].

B. The Williams (No 1) Case

Unfortunately for the Commonwealth, another extraordinary plaintiff, Ron Williams, soon appeared.²¹ Williams objected to the Commonwealth making grants to religious organisations to fund a chaplaincy program in the State school attended by his children. Williams had claimed sufficient standing due to his parental relationship to his affected children, but the defendants contested his standing. A majority of the High Court considered that the question of standing could be put to one side because a number of States, which clearly had standing, had intervened in support of Williams' arguments.²² Williams challenged the grant to Scripture Union Queensland, which supplied the school chaplains, on the basis that it did not fall within a Commonwealth head of power. In this case there was no legislation (other than the appropriation) supporting the scheme. Instead, the Commonwealth relied upon its powers as a polity with a legal personality to contract and spend to establish the school chaplaincy scheme and to spend appropriated sums for that purpose.

In *Williams v Commonwealth (No 1)*, the Commonwealth argued that, taking a broad view, it had the same capacity as any other legal person to spend money upon any subject that it chose, as long as a valid appropriation had been passed. Alternatively, the Commonwealth put a narrow view that it had the power to spend public money on subjects that fell within the scope of the Commonwealth's legislative power, even when no such legislation had been enacted. The High Court, however, rejected both the broad²³ and the narrow

21 *Williams v Commonwealth (No 1)* (2012), 248 CLR 156 (HCA) [*Williams (No 1)*].

22 *Ibid* at para 112, Gummow & Bell JJ; with agreement at paras 9, French CJ, 168, Hayne J, 475, Crennan J, 557, Kiefel J.

23 *Ibid* at paras 38, 83, French CJ, 159, Gummow & Bell JJ, 182, 253, Hayne J, 534, Crennan J, 577, 595, Kiefel J; (Heydon J found it unnecessary to decide at 407).

view.²⁴ The Court held that as the expenditure of public money was involved, parliamentary authorisation was needed, except in limited cases.²⁵

The High Court stressed the importance of the accountability of the Executive to Parliament.²⁶ Parliament needed to have a role in the “formulation, amendment or termination” of programs for the expenditure of public money,²⁷ beyond the appropriation. The Court noted that the Senate’s powers in relation to appropriations are limited, as it cannot initiate them or amend bills for the appropriation of the ordinary annual services of government (although it can ‘request’ amendments to such bills).²⁸ In contrast, the Senate has full power to deal with laws that authorise expenditure.²⁹

A further consideration was that it was ‘public money’ that was being spent, rather than the Commonwealth’s own money.³⁰ The Executive must be accountable to the public, through Parliament, for such expenditure, including seeking approval for the programs upon which it is to be expended. Justice Crennan, for example, observed:

24 *Ibid* at paras 36, French CJ, 134–37, Gummow & Bell JJ, 537, 544, Crennan J (Hayne J at paras 286, 288 and Kiefel J at para 569 found it unnecessary to decide upon the narrow ground because no Commonwealth head of legislative power could potentially support the expenditure under the chaplaincy scheme).

25 *Ibid* (exceptions included when the expenditure was for the ordinary administration of the functions of the government or in support of prerogative powers); see further Anne Twomey, “Post-Williams Expenditure – When Can the Commonwealth and States Spend Public Money Without Parliamentary Authorisation?” (2014) 33:1 University of Queensland Law Journal 9 at 9–25.

26 *Williams (No 1)*, *supra* note 21 at paras 60, French CJ, 136, 145, Gummow & Bell JJ, 173, 219, Hayne J, 516, Crennan J, 579, Kiefel J.

27 *Ibid* at para 145, Gummow & Bell JJ.

28 *Constitution*, *supra* note 4, ss 53–54.

29 *Williams (No 1)*, *supra* note 21 at paras 60, French CJ, 136, Gummow & Bell JJ, 532, Crennan J.

30 *Ibid* at paras 151, Gummow & Bell JJ, 173, 216, Hayne J, 519, Crennan J, 577, Kiefel J.

The principles of accountability of the Executive to Parliament and Parliament's control over supply and expenditure operate inevitably to constrain the Commonwealth's capacities to contract and to spend. Such principles do not constrain the common law freedom to contract and to spend enjoyed by non-governmental juristic persons.³¹

Justices Gummow and Bell pointed out that the absence of legislative engagement gives rise to a "deficit in the system of representative government".³²

The expenditure on a chaplaincy scheme did not fall within the nationhood power, the prerogative or the ordinary administration of the functions of government. The money had been spent under a program that was initiated and run by the Executive Government without parliamentary scrutiny beyond the passage of an appropriation for the vaguely expressed purpose of achieving "high quality foundation skills and learning outcomes from schools".³³ The Court held that the executive power was insufficient to support expenditure on the chaplaincy scheme, and it was therefore invalid.³⁴

C. The Financial Framework (Supplementary Powers) Act 1997

This time the Commonwealth Government did react – at least in a formalistic manner. It asked every government department to identify all its non-statutory funding programs. It collected them in a list of over 400 programs and rushed approval of them through both Houses of Parliament in just over 24 hours.³⁵

31 *Ibid* at para 516, Crennan J.

32 *Ibid* at para 143, Gummow & Bell JJ.

33 *Ibid* at para 227, Hayne J.

34 *Ibid* at paras 83–84, French CJ, 161, Gummow & Bell JJ, 289–90, Hayne J, 548, Crennan J, 597, Kiefel J; Heydon J, dissenting at paras 441, 592–93.

35 Austl, Commonwealth, House of Representatives, *Parliamentary Debates* (26 June 2012) at 8041; Austl, Commonwealth, Senate, *Parliamentary Debates* (27 June 2012) at 4752 (the Bill received its first reading in the House of Representatives at 5:38pm on 26 June 2012 and received its third reading in the Senate at 6:56pm on 27 June 2012. It was debated for 3 hours and 5

Consideration of the Bill was extremely limited, with virtually no scrutiny of the listed programs, apart from a cursory discussion of the school chaplaincy program, which was one of those listed. The then Opposition raised concern about whether the listed programs fell within the Commonwealth's powers. It complained that it had had almost no time to scrutinise those programs.³⁶ Nonetheless, the Bill was passed. The process made a mockery of the importance that the High Court had accorded to the parliamentary approval and scrutiny of the expenditure of public money. The Commonwealth gave formal effect to the requirement for legislative approval, but did not give effect to the Court's reasoning.

The result was the enactment of section 32B of an Act since retitled the *Financial Framework (Supplementary Powers) Act 1997*.³⁷ It validated and authorised Commonwealth spending on all grants or programs listed in what became the *Financial Framework (Supplementary Powers) Regulations 1997*³⁸ ("Financial Framework Regulations"). The use of regulations to identify these programs meant that more could be added by the Commonwealth at any time without the need for direct parliamentary scrutiny that would otherwise have been required for the passage of legislation. Further, the descriptions of the listed programs were often so broad that almost anything could be included within them. Examples include expenditure of public money for "Regulatory Policy", "Diversity and Social Cohesion" and "Regional Development".³⁹ Many of the listed programs had no apparent constitutional head of power to support them. Again, reliance was placed upon the fact that it was unlikely that anyone would challenge them. The 'constitutional risk' was again regarded as low.

minutes in the House of Representatives and 2 hours and 6 minutes in the Senate) [*Senate Parliamentary Debate*].

36 *Senate Parliamentary Debate*, *supra* note 35 at 4651–53 (Senator Brandis).

37 (Cth) (Austl), 1997/154, s 32B [*Financial Framework Act*].

38 (Cth) (Austl), 1997/328 [*Financial Framework Regulations*].

39 *Ibid*, schedule 1AA, part 4.

D. Williams v Commonwealth (No 2)

But Mr. Williams' children still attended a school with a chaplain paid by Scripture Union Queensland from Commonwealth funds. Williams again commenced legal proceedings, arguing this time that while there was a legislative provision that purported to authorise expenditure on the school chaplaincy program, there was no Commonwealth head of power to support that legislative provision.⁴⁰ Again, the High Court held that the school chaplaincy program was not validly authorised.

In *Williams v Commonwealth (No 2)*,⁴¹ the High Court held that there was no Commonwealth head of power that supported expenditure on a chaplaincy program. Arguments that it was supported by the power to make laws with respect to trading corporations⁴² or “benefits to students”⁴³ were rejected by the High Court. However, the High Court did not strike down section 32B in its entirety. Instead, it read it down so that it only authorised the making of grants that were within the Commonwealth's constitutional power.⁴⁴

The Commonwealth had argued for the restoration of its previously claimed power to spend on whatever subjects it wished. It contended that if any limitations on its power to spend were deemed necessary, the Commonwealth should still be permitted to contract and spend in relation to “all those matters that are reasonably capable of being seen as of national benefit or concern; that is, all those matters that befit the national government of the federation, as discerned from the text and structure of the Constitution”.⁴⁵

The High Court was not sympathetic to this argument. It noted that the proposition was one of great width and that it was “hard to think of any program

⁴⁰ *Williams v Commonwealth (No 2)* (2014), 252 CLR 416 (HCA) [*Williams (No 2)*].

⁴¹ *Ibid.*

⁴² *Ibid* at para 49, French CJ, Hayne, Kiefel, Bell & Keane JJ.

⁴³ *Ibid* at paras 43–48, French CJ, Hayne, Kiefel, Bell & Keane JJ.

⁴⁴ *Ibid* at para 36, French CJ, Hayne, Kiefel, Bell & Keane JJ.

⁴⁵ *Ibid* at para 70, French CJ, Hayne, Kiefel, Bell & Keane JJ [emphasis omitted].

requiring the expenditure of public money appropriated by the Parliament which the Parliament would not consider to be of benefit to the nation".⁴⁶ It added that this was simply "another way of putting the Commonwealth's oft-repeated submission that the Executive has unlimited power to spend appropriated moneys for the purposes identified by the appropriation".⁴⁷ The Court was not prepared to accept this submission. It contended that the Commonwealth's argument was flawed because it assumed that the Commonwealth's executive power was the same as that of the United Kingdom. But this was not the case because Australia is a federation and its *Constitution* distributes powers and functions between the Commonwealth and the States. Their Honours concluded:

The polity which, as the Commonwealth parties rightly submitted, must "possess all the powers that it needs in order to function as a polity" is the central polity of a federation in which independent governments exist in the one area and exercise powers in different fields of action carefully defined by law. It is not a polity organised and operating under a unitary system or under a flexible constitution where the Parliament is supreme. The assumption underpinning the Commonwealth parties' submissions about executive power is not right and should be rejected.⁴⁸

III. Government Grants and 'Pork-Barrelling'

Despite the above legal history which made it abundantly clear from 2014 onwards that the Commonwealth cannot spend money on subjects outside those distributed to it by the *Constitution*, and that section 32B⁴⁹ does not provide legislative authorisation for any spending outside its powers, the Commonwealth has persisted in funding programs with little if any discernible relationship to a head of constitutional power. Again, it relies on advice concerning 'constitutional risk', which is largely predicated upon the

46 *Ibid* at para 71, French CJ, Hayne, Kiefel, Bell & Keane JJ.

47 *Ibid* [footnotes omitted].

48 *Ibid* at para 83, French CJ, Hayne, Kiefel, Bell & Keane JJ [footnotes omitted].

49 *Financial Framework Act*, *supra* note 37.

unlikelihood of anyone with standing taking legal action in relation to such grants. The amounts of money involved are large⁵⁰ and the scrutiny of them is limited.⁵¹ In the 2018-2019 financial year, there were 312 different Commonwealth grants programs or grant opportunities, with AUD \$18,639,000 being awarded in grants.⁵²

On occasion, the Auditor-General, through the Australian National Audit Office (“ANAO”), has examined spending programs and criticised the Government for bias in spending decisions or failures in process. While the ANAO considers whether there is legal authority to make grants, it does not address constitutional issues and its assessment of legal issues is limited. Its focus is instead on whether there has been a fair and efficient process. For example, in its audit of the use of the National Stronger Regions Fund, the ANAO noted that a policy decision had been made to spend the money on projects beyond ‘regional Australia’, including in metropolitan areas. No such change was made to the scope of the program as authorised by the *Financial Framework Regulations*. Accordingly, such expenditure, which involved 51 grants totalling AUD \$189.2 million for projects in major cities, was unlawful as it had no legislative authorisation. But instead of criticising the Government for unlawful spending, the ANAO merely observed that “there would be benefit” in the

50 “Scrutiny of Commonwealth Expenditure” (30 September 2020) online: *Parliament of Australia* <www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Scrutiny_of_Commonwealth_expenditure> (the amounts involved in such expenditure programs are regularly tabulated by the Senate Standing Committee for the Scrutiny of Delegated Legislation).

51 The most consistent scrutiny comes through the Senate Standing Committee on the Scrutiny of Delegated Legislation which considers programs when authorised by delegated legislation. But it is not able to scrutinise spending on programs where the authorization is sourced in statute, as is the case with the CSIG program.

52 Austl, Commonwealth, Senate Select Committee on Administration of Sports Grants, *Response to Question on Notice* (Department of Finance, Hearing of 22 July 2020) (Parliament of Australia: Additional Documents, 5 August 2020) at 1.

Department ensuring “that it advises decision-makers of the legislative authority for proposed grants and that the legislative authority accurately reflects the nature and scope of the granting activity at the time”.⁵³

Whether or not any of the projects funded by those grants were supported by a Commonwealth head of power is also unclear. This is because the scope of the Fund is broadly described, it relies upon a wide range of Commonwealth heads of power, and there is a disjunct between those heads of power and the actual projects funded. According to the *Financial Framework Regulations*, the purpose of the National Stronger Regions Fund is to “provide grants to support the construction, expansion and enhancement of infrastructure across regional Australia”.⁵⁴ It relies upon the Commonwealth’s powers in relation to subjects including: territories, Indigenous Australians, financial assistance to the States, aliens and immigrants, interstate and overseas trade and commerce, Australia’s obligations under international agreements, the provision of welfare benefits, electronic communications, assistance to foreign, trading or financial corporations and measures that are peculiarly adapted to the government of a nation that cannot otherwise be carried on for the benefit of the nation.⁵⁵

Funded projects included the construction of an aquatic centre in Robertson, upgrading the Terrigal Rugby clubhouse, improving the heating in the Pool Hall of the Whyalla Leisure Centre, a Healthy Living Centre in Norlane, a basketball stadium extension in Frankston, a youth hub and skate park in Mansfield and a Community Health and Wellbeing Space in Romsey.⁵⁶ It is doubtful that these projects would fall under any of the above heads of

⁵³ Austl, Commonwealth, Australian National Audit Office, *Design and Implementation of Round Two of the National Stronger Regions Fund* (Report No 30) by Grant Hehir (Canberra: ANAO 2016–17) at 32–3.

⁵⁴ *Financial Framework Regulations*, *supra* note 38, schedule 1AA, part 4, item 62.

⁵⁵ *Ibid.*

⁵⁶ See further Australian Government, “National Stronger Regions Fund: Round Two List of Approved Projects” (6 October 2017), online (pdf): *Department of Infrastructure, Transport, Regional Development and Communications* <www.region.al.gov.au/region.al/programs/files/NSRF_Round_Two_List_of_Approved_Projects_071215.pdf>.

Commonwealth constitutional power. Such funding is not ‘peculiarly adapted to the government of a nation’ and it can clearly be funded by the relevant State Government if it regards it as a worthy project. While immigrants and Indigenous Australians may use these facilities, that is not a sufficient connection to provide legislative authorisation of the making of the grants.

Essentially, the problem is that while programs can be vaguely described⁵⁷ and then justified as having some potential connection to a plethora of different heads of power, there is no disciplined checking⁵⁸ that any of the actual grants made under those programs fall within the scope of the relevant head of power. The consequence is large-scale unlawful spending by the Commonwealth Government. The ‘constitutional risk’ is again low because no one is likely to check the conformity between actual spending and constitutional authority to do so.

Such unlawful and unconstitutional expenditure only tends to be revealed in relation to political scandals where there have been other failures in proper administration, such as political bias in the allocation of grants. The Community Sport Infrastructure Grant program provides a perfect case study of such a scheme. While on the one hand, it is not unusual, as ‘pork-barrelling’ involving sporting grants has been a conspicuous activity of both sides of government over a long time, on the other hand, this program was the subject of detailed scrutiny by a number of parliamentary committees, producing a great deal of primary documents and oral evidence from those involved. This has

57 See e.g. *Financial Framework Regulations*, *supra* note 38, schedule 1AB, part 4, item 46 (the ‘Strengthening Communities’ program), item 61 (the ‘Community Development Grants Programme’), and item 91 (the ‘Stronger Communities Program’ which was used to fund projects including a mini-golf course, a children’s water frog slide and a reusable Santa sleigh); see also Rosie Lewis, “Potato Peelers and Mini-Golf Enthusiasts Among Grant Winners”, *The Australian* (13 August 2018).

58 Note that while the Senate Standing Committee for the Scrutiny of Delegated Legislation examines all new instruments that add programs to the *Financial Framework Regulations*, and queries whether these programs are supported by a constitutional head of power, its jurisdiction does not extend to scrutiny of the actual expenditure under those programs.

provided an unusual degree of enlightenment about the government practice in dealing with such programs of doubtful legal validity.

IV. Community Sport Infrastructure Grant Program

The Community Sport Infrastructure Grant Program (“CSIG Program”) was established by the Commonwealth Government in 2018. The Treasury’s budget papers⁵⁹ show that the money for the CSIG Program was appropriated for the purpose of expenditure by the Australian Sports Commission (also known as “Sport Australia”) in the form of grants. The *Australian Sports Commission Act 1989*⁶⁰ establishes the Commission as a corporate Commonwealth entity with its own legal personality and powers to enter into contracts and spend money. It has the function of implementing programs to promote equality of access to and participation in sport by all Australians, and to spend money appropriated by Parliament for the purposes of the Commission.⁶¹ It was established as a statutory body, rather than as part of a government department, so as to ensure its independence and operation at arm’s length from the Government.⁶²

The *Australian Sports Commission Act* gives power to the Commission to make grants and enter into contracts.⁶³ It is this statutory power, rather than section 32B of the *Financial Framework (Supplementary Powers) Act*,⁶⁴ which has been regarded as supporting expenditure on the grants under the CSIG Program. Section 8 simply says that the Commission has the power to do all things necessary or convenient to be done for or in connection with the performance of its functions and, in particular may: “(a) enter into contracts;

59 Austl, Commonwealth, *Budget Measures*, Budget Paper No 2 (2019) at 92–93.

60 (Cth), 1989/12 [*Australian Sports Commission Act*].

61 *Ibid*, s 7.

62 Austl, Commonwealth, Senate Select Committee on Administration of Sports Grants, *Committee Hansard* (22 July 2020) at 34 [*Committee Hansard 22 July 2020*].

63 *Australian Sports Commission Act*, *supra* note 60, s 8.

64 *Financial Framework Act*, *supra* note 37, s 32B.

and ... (d) make grants or lend money, and provide scholarships or like benefits".⁶⁵

Three rounds of grants were made in December 2018, February 2019 and April 2019, before the federal election was held on 18 May 2019. A total of AUD \$100 million was awarded in a competitive grants scheme to 684 projects. The projects included resurfacing sporting fields, providing lighting for sporting facilities, walking tracks and carparks, improving spectator facilities and upgrading clubrooms. The *Program Guidelines*⁶⁶ set out the eligibility conditions⁶⁷ and three weighted merit criteria against which applications were assessed.⁶⁸ They concerned the extent to which the project enhanced community participation in sport, satisfied community need and showed appropriate project design and planning. The applicant also had to show a proven capacity and capability to complete the project. The *Program Guidelines* stated that applications would be assessed for eligibility and then against the selection criteria.⁶⁹ The assessment would occur by way of an industry panel using the same selection criteria.

Clause 8.1 of the *Program Guidelines*, controversially, then conferred the power of final approval on the Minister. It provided:

The Minister for Sport will provide final approval. In addition to the application and supporting material, other factors may be considered when deciding which projects to fund.

While delivery of funding will be on a competitive basis, if, after completing the assessment process, emerging issues have been identified and/or there are priorities that have not been met, other projects may be considered to address

65 *Ibid*, ss 8(1)(a),(d).

66 Austl, Commonwealth, Australian Sports Commission, *Community Sport Infrastructure Grant Program* (Program Guidelines) (Australian Government, August 2018) [Program Guidelines].

67 *Ibid*, clause 5.

68 *Ibid*, clause 6.

69 *Ibid*, clause 8.

these emerging issues (or other forms of financial arrangements with applicants to otherwise further the objectives of the program). It is expected that, in these cases, the assessment criteria outlined in these guidelines will remain applicable.

The Program Delegate may require additional conditions be attached to the grant funding.

Clause 9 of the *Program Guidelines* added that the decision of the Program Delegate – the Minister – was final and was not subject to review or appeal.

Numerous announcements of funding under this scheme were made by Ministers, Members of Parliament who belonged to the Coalition Liberal - National Party Government and even Coalition candidates in the lead up to the Commonwealth election, as part of campaigning.⁷⁰ The last round of grants, amounting to AUD \$40 million, was controversially finalised on 11 April 2019, after the Parliament had been dissolved at 8:30 am that morning and the Government had commenced the period of caretaker governance.⁷¹ Successful grants were then announced during the election period. The Minister for Sport,

70 “Georgina Downer’s \$127,000 bowls club novelty cheque to be examined by auditor-general” (22 March 2019), online: *ABC News* <www.abc.net.au/news/2019-03-22/georgina-downers-bowls-club-cheque-to-be-investigated/10928020> (the investigation by the ANAO was instigated after a Liberal Party candidate, who was not the local Member of Parliament, was photographed handing over a novelty cheque for a government grant to a bowling club, featuring the candidate’s face and Liberal Party logos).

71 See Grant Hehir, “Letter by Auditor-General” (16 April 2020) online (pdf): *Parliament of Australia* <www.aph.gov.au/Parliamentary_Business/Committees/Senate/Administration_of_Sports_Grants/AdminSportsGrants/Additional_Documents?doacType=Additional%20Information> (An email from the Minister’s Office to the Australian Sports Commission was received at 8:46 am, with details of those projects approved for funding in Round 3 of the grants. A further email was received at 12:43 pm with a changed list of approved projects. According to the ANAO there were 11 changes made between 8:46 am and 12:43 pm, with a net increase of AUD \$2,767,071 in grant funding. Grants were removed, reduced, added and increased. Some were new applications made after the close of the scheme).

Senator Bridget McKenzie, later said that she had made her final approval of the grants on 4 April 2019 and that it was later changed without her approval.⁷²

In January 2020, the ANAO presented a report to Parliament upon the administration of the CSIG Program. It found that while the Commission had assessed the grant projects on the basis of merit, the office of the Minister for Sport had run a parallel process which was based on factors other than those identified in the *Program Guidelines*, “such as project locations including Coalition ‘marginal’ electorates and ‘targeted’ electorates”.⁷³ Indeed, the Minister’s office sent the Australian Sports Commission a list of approved grants before the Commission’s independent panel had even met to make its merit assessment or the Board had met to approve the grant recommendations.⁷⁴ When it came to the second round, the Commission did not even bother making recommendations to the Minister, based on merit. It just acted as instructed by the Minister as to which grants should be made.⁷⁵ For the third round, the Commission put recommendations to the Minister, but then made

72 Bridget McKenzie, “Statement Regarding Senate Estimates” (5 March 2020), online: *Bridget McKenzie* <www.bridgetmckenzie.com.au/media-releases/statement-senate-estimates/>; Austl, Commonwealth, Senate Select Committee on Administration of Sports Grants, *Committee Hansard* (27 August 2020) at 8–9 (no record of the signed brief was entered into the Department’s computer system until 11 April 2019) [*Committee Hansard 27 August 2020*]; *Committee Hansard 22 July 2020*, *supra* note 62 at 22–23 (note that the Department of the Prime Minister and Cabinet took no action to determine who was purporting to exercise the Minister’s powers without the Minister’s authority, the lawfulness of doing so, and the appropriateness of acting after the caretaker period commenced).

73 Austl, Commonwealth, Australian National Audit Office, *Award of Funding under the Community Sport Infrastructure Program* (Auditor-General Report no 23) by Grant Hehir (Canberra: ANAO, 2020) at para 18 [*ANAO Report no 23*].

74 Austl, Commonwealth, Joint Committee of Public Accounts and Audit, *Committee Hansard* (3 July 2020) at 11, 24 [*Committee Hansard 3 July 2020*].

75 *Ibid* at 3.

the grants according to the Minister’s instructions, overriding its own recommendations.⁷⁶

The ANAO added that there was “evidence of distribution bias in the award of grant funding”.⁷⁷ It concluded:

The award of funding reflected the approach documented by the Minister’s Office of focusing on “marginal” electorates held by the Coalition as well as those electorates held by other parties or independent members that were to be ‘targeted’ by the Coalition at the 2019 Election. Applications from projects located in those electorates were more successful in being awarded funding than if funding was allocated on the basis of merit assessed against the published program guidelines.⁷⁸

It also concluded that there was no evident legal authority for the Minister to be the decision-maker in making the grants.⁷⁹ The reference in the *Program Guidelines* to the Minister as providing the final approval and as the Program Delegate did not give her the legal power to fulfil this role.

As a consequence of the ensuing controversy, the Prime Minister, asked the Secretary of the Department of the Prime Minister and Cabinet, Philip Gaetjens, whether Senator McKenzie had breached ministerial standards. While the report was not released, the Prime Minister summarised it in a press conference, stating that the report concluded that the Minister, according to the *Program Guidelines*, had the final approval authority with respect to the grants and the right to consider other factors. The Minister used that discretion, and there was no basis to find that she had breached the ministerial standards in that respect. The Prime Minister said that the Secretary did not consider that the process was “unduly influenced by reference to marginal or targeted electorates”.

76 *Ibid* at 13.

77 *ANAO Report no 23, supra* note 73 at para 24.

78 *Ibid*.

79 *Ibid* at paras 10, 13, 2.19.

He found “no basis for the suggestion that political considerations were... the primary determining factor”.⁸⁰

The Prime Minister stated, however, that the Secretary found that the Minister had a conflict of interest with respect to a grant to a gun club of which she was a member. Due to her failure to manage that conflict of interest, the Minister ‘tendered her resignation’ as a minister.⁸¹

A. Constitutional Validity of the Grants

As the Commonwealth has no express power to make laws with respect to sport or local infrastructure, a question arises as to the constitutional validity of the *Australian Sports Commission Act*, including the functions and powers conferred upon the Commission, such as the making of the grants. This is reflected in section 7(5) of the Act, which provides:

- 7 (5) The Commission may perform its functions to the extent only that they are not in excess of the functions that may be conferred on it by virtue of any of the legislative powers of the Parliament, and, in particular, may perform its functions:
- (a) by way of expenditure of money that is available for the purposes of the Commission in accordance with an appropriation made by the Parliament;
 - (b) for purposes related to the collection of statistics;
 - (c) for purposes related to external affairs; and
 - (d) for purposes in relation to a Territory.⁸²

This provision was enacted in 1989, at a time when the Commonwealth still considered that it had the full power to spend public money appropriated for any purpose that the Parliament considered to be a purpose of the Commonwealth. As discussed above, that position was rejected by the High

80 “Press Conference – Australian Parliament House, ACT” (2 February 2020), online: *Prime Minister of Australia* <www.pm.gov.au/media/press-conference-australian-parliament-house-act-4> [Press Conference].

81 *Ibid.*

82 *Australian Sports Commission Act*, *supra* note 60, s 7(5).

Court in the *Pape Case*⁸³ in 2009. Accordingly, section 7(5)(a)⁸⁴ is ineffective in supporting the Australian Sports Commission's expenditure on grants.

The Commonwealth Parliament's power to make laws for territories in section 122 of the *Constitution*⁸⁵ could be used to support the establishment of the Australian Sports Commission as an institution in the Australian Capital Territory and to make grants to bodies located in the territories. But it would not extend to supporting the Commission making grants to community groups in the States.

The power to make laws with respect to "census and statistics" in section 51(xi) of the *Constitution*⁸⁶ may support research conducted by the Commission into the level of sporting activity across the country and the gathering of statistics upon it but is not sufficient to support grants to sporting clubs to provide infrastructure.

If the grant recipients were trading or financial corporations, the grants might be supported under the corporations power in section 51(xx) of the *Constitution*,⁸⁷ but the grant Guidelines require recipients to be not-for-profit community bodies, most of which would not be trading or financial corporations.⁸⁸ In any case, as there was no legal requirement for the recipients to be trading or financial corporations, the corporations power would be insufficient to support the grants, as the provisions in the *Australian Sports Commission Act* which authorise spending on the grants could not be characterised as laws with respect to trading or financial corporations.⁸⁹ There

83 *Pape*, *supra* note 14 at paras 111, French CJ, 178, 183, Gummow, Crennan & Bell JJ, 320, Hayne & Kiefel JJ, 601–02, Heydon J.

84 *Australian Sports Commission Act*, *supra* note 60.

85 *Constitution*, *supra* note 4, s 122.

86 *Ibid*, s 51(xi).

87 *Ibid*, s 51(xx).

88 *Program Guidelines*, *supra* note 66.

89 *Williams (No 1)*, *supra* note 21 at paras 271–72, Hayne J, 575, Kiefel J; *Williams (No 2)*, *supra* note 40 at paras 50–51, French CJ, Hayne, Kiefel, Bell & Keane JJ.

are also doubts, flowing from *Williams (No 2)* about whether merely making a grant to a trading or financial corporation is sufficient to attract the application of the power.⁹⁰

The nationhood power, which supports activities and enterprises that are “peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation”,⁹¹ might be relied on to support funding of national teams, such as Olympic teams, but not local sporting facility upgrades. The provision of funding for local sporting infrastructure could also not be characterised as a “national emergency”⁹²

The external affairs power in section 51(xxix) of the *Constitution*⁹³ would support a number of the Commission’s functions, such as fostering co-operation in sport between Australia and other countries. It is less useful with respect to grants to local community sporting bodies in Australia. There are, however, two relevant treaties that Australia has ratified. Article 10(g) of the *Convention on the Elimination of all forms of Discrimination Against Women* requires parties to take “all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women... the same opportunities to participate actively in sports and physical education”.⁹⁴

Article 30(5) of the *Convention on the Rights of Persons with Disabilities*⁹⁵ imposes an obligation on parties to encourage and promote the participation of

90 *Ibid.*

91 *AAP Case, supra* note 11 at 397, Mason J.

92 *Williams (No 1), supra* note 21 at paras 146, Gummow & Bell JJ, 196, 240, Hayne J, 499, 503, Crennan J; *CPCF v Minister for Immigration and Border Protection* (2015), 255 CLR 514 (HCA) at para 150, Hayne & Bell JJ.

93 *Constitution, supra* note 4, s 51(xxix).

94 *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, GA Resolution 34 at article 10(g) (entered into force 18 December 1979).

95 *Convention on the Rights of Persons with Disabilities*, 13 December 2006, HRC TS 2515 at article 30(5) (entered into force 3 May 2008).

persons with disabilities in mainstream sporting activities and to ensure they have an opportunity to participate in disability-specific sporting activities. It also requires parties to ensure that persons with disabilities have access to sporting venues.

The external affairs power in section 51(xxix) of the *Constitution*⁹⁶ would, therefore, support the implementation of this treaty obligation with respect to funding for change rooms for women or facilities and access for persons with a disability. However, this is not sufficient to support the whole of the grants program, given that grants were made for many other purposes, such as upgrading playing surfaces or providing lighting. Of the six specific aims of the CSIG Program listed on page 2 of its *Program Guidelines*, only one – “prioritise opportunities for women and girls, multicultural communities and people of all abilities to play sport and be physically active”⁹⁷ – appears to be capable of support by the external affairs power.

Overall, it appears unlikely that the Commonwealth had constitutional power to support the expenditure of money under the *Australian Sports Commission Act* on this particular sports program in its entirety, although it would have had the power to spend on some items that fell within its scope. Section 7(5) of the *Australian Sports Commission Act*⁹⁸ therefore required the Commission to limit its spending to purposes that fell within the Commonwealth’s legislative powers under the *Constitution*. This is consistent with section 15A of the *Acts Interpretation Act 1901*⁹⁹ which instructs the courts to read and construe Acts so that they do not exceed the legislative power of the Commonwealth.¹⁰⁰ On this basis, the provisions in the Act would not be

96 *Constitution*, *supra* note 4, s 51 (xxix).

97 *Program Guidelines*, *supra* note 66 at 2.

98 *Australian Sports Commission Act*, *supra* note 60, s 7(5).

99 (Cth) (Austl), 1901/02, s 15A [*Acts Interpretation Act*].

100 *Ibid* (Section 15A of the *Acts Interpretation Act*, provides that “Every Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of

invalid, but some or all of the spending under the program would be. Both the Commission and the Minister should have been aware that, by law, the power to make grants was limited in this way.

B. Legislative Power to Make the Grants

Accepting that some grants, however, may have been supported by a constitutional head of power, such as those for female changing facilities and those made to organisations within a Territory, did the Minister for Sport have the power to decide who received those grants?

The Australian Sports Commission was created as an independent corporate entity. It is not a government department created under section 64 of the *Constitution*.¹⁰¹ Its existence, functions and powers are determined by legislation. Its relationship with the Minister is also determined by legislation. While a Minister may have a general power to direct public servants in his or her department (subject to any statutory obligations and the requirements of administrative law), a Minister does not have the same power with respect to corporate entities established by statute.

The *Australian Sports Commission Act* is explicit about the extent of the Minister's powers.¹⁰² Section 11 gives the Minister the power to direct the Commission with respect to the "policies and practices to be followed by the Commission in the performance of its functions and the exercise of its powers".¹⁰³ It does not permit the Minister to exercise the Commission's powers. It only permits her to direct the Commission, at the higher level of policies and

that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power").

101 *Constitution*, *supra* note 4, s 64.

102 See e.g. *Australian Sports Commission Act*, *supra* note 60, ss 13(2), 19(1), 23, 26 (for example, the Minister may only request a change to the operational plan, or fail to approve it, if the Minister is of the opinion that it is inconsistent with the corporate plan relating to that period, and such a request is given in writing (s 26(2)(5))).

103 *Ibid*, s 11.

practices, with respect to how the Commission exercises its own functions and powers.¹⁰⁴ Further, any such direction must be in writing, published in the Government Gazette and tabled in Parliament. No such direction was ever made in relation to the CSIG Program.¹⁰⁵ The purpose of this provision is to ensure the exercise of the Minister's power of direction is subject to transparency and accountability. Its existence points to the absence of any general executive power to direct the Commission. There would be no point in requiring that the Minister's directions be gazetted and tabled if the Minister had an unwritten parallel power to direct the Commission that avoided tabling and gazettal.

After the Auditor-General's report on the administration of this scheme became public, the Prime Minister asked the Attorney-General for advice about the legality of the Minister's conduct. The Prime Minister refused to release that advice.¹⁰⁶ He noted in a press conference, however, that the Auditor-General had found that in the absence of the Minister making a direction under section 11 of the *Australian Sports Commission Act*, there was no evident legal authority under which the Minister was able to approve of the program grants.¹⁰⁷ The Prime Minister stated that the Attorney-General considered that the "Auditor-General's assumption arising out of his apparent interpretation of section 11 of the Australian Sports Commission Act is, as he notes with respect, not correct".¹⁰⁸ It remains unclear what the Attorney-General considers to be the correct interpretation of section 11. No Commonwealth officer appearing before the Senate Select Committee that inquired into these grants was able to

¹⁰⁴ *Committee Hansard 3 July 2020*, *supra* note 74 at 20 (the Australian Sports Commission also took the view that section 11 does not allow the Minister to direct the Commission "to make specific grants to specific organisations").

¹⁰⁵ *ANAO Report no 23*, *supra* note 73 at 2.19.

¹⁰⁶ Letter from Christian Porter to Senator Payne (11 February 2020) (note that the Senate ordered the production of the advice on 5 February 2020 (Order No 388), but the Attorney-General refused to produce it on the ground that it was privileged legal advice).

¹⁰⁷ *Press Conference*, *supra* note 80.

¹⁰⁸ *Ibid.*

identify any legal authority for the Minister's actions or any different 'interpretation' of section 11 that would provide such authority. Nor has any submission been made to the Committee, as would ordinarily be the case, from the Attorney-General's Department¹⁰⁹ or any other agency, which has identified the Minister's source of power to approve of the grants or the 'correct' interpretation of section 11.

The *Program Guidelines* described the Minister as the 'Program Delegate'.¹¹⁰ Could the Australian Sports Commission have delegated its powers to the Minister? Section 54 of the *Australian Sports Commission Act* confers on the Commission the power to delegate its powers to a member of the Commission; a committee of the Commission; the Executive Director, the Director or a person employed by the Commission.¹¹¹ There is no power to delegate the Commission's powers to the Minister. Despite this fact, Appendix A in the *Program Guidelines* defines the 'Program Delegate' as the Minister for Sport.¹¹² In answers to questions taken on notice, the Australian Sports Commission stated that it "did not delegate or attempt to delegate any statutory power pursuant to section 54".¹¹³ Instead, it "exercised its own power under section 8

¹⁰⁹ Austl, Commonwealth, Senate Select Committee on Administration of Sports Grants, *Committee Hansard* (2 September 2020) at 26–31 (officers of the Commonwealth Attorney-General's Department gave oral evidence to the Committee but claimed legal privilege as the ground for declining to identify the legal authority held by the Minister to approve the grants).

¹¹⁰ *Program Guidelines*, *supra* note 66.

¹¹¹ *Australian Sports Commission Act*, *supra* note 60, s 54.

¹¹² *Program Guidelines*, *supra* note 66 (note that the Program Guidelines have a status no higher than policy. They do not comprise a statutory instrument and they cannot alter a law).

¹¹³ Austl, Commonwealth, Senate Select Committee on Administration of Sports Grants, *Parliamentary Inquiry Question on Notice* (Sport Australia) (Parliament of Australia: Additional Documents, 13 May 2020) at 12 [*Parliamentary Inquiry 13 May 2020*].

of the Act to make grants and enter into contracts for the purpose of the Community Sport Infrastructure Grant program".¹¹⁴

It might be argued that the Minister was the 'authorised agent' of the Commission under the *Carltona* principle.¹¹⁵ This is a principle that allows a public servant to act as the agent for his or her Minister or Department head, even when there is no formal delegation. It is based in part upon the fact that the Minister remains responsible to Parliament for that action. It is also based upon the argument of practical necessity – i.e. that it is impossible for a Minister or senior official to make personally the large number of decisions required by the powers conferred upon him or her. As a matter of statutory interpretation, it may sometimes be accepted by a court that Parliament intended that a power would not be personally exercised by the Minister on whom it was conferred, because administrative necessity would require the Minister to act through officers responsible to him or her.¹¹⁶

To apply the *Carltona* principle in relation to the Minister exercising the powers of the Australian Sports Commission would be to turn the principle on its head. The Minister is not a subordinate officer who is responsible to the Commission. There is no practical necessity for the Minister to take the administrative load from the Commission. The *Australian Sports Commission Act* already provides for other delegates to do this. The *Australian Sports Commission Act* also makes quite clear the relationship between the Minister and the Commission, and the Commission's degree of independence from the Minister. One could not argue that Parliament, in enacting the *Australian Sports Commission Act*, really intended that the Commission's powers to make grants

¹¹⁴ *Ibid.*

¹¹⁵ *Carltona Ltd v Commissioner of Works* [1943] 2 ALL ER 560 (CA (Eng)) (note that the existence of an express power to delegate does not automatically preclude an implied power to authorise another to exercise the power as an agent; *O'Reilly v State Bank of Victoria Commissioners* (1983), 153 CLR 1 (HCA) at 12–13, Gibbs CJ, 32, Wilson J.

¹¹⁶ *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 (HCA) at 38, Mason J.

should be exercised, by reason of administrative necessity, by the Minister. If Parliament had intended that the Minister should make the grants, it would have said so in the Act.

There appears, therefore, to be no legal basis upon which the Minister could have been made the delegate or agent of the Commission to undertake the approval of the grants under clause 8.1 of the *Program Guidelines*.¹¹⁷ Such an appointment would subvert the relationship established by statute between the Minister and the Commission.

It also appears that the Australian Sports Commission and the Minister's Department were aware that the Minister did not have the power to act as the delegate of the Commission in approving these grants. The Auditor-General noted in evidence before a parliamentary Committee that:

The evidence to us was that Sport Australia expressed a view during the audit they didn't believe that the minister had the authority, that they were the decision-making body as a corporate Commonwealth entity and that the Department of Health raised concerns and said that they should get legal advice.¹¹⁸

That concern was set out in an email from an officer in the Department of Health, dated 28 June 2018, which examined the *Australian Sports Commission Act* and concluded that it did not give the Minister authority to approve expenditure where the amount was less than AUD \$500,000, but that the Minister could give a written direction to the Commission under s 11 of the

¹¹⁷ *Program Guidelines*, *supra* note 66.

¹¹⁸ Austl, Commonwealth, Senate Select Committee on Administration of Sports Grants, *Committee Hansard* (13 February 2020) at 13 (this is consistent with paras 2.16 and 2.17 of the *ANAO Report no 23*, *supra* note 73).

Act.¹¹⁹ It concluded “It may be worth seeking further advice from Legal services if the Minister intends to pursue this option”.¹²⁰

In its submission to the Senate Committee, the Department of Health deflected all responsibility for obtaining legal advice back to the Australian Sports Commission (“Sport Australia”), observing:

While the department collaborated with Sport Australia on the development [of] the program guidelines..., the department did not seek legal advice. It was the responsibility of Sport Australia to satisfy itself in relation to the legality of processes outlined in the guidelines.

The process of administering the Community Sport Infrastructure Grant Program was ultimately a matter for Sport Australia.¹²¹

Mr. Wylie, the Chair of the Australian Sports Commission, when asked about the legal basis for the Minister’s decision-making stated that it was “not for us to comment on the minister’s legal basis for decision-making”.¹²² He added that he was satisfied that Sport Australia acted within the powers and purposes under the *Australia Sports Commission Act*. He observed that the “Department of Health did not raise the issue of the need for legal advice, and so we’re confident that this program and the manner of implementation of this program is consistent with our legal powers and purposes”.¹²³ He also asserted that it was “open to Sport Australia to take account of the minister’s approval in

¹¹⁹ Austl, Commonwealth, Senate Select Committee on Administration of Sports Grants, *Parliamentary Inquiry Question on Notice* (Department of Health) (Parliament of Australia: Additional Documents, 27 August 2020) at 3.

¹²⁰ *Ibid.*

¹²¹ Austl, Commonwealth, Department of Health, *Submission to the Senate Select Committee on Administration of Sports Grants* (Submission No 21) (Canberra: Select Committee on Administration of Sports Grants, 21 February 2020) at paras 12–13.

¹²² Austl, Commonwealth, Senate Select Committee on Administration of Sports Grants, *Committee Hansard* (27 February 2020) at 14 [*Committee Hansard 27 February 2020*].

¹²³ *Ibid.*

relation to a grant program". He drew a distinction between ministerial approval and the actual awarding of the grants, which was done by Sport Australia.¹²⁴

In answers to questions taken on notice, the Australian Sports Commission stated that the Minister for Sport had previously provided approval for grants in the 'Move It AUS' programs. It asserted that the legal basis was the Commission's powers under its own Act to make grants. It added that it had legal advice¹²⁵ that "in exercising its powers, it was open to Sport Australia to take account of the Minister's approval".¹²⁶ Yet the Commission's own records show that it regarded the Minister as the final decision-maker, stating that the Minister had "overturned some of the recommendations that were put forward to her and endorsed others that were not part of the original recommendations".¹²⁷ It put a brief to the Minister to approve an "attached list of 245 round three Community Sport Infrastructure grants recommended by Sport Australia", but this was amended by hand on the brief to approve instead the grants "approved by the Minister".¹²⁸ It was the Minister's list that was given effect — not that recommended by the Commission. The Auditor-General

¹²⁴ *Ibid* at 15.

¹²⁵ Committee Hansard 27 August 2020, *supra* note 72 at 20 (the Commission initially agreed to provide a copy of that advice to the Senate Select Committee, but the Minister for Sport prevented that, raising a claim for public interest immunity with respect to it).

¹²⁶ Parliamentary Inquiry 13 May 2020, *supra* note 113 at 1; Committee Hansard 27 August 2020, *supra* note 72 at 21.

¹²⁷ Austl, Commonwealth, Senate Select Committee on Administration of Sports Grants, *Parliamentary Inquiry Question on Notice* (Answers to Questions taken on Notice during 27 February public hearing, received from Sport Australia) (Parliament of Australia: Additional Documents, 17 March 2020) at 11–14 (Australian Sports Commission, Minutes of Meeting No 107 of the Sport Australia Finance Audit and Risk Committee, 13 December 2018) [*Parliamentary Inquiry 17 March 2020*].

¹²⁸ Austl, Commonwealth, Senate Select Committee on Administration of Sports Grants, *Parliamentary Inquiry Question on Notice* (Answers to Questions taken on Notice during 27 February public hearing, received from Sport Australia) (Parliament of Australia: Additional Documents, 17 July 2020) at 1459 [*Parliamentary Inquiry 17 July 2020*].

observed that if the Australian Sports Commission had been the decision-maker, and the Minister just an adviser to it, then there should have been evidence of its board making the decisions, but there was not.¹²⁹

The Commission did not independently exercise its powers, taking into account the Minister's views. It acted at the dictation of the Minister, despite expressing concern about the effect upon the "integrity of the assessment process" and the risks involved.¹³⁰ Moreover, in its brief to the Minister, the Commission requested a 'delegation' from the Minister to the Commission of the power to make minor changes "to the scope/amount of individual grants approved by you", taking into account the lengthy period between the original application and the award of the grants and possible changes in the status of projects in the meantime.¹³¹ This clearly shows that, in practice, the Commission treated the Minister as the final decision-maker and that it did not merely 'take into account' the Minister's approval in making its own decisions.

The Department of Health regarded the Minister as the 'decision-maker' and noted that the Minister had never entertained the view that she would not be the decision-maker.¹³² Senator McKenzie, in her submission to the inquiry into the administration of the CSIG Program, also regarded herself as the decision-maker, rather than as someone whose 'approval' was merely taken into account. She continued to claim that she had ministerial discretion to approve the grants. She stated that as Sports Minister she "was responsible for the policy settings and the decision-making process for the CSIG program".¹³³ She also claimed that the "provisions for and exercise of Ministerial authority in the case

129 *Committee Hansard 3 July 2020*, *supra* note 74 at 20.

130 *Parliamentary Inquiry 17 March 2020*, *supra* note 127 at 11–14.

131 *Parliamentary Inquiry 17 July 2020*, *supra* note 128 at 1460.

132 *Committee Hansard 27 August 2020*, *supra* note 72 at 4.

133 Austl, Commonwealth, Select Committee on Administration of Sports Grants, *Statement to the Senate Select Committee on Administration of Sports Grants* (Admission of Sports Grants Submission 44) by Senator the Hon. Bridget McKenzie (Canberra, ACT, 2600: 29 April 2020) at 5 [Senator McKenzie Submission no 44].

of the CSIG program was conducted within existing Commonwealth legislated requirements”,¹³⁴ without identifying what those legislated requirements were. She stated that she “made the decision”¹³⁵ to depart from the merit-based recommendations of the Commission that had been made under the criteria set out in the *Program Guidelines*. She considered that it was her ‘prerogative’ and responsibility to exercise ministerial discretion, arguing that under the Westminster system, “Ministers are given the responsibility of making the final decisions in the execution of programs in their portfolios”.¹³⁶

Senator McKenzie did not seem to understand the difference between the public service and an independent statutory corporation upon which specific powers have been conferred, except to the extent that she considered this difference exculpated her from the usual requirements of ministerial accountability for decision-making regarding grants.¹³⁷ Despite stating that she had the power and responsibility for making the grants, she noted a ‘technical question regarding the statutory basis of [her] discretion’ and complained that it had not been raised with her or her Ministerial office. She stated that she “expected the Australian Public Service would resolve such legal issues, if they exist, prior to advising a Minister on how she should proceed with the expenditure of public monies”.¹³⁸ This was no mere ‘technical question’. It was a fundamental question of whether she had the legal authority to decide on the making of the grants, which she did not.

Senator McKenzie’s argument that she had a prerogative power or general ministerial discretion under the Westminster system to make the grants is

¹³⁴ *Ibid* at 14.

¹³⁵ *Ibid* at 20.

¹³⁶ *Ibid* at 42.

¹³⁷ *Ibid* at 14 (Senator McKenzie claimed that the requirements of the *Public Governance, Performance and Accountability Act 2013* and the *Commonwealth Grant Rules and Guidelines 2017* did not apply, because it was a statutory body that was administering the grants; see the discussion below about the application of the Act and the Guidelines).

¹³⁸ *Ibid* at 44.

untenable. All executive power, including the prerogatives and capacities of the Crown in Westminster systems of government, is subject to statute. Statute conferred the power on the Australian Sports Commission – not the Minister or a public service body.

It cannot be contended that despite the existence of sections 11, 54 and all the other provisions of the *Australian Sports Commission Act* which stipulate the Minister's limited powers, she had some kind of general discretion to direct the Commission and to exercise its powers by providing “the final approval” in relation to the allocation of grants by the Commission.¹³⁹ This is for three reasons. First, ministerial power under section 64 of the *Constitution* to administer “such departments of State of the Commonwealth as the Governor-General in Council may establish” does not extend to corporate Commonwealth entities established by statute.¹⁴⁰ Second, as the Commission is a creature of statute, its powers and functions are necessarily determined by statute, and it has no capacity to act outside statute. Third, the statute expressly deals with the power of the Minister to direct the Commission and expressly addresses who may act as a delegate of the Commission. The exercise of executive power is subject to statute, and any exercise of executive power contrary to the limited powers conferred by statute would be invalid.

Accordingly, to the extent that clause 8.1 of the *Program Guidelines* stated that the Minister was the final approver of the grants, it appears to have been invalid as it was inconsistent with the *Australian Sports Commission Act*. As the ANAO asserted, there appears to have been no legal basis for the actions of the Minister and her staff in approving grants under the CSIG program.

This problem did not arise only with respect to this grants program. For example, Senator McKenzie, as Sports Minister, also approved AUD

¹³⁹ *Committee Hansard 3 July 2020, supra* note 74 at 12–13 (note that on 3 July 2020, when a Government MP, Dr Gillespie, did seek to assert that the Minister does have discretion, the Auditor-General replied that he had seen no legal advice to this effect and that it is inconsistent with the legal framework with respect to corporate entities).

¹⁴⁰ *Constitution, supra* note 4, s 64.

\$22,925,568 worth of grants under the ‘Move it AUS – Better Ageing’ grant program and AUD \$18,000,089 under the ‘Move it AUS – Participation’ grant program,¹⁴¹ even though the power to award the grants was held by the Australian Sports Commission, not the Minister.

C. Financial Legislation

Senator McKenzie, in her submission to the Senate Select Committee, stated that her exercise of ministerial discretion to approve the grants was “not governed by the *Public Governance, Performance and Accountability Act 2013*” (“*PGPA Act*”).¹⁴² This does not appear to be correct. As the Department of Finance and the ANAO both recognised, section 71 of the *PGPA Act* applies to ministers approving the expenditure of public money, even when this is being done through a corporate Commonwealth entity, such as the Australian Sports Commission.¹⁴³

Section 71 provides that a “Minister must not approve a proposed expenditure of [money held by a corporate Commonwealth entity] unless the Minister is satisfied, after making reasonable inquiries, that the expenditure would be a proper use of the relevant money”.¹⁴⁴ ‘Proper’ is defined in section 8 of the *PGPA Act* as meaning “efficient, effective, economical and ethical”.¹⁴⁵ The Minister was therefore required by law to satisfy herself, which would require a rational assessment of relevant evidence, whether the allocation of these grants was ‘efficient, effective, economical and ethical’ in circumstances where they

¹⁴¹ *Parliamentary Inquiry 13 May 2020*, *supra* note 113 at 16–21.

¹⁴² (Cth) (Austl), 2013/123 [*PGPA Act*]; *Senator McKenzie Submission No 44*, *supra* note 133 at 14 (Senator McKenzie referred to the ANAO report as authority for this proposition, but misread it. It in fact said that section 71 of the *PGPA Act* applies to Ministers regardless of whether the grant making power was vested in a Commonwealth corporate entity).

¹⁴³ *Committee Hansard 22 July 2020*, *supra* note 62 at 37; *ANAO Report no 23*, *supra* note 73 at 1.7, 4.2.

¹⁴⁴ *PGPA Act*, *supra* note 142, s 71.

¹⁴⁵ *Ibid*, s 8.

overturned independent merit assessments. It does not appear that the Minister did so.

D. Commonwealth Grants Rules and Guidelines 2017

In 2009, the Commonwealth wisely sought to clean-up the grant-making process to make it more transparent and accountable. It set out guidelines and regulations which were later updated and reissued as the *Commonwealth Grants Rules and Guidelines 2017* (“CGRGs”).¹⁴⁶ The CGRGs were made by way of a statutory instrument under section 105C(1) of the *PGPA Act*¹⁴⁷ and therefore have the force of law. The CGRGs comprise two parts – mandatory requirements in Part 1 and guidance on key principles in Part 2. The material discussed below falls within the mandatory part.

The CGRGs do not impose obligations upon corporate Commonwealth entities, such as the Australian Sports Commission.¹⁴⁸ Accordingly, there was no obligation on the Commission to comply with them. However, the Australian Sports Commission has its own Grant Management Framework based upon the CGRGs.¹⁴⁹ In particular, it provided that in “instances where the delegate rejects or changes the funding account from what is being recommended, the reasons should be recorded”.¹⁵⁰ The Minister’s office was reminded by email that if the Minister wished to depart from the recommendations of the Australian Sports Commission, she needed to record her reasons.¹⁵¹ The final brief sent to the Minister for approval also stated that under section 6.1.1 of the Commission’s Grant Management Framework, the Minister must “provide reasons for

¹⁴⁶ (Cth) (Austl), 2017/F2017L01097 [CGRGs].

¹⁴⁷ *PGPA Act*, *supra* note 142, s 105C(1).

¹⁴⁸ *CGRGs*, *supra* note 146 at para 1.2.

¹⁴⁹ ANAO Report no 23, *supra* note 73 at 2.1.

¹⁵⁰ Parliamentary Inquiry 17 March 2020, *supra* note 127 at 1–8.

¹⁵¹ *Ibid* (see emails on 5 and 9 December 2018. Note that the Minister’s office was also advised that if it wished to fund projects that involved significant risks to successful completion, it could fund them separately via a ministerial budget).

rejecting or changing the recommended grant applicants”.¹⁵² The brief was returned with this marked as ‘agreed’, and with changes made to the recommended grants, yet without any reasons provided for making those changes.¹⁵³ The Minister seems to have taken the view that she could instruct an independent statutory entity, or exercise its powers, but was not obliged to comply with that entity’s rules, which substitute for the application of the CGRGs.

In any case, the CGRGs still appear, on their face, to apply to the Minister, even when the grant program is being conducted by a corporate Commonwealth entity. Paragraph 2.9(a) expressly states that the “CGRGs apply to grants administration performed by … Ministers”.¹⁵⁴ Grants are defined in para 2.3 as arrangements for the provision of financial assistance by the Commonwealth or on behalf of the Commonwealth under which “relevant money” is to be paid to a grantee other than the Commonwealth.¹⁵⁵ “Relevant money” includes money standing to the credit of the bank account of a corporate Commonwealth entity, such as the Australian Sports Commission. Accordingly, the CGRGs apply to Ministers administering grants where the money comes from the bank account of the Australian Sports Commission, even though they do not impose obligations on the corporate Commonwealth entity itself.

Paragraph 3.3 requires Ministers to comply with relevant legislative requirements in the *PGPA Act* and with the CGRGs¹⁵⁶. Paragraph 3.11 repeats the *PGPA Act* requirement that Ministers must not approve expenditure unless satisfied, after reasonable inquiries, that the expenditure would be ‘proper’, but adds that the “terms of the approval *must* be recorded in writing as soon as

¹⁵² *Parliamentary Inquiry 17 July 2020*, *supra* note 128 at 1459.

¹⁵³ *Ibid.*

¹⁵⁴ CGRGs, *supra* note 146 at para 2.9.

¹⁵⁵ *Ibid* at para 2.3.

¹⁵⁶ *Ibid* at para 3.3.

practicable after the approval is given".¹⁵⁷ Paragraph 4.10 then states that a Minister must not approve a grant without first receiving written advice from officials on its merits.¹⁵⁸ The Minister must then record, in writing, "the basis for the approval relative to the grant opportunity guidelines and the key principle of achieving value with relevant money".¹⁵⁹

Paragraph 4.12 provides that while Ministers may approve grants that are not recommended by relevant officials, they must report annually to the Finance Minister by 31 March about all instances where they have approved a grant which the officials recommended be rejected.¹⁶⁰ The report must contain a brief statement of reasons for the approval of each grant. No such report was made in relation to the CSIG program.

The ANAO, in its report, relied upon advice from the Department of Finance that the CGRGs would not apply to the Minister when dealing with grants made through a corporate Commonwealth entity, unless it was acting on behalf of a non-corporate Commonwealth entity, such as the Department of Health.¹⁶¹ The Department of Finance, when asked about this by the Senate Select Committee, said that it is up to accountable authorities to seek legal advice on the application of the CGRGs¹⁶² and pointed to the ANAO's conclusion, after much work, that the CGRGs did not apply.¹⁶³

The key legal question is whether the Minister is performing grant administration. If the Minister were merely a delegate of the Australian Sports Commission, operating under its statutory powers, then she would not be exercising any ministerial discretion under sections 61 or 64 of the

¹⁵⁷ *Ibid* at para 3.11.

¹⁵⁸ *Ibid* at para 4.10.

¹⁵⁹ *Ibid*.

¹⁶⁰ *Ibid* at para 4.12.

¹⁶¹ ANAO Report no 23, *supra* note 73 at 4.3.

¹⁶² Committee Hansard 22 July 2020, *supra* note 62 at 33.

¹⁶³ *Ibid* at 40.

*Constitution*¹⁶⁴ and the CGRGs would clearly not apply. If, however, Senator McKenzie was correct in her conclusion that she was exercising her ministerial discretion in administering the grants by being the decision-maker or approver of who received the grants, then the CGRGs would appear to apply.

E. Administrative Law Breaches

If one were to accept that there was constitutional power to make the grant and that the Minister had legal power to act as the approver of the grants, then issues arise concerning the potential breach of administrative law requirements in the decision-making process. In Australia, the High Court has a constitutionally mandated jurisdiction to undertake judicial review of decisions made by Commonwealth Ministers, and an equivalent jurisdiction is conferred by legislation on lower federal courts.

The grounds of judicial review are relatively well settled. Ministers, as decision-makers, must act within the scope of their legal powers, otherwise their decisions will be regarded as *ultra vires*. They must not act for an improper purpose or in an irrational manner. They must take into account relevant considerations and must not take into account irrelevant considerations. They must behave in a manner that is procedurally fair to those affected by the decision. This includes not acting in a biased manner or a way that is perceived as biased.¹⁶⁵

For example, the mere fact that irrelevant material was presented to, or requested by, the decision-maker (such as whether grant applicants were located in marginal or targeted seats) may be sufficient to establish apprehended bias, regardless of the actual decision made. The courts have long recognised the risk of ‘subconscious bias’. They look to whether a fair-minded, lay observer might

¹⁶⁴ *Constitution*, *supra* note 4, ss 61, 64.

¹⁶⁵ See further Mark Aronson, Matthew Groves & Greg Weeks, *Judicial Review of Administrative Action and Government Liability*, 6d (Australia: Lawbook Co, 2017) at 195–730.

reasonably apprehend that the decision-maker might not bring an impartial mind to making the decision.¹⁶⁶ Nettle and Gordon JJ have observed:

One does not need to find that the irrelevant material affected the decision. One needs only to find that the fair-minded lay observer might have reached the conclusion that the irrelevant material might lead to a deviation from the merits.¹⁶⁷

Alternatively, if a person aggrieved by a decision of an administrative character made under a Commonwealth Act challenged it under the *Administrative Decisions (Judicial Review) Act 1977*,¹⁶⁸ then similar issues would arise. The person could contend, for example, “that the person who purported to make the decision did not have jurisdiction to make the decision”, or “that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made” because of the decision-maker “taking an irrelevant consideration into account in the exercise of a power” or exercising the power “for a purpose other than a purpose for which the power is conferred” or exercising “a discretionary power in bad faith” or “at the direction or behest of another person” or in any other way “that constitutes an abuse of the power”.¹⁶⁹

Ministers should be conscious (and advised by public servants and ministerial staff) of these legal constraints on the exercise of discretionary powers conferred upon them, especially when acting under statutes. Contrary to the beliefs expressed by some Ministers, no Minister has an unfettered ministerial

¹⁶⁶ *CNY17 v Minister for Immigration and Border Protection* [2019] HCA 50 at para 56, Nettle & Gordon JJ.

¹⁶⁷ *Ibid* at para 70, Nettle & Gordon JJ.

¹⁶⁸ (Cth) (Austl), 1977/59.

¹⁶⁹ *Ibid*, s 5.

discretion¹⁷⁰ to make decisions according to his or her own personal wishes or political advantage.

F. The Statement of Ministerial Standards

In 1996 the Prime Minister, John Howard, introduced a ministerial code of conduct. It has since been reintroduced in various forms, with the latest version, the “Statement of Ministerial Standards” (“Ministerial Standards”) being released on 30 August 2018, shortly after Prime Minister Morrison took office.¹⁷¹ It provides that Ministers “may be required to resign if the Prime Minister is satisfied that they have breached or failed to comply with these Standards in a substantive and material manner”.¹⁷² It also provides that the “Prime Minister may seek advice from the Secretary of the Department of the Prime Minister and Cabinet on any matters within these Standards, at any time” and that the Secretary may seek professional advice,¹⁷³ such as legal advice, in providing that advice. The Secretary’s advice may be made public by the Prime Minister.¹⁷⁴

As noted above, the Prime Minister referred to the Secretary, Philip Gaetjens, the question of whether Senator McKenzie had breached the Ministerial Standards, but declined to make public the Secretary’s advice,¹⁷⁵ which appears

¹⁷⁰ *Wotton v Queensland* (2012) 246 CLR 1 (HCA) at para 10, French CJ, Gummow, Hayne, Crennan & Bell JJ (the “notion of “unbridled discretion” has no place in the Australian universe of discourse”).

¹⁷¹ Prime Minister Scott Morrison, “Statement of Ministerial Standards” (August 2018), online (pdf): *Prime Minister of Australia* <www.pmc.gov.au/sites/default/files/publications/statement-ministerial-standards-3.pdf> [Ministerial Standards].

¹⁷² *Ibid* at 7.2.

¹⁷³ *Ibid* at 7.4.

¹⁷⁴ *Ibid* at 7.5.

¹⁷⁵ Austl, Commonwealth, Submission to the Select Committee on Administration of Sports Grants, (Submission no 1) by Philip Gaetjens (14 February 2020) (note however, that the Secretary’s submission to the Senate

to have been very limited in scope, not dealing with most of the relevant Standards.

For example, paragraph 1.3 of the Ministerial Standards provides that in carrying out their duties, Ministers must act in “the lawful and disinterested exercise of the statutory and other powers available to their office”.¹⁷⁶ If the Minister acted unlawfully because she had no legal power to approve the grants or she breached administrative law requirements in the decision-making process, then she would also have breached paragraph 1.3 of the Ministerial Standards. Gaetjens, in assessing whether Senator McKenzie breached the Ministerial Standards, declined to assess whether the Senator had failed to act lawfully. He did so because he said he was not a lawyer and could not make such an assessment.¹⁷⁷ However, he conceded that most of the drafting of his report was done by other persons in his Department,¹⁷⁸ which does contain lawyers who are capable of making that assessment.¹⁷⁹ Moreover, the Ministerial Standards expressly permitted him to seek professional advice, and he could have also sought to apply the Attorney-General’s advice.

Paragraph 2.8 of the Ministerial Standards provides that “Ministers will not provide advice or assistance to any enterprise otherwise than in a disinterested manner as may be required in their official capacity as a Minister”.¹⁸⁰ If, as was alleged, the Minister directed funding to assist sporting bodies in particular electorates for party-political advantage, or instructed that certain enterprises should be permitted to make applications after the date for applications had closed, or allowed applicants to alter applications after the applications had

Select Committee appears to reflect the substance of that advice) [*Submission 14 February 2020*].

176 *Ministerial Standards*, *supra* note 171 at para 1.3.

177 *Committee Hansard 22 July 2020*, *supra* note 62 at 16–17, 20–21.

178 *Ibid* at 17–18.

179 The Department has a Legal Services branch in its Government Division which provides legal advice.

180 *Ministerial Standards*, *supra* note 171 at para 2.8.

closed,¹⁸¹ but did not afford the same opportunity to all potential applicants or existing applicants, it is hard to see how this could be regarded as ‘disinterested’ conduct.

Paragraph 3.2 of the Ministerial Standards provides that “Ministers are required to ensure that official decisions made by them as Ministers are unaffected by bias or irrelevant considerations, such as considerations of private advantage or disadvantage”.¹⁸² This requirement is absolute. It does not permit bias or the application of considerations such as private advantage as long as this is not the “primary determining factor”.¹⁸³ If a Minister takes into account any considerations of private advantage or disadvantage when making an official decision, including the advantage or disadvantage to political parties and the advancement to the Minister’s career that would flow from helping her colleagues to be re-elected, this would appear to breach this standard.

Paragraph 5.2 states that “Ministers must not encourage or induce other public officials, including public servants, by their decisions, directions or conduct in office to breach the law”.¹⁸⁴ If the Minister, directly or through her

¹⁸¹ See further *Parliamentary Inquiry 17 March 2020*, *supra* note 127 at 6, 8, 32 (the application process closed on 14 September 2018. The Commission stated publicly that no new applications would be accepted. Nonetheless, the Minister’s Office asked the Commission to assess four amended and five additional applications, by email on 22 March 2019. This was despite the warning by the Australian Sports Commission to the Minister’s Office in an email of 5 March 2019 that to “invite applications on an ad hoc basis outside of the grant program means that all applicants do not enjoy the same opportunity” and in an email dated 22 March 2019 that “it is not appropriate to invite or accept new applications”. The Commission did not recommend the additional or amended projects, but the Minister approved them and they were funded).

¹⁸² *Ministerial Standards*, *supra* note 171 at para 3.2.

¹⁸³ *Submission 14 February 2020*, *supra* note 175 at 27 (note that the Secretary of the Department of the Prime Minister and Cabinet appeared to exonerate the Minister in this regard on the basis that political considerations were not the “primary determining factor in the Minister’s decisions to approve the grants”).

¹⁸⁴ *Ministerial Standards*, *supra* note 171 at para 5.2.

office, pressured or directed the Australian Sports Commission to make guidelines conferring on the Minister the power to be the final approver of all grants contrary to the requirements of the *Australian Sports Commission Act*, then this would appear to be a breach of paragraph 5.2. When asked about this, the Secretary of the Department of the Prime Minister and Cabinet responded that he was not aware of any evidence that pressure had been applied by the Minister with respect to the Guidelines.¹⁸⁵

In contrast, the ANAO's report said that during the development of the *Program Guidelines*, the Department of Health 'reminded' the Commission that "the Minister wanted to approve CSIG funding"¹⁸⁶ and that the Commission also advised the ANAO in March 2019 that "the program guidelines would only be approved on the basis that the Minister was the decision-maker".¹⁸⁷ The Australian Sports Commission confirmed that the original draft guidelines, produced in May 2018, did not include the Minister for Sport as the program delegate.¹⁸⁸ It also confirmed that the Minister's office told the Australian Sports Commission that the program guidelines would only be approved if she was made the approver of the grants.¹⁸⁹

As noted above, Gaetjens found that the Minister had not breached the Ministerial Standards in relation to matters such as fairness in the manner in which the grants were allocated, but that she had failed to declare that she had an actual conflict of interest in awarding funding to an organisation of which she was a member and had not managed the conflict appropriately.¹⁹⁰ This caused Senator McKenzie to resign as a Minister.

¹⁸⁵ *Committee Hansard 22 July 2020*, *supra* note 62 at 19.

¹⁸⁶ *Parliamentary Inquiry 13 May 2020*, *supra* note 113 at 4 (this was confirmed by the Australian Sports Commission which said that it was advised by email on 7 June 2018 that the Minister would like to approve the grants).

¹⁸⁷ *ANAO Report no 23*, *supra* note 73 at 2.16.

¹⁸⁸ *Parliamentary Inquiry 13 May 2020*, *supra* note 113 at 5.

¹⁸⁹ *Committee Hansard 3 July 2020*, *supra* note 74 at 22.

¹⁹⁰ *Submission 14 February 2020*, *supra* note 175 at 27–28.

V. Conclusion

Despite the rulings of the High Court in the *Pape* and *Williams* cases, there appears to be a continuing cavalier attitude within the Commonwealth Government as to the application of the rule of law when it comes to grants that are used to seek to influence public favour in relation to elections. Minimal formal compliance is shown by including programs under job-lot approvals, such as s 32B of the *Financial Framework Act*¹⁹¹ or under ongoing legislative powers by bodies to ‘make grants’, without any substantive parliamentary consideration of whether money ought to be spent on any particular program. In establishing grant programs, little consideration is given to whether the scope of the program fully falls within Commonwealth heads of legislative power, and no genuine consideration is given to whether actual expenditure under a scheme (such as resurfacing a football oval or constructing lighting in a carpark) is supported by a Commonwealth head of legislative power. The focus appears to be on ‘constitutional risk’ – namely, what one can get away with, rather than strict compliance with the *Constitution* and the rule of law.

While the *PGPA Act*¹⁹² very properly requires Ministers to be satisfied that grant money is being spent in an efficient, effective, economical and ethical manner, there is scant evidence that this obligation is taken seriously. There is no effective enforcement of it, other than the political embarrassment that may arise from an adverse report by the Auditor-General. The *CGRGs*¹⁹³ also create an admirable system for the management of grants, but the above case study shows that these rules may be bypassed.

Even when the *CGRGs* should apply, because a grant is being administered by a public service department, as in the case of the “Female Facilities and Water Safety Stream Program”, the requirements for grant application guidelines, selection criteria and merit assessment can all be avoided by describing a grant

191 *Financial Framework Act*, *supra* note 37, s 32B.

192 *PGPA Act*, *supra* note 142.

193 *CGRGs*, *supra* note 146.

scheme as ‘one-off or ad hoc’.¹⁹⁴ In this way, grant schemes can be used to give effect to promises made during election campaigns when there has been no assessment at all of need, value for money, or the capacity of the recipient to build, operate or maintain the facility being funded, and funding is allocated to influence voters.¹⁹⁵ After the election, the public service is only obliged to make guidelines to manage the administration of the grants, on the basis that the selection had already been made by politicians making promises during the campaign.¹⁹⁶ An election apparently absolves anyone of the obligation to administer public money on the basis of need and merit, without bias and self-interest.

When questions of legality are raised by the Auditor-General or in parliamentary committees, the response has been almost invariably one of shifting blame to others for not obtaining the relevant legal advice or obfuscation of the issues. Evidence of government failure is hidden behind reams of heavily redacted documents, privilege is claimed to prevent the production of potentially damning evidence and transparency is negligible.

Ministers seem to be under the impression that they have unfettered discretion to act as they please, including spending public money for party-political gain, whether that be through making grants in the lead up to an election, including in the caretaker period, or making election promises that are then later implemented without regard to the existing rules. The rules of administrative law, such as those concerning bias and what can relevantly be taken into account, are ignored. Ministerial standards are treated with contempt

¹⁹⁴ Committee Hansard 27 August 2020, *supra* note 72 at 7–8.

¹⁹⁵ Jack Snape & Andrew Probyn, “Government’s \$150 Million Female Sports Program Funnelled into Swimming Pools for Marginal Coalition Seats” (7 February 2020), online: *ABC News* <www.abc.net.au/news/2020-02-07/government-cash-splash-swimming-pools/11924850>.

¹⁹⁶ Letter from Senator Richard Colbeck to Senator Scott Ryan, President of the Senate (24 February 2020) in response to an order for the production of documents.

both by those who are meant to obey them and those who are meant to administer them.

This is what the decay of democracy looks and smells like. It is by no means full-blown decay. Australia is still one of the most law-abiding and democratic countries in the world. But when the rule of law is disregarded because it is inconvenient, when governments calculate how they should behave according to what they can get away with, when public servants facilitate such action rather than insisting upon the application of the law, and when power is seen as giving immunity from the application of rules and impunity from the legal consequences, then the rot in the democratic system has begun and will spread unless action is taken to stop it.

Populism and Democratic Decay: Will Canada's Cure be Worse than the Disease?

Ryan Alford*

Many political theorists consider populism the principal threat to liberal democracy in the twenty-first century. They argue that the election of demagogues like Donald Trump prefigure a fascist resurgence, which might only be forestalled by an unprecedented reinforcement of the constitutional order — one which would limit the civil rights of anyone who disavows its premises. This paper challenges the assumptions of those who would limit free speech to create a battle-ready democracy. It argues that the lesson of history from the Weimar Republic which we must learn is this: the narrowing of the window of acceptable political discourse is the impetus of political polarization. In the present, we must distinguish between those who would repudiate the tenets of constitutionalism and those who merely spurn the opportunity to align their values with those of the professional-managerial class. The paper demonstrates that reactionary populism should be considered primarily a challenge to the claims of expertise and virtue that are central to the social reproduction and advancement of this class; the rejection of these values is principally the result of political changes that disenfranchised the working class. Further retrenchment of the speech of those who refuse to adopt PMC values will only serve to broaden the inroads for Canadian populism. Despite the danger of this hastening democratic decay, there is an accelerating drive to transform the Canadian legal and constitutional order into a battle-ready democracy, one which has already manifested within the legal profession. The epistemic closure of the legal academy and professions to arguments against that transformation would turn the failure to learn the lessons of history into a self-fulfilling prophecy: those who cannot remember the past accurately are doomed to repeat it.

* Ryan Alford is an Associate Professor at the Bora Laskin Faculty of Law, Lakehead University, a Bencher of the Law Society of Ontario and an Adjudicator of the Law Society Tribunal; LLD University of South Africa, MSt University of Oxford (Hertford College), JD New York University, MA University of Amsterdam, BA Carleton University and author of *Seven Absolute Rights: Recovering the Historical Foundations of Canada's Rule of Law* and *Permanent State of Emergency: Unchecked Executive Power and the Demise of the Rule of Law* (McGill-Queens' University Press 2020 & 2017).

- I. INTRODUCTION
 - II. FROM THE PAST, THROUGH THE PRESENT, TO THE FUTURE
 - A. Weimar America? The Use and Abuse of Historical Parallels
 - B. Trump: American *Führer*?
 - C. The Dangers of ‘Antifascist’ Hyperbole: Antifa and the SPD
 - III. THE PMC: THE CLASS THAT DARES NOT SPEAK ITS NAME
 - A. The Class Basis of Contested Values Within Woke Neoliberalism
 - B. Trumpian Aesthetics as the Antithesis of the PMC’s *Habitus*
 - IV. PREPARING FOR BATTLE WITH POPULISM: *STREITBARE DEMOKRATIE*
 - A. The Theory and Practice of Fortifying Democracy
 - B. (Post)modern Rationales for Intolerance of Intolerance
 - V. CONSTITUTION READY TO BATTLE POPULISM — & FREE SPEECH
 - A. Coercing Lawyers to Promote Values: Rage at Resistance
 - 1. The Statement of Principles: First Skirmish of Legal Culture Wars
 - 2. The Law Society of Ontario as a Site of Symbolic Counterviolence
 - 3. The PMC’s Wedge in the Legal System: *Doré* and Charter Values
 - 4. Epistemic Closure of the Legal System: A Harbinger of Violence?
 - VI. CONCLUSION
-

“Nor does it matter which symbols the enemies of human freedoms choose: freedom is not less endangered if attacked in the name of anti-Fascism or in that of outright Fascism”.¹

I. Introduction

Democratic decay is a dialectical process; the political forces whose reactions and counter-reactions create threats to the rule of law are always

1 Erich Fromm, *Escape From Freedom* (New York: Holt, Rinehart & Winston, 1961).

in flux. At the time of writing, the currents can be difficult to observe within its roiling turbulence. One risks tempting fate by hazarding any predictions about how future constitutional crises will unfold. In times like these, it is best to begin with a clear assessment of our present circumstances; accordingly, this article will explore the particularities of this contemporary historical moment to demonstrate why it is essential to avoid reliance on misleading historical parallels to past instances of democratic decay.

This will likely be where the divergences between this contribution and others begin. Our analyses will invariably veer further apart as we attempt to chart the future effects of whatever accelerators of decline we take note of, since even a small difference in the initial position in a chaotic system will inevitably lead to pronounced discrepancies in outcomes.

That said, one hopes that this difference of opinion will frame a productive debate about which of the threats to constitutionalism and the rule of law are the most serious. This contribution will assert that it will not be populism that hollows out our democracy. Rather, it is the modification of the constitutional order to protect it from populism — to make it ‘battle-ready’ — which is far more likely to accelerate democratic decay.

As this article will demonstrate, the heterogeneous political currents now labelled populism are primarily reactive. The unrecognized catalyst is a new form of class struggle in the realm of ideology and ideological state apparatuses, waged between the professional-managerial class (the “PMC”, or the “manageriate”) and its rivals. Successful populist challenges to this new class’s hegemony in the political and cultural spheres has led to increasingly open conflict.

The first tactical objective of this war of position is control over the past, namely to seize authority over the lessons of history about the rise of fascism. Its corollary is the second strategic imperative: the particular class interests of the PMC must be re-branded as universal and integral to democracy and constitutionalism. Next, the constitutional order must be armoured to defend against whatever now qualifies as an existential threat, following the logic of what a democratic order and public sphere dominated by the PMC requires.

If democracy must be made ready for battle, the model for its rearmament is the German *streitbare Demokratie*, which allows for the restriction of the fundamental rights of those whose views are deemed antithetical to the constitutional order. The concept of a battle-ready democracy is particularly attractive to those who confuse populism with fascism owing to their ideological bind spots. Political history — as opposed to ideological just-so stories — provide cautionary examples of its abuses.

Canada's constitutional bulwark against the creation of a militant democracy is not as impregnable as one might imagine. While the *Charter*'s² entrenchment of fundamental freedoms would prevent the formal implementation of *streitbare Demokratie*, it is possible to operationalize its tenets in practice within jurisprudence. All this requires is further judicial recognition of the prevention of dignitary harm as a compelling governmental objective and either the weakening of the minimal impairment stage of the *Oakes*³ test or the continued vitality of a *Doré/Loyola*⁴ framework, which is open to the recognition of additional *Charter* values.

The danger of democratic decay that this represents stems from the fact that the concept of dignitary harm can never be neutral, nor will be the assessment of the value of the political speech of those whose freedom of expression will be limited to protect it. While its advocates will typically remain blind to the class-based identification of the types of harms and of the purportedly minimal limitations of rights they justify, those targeted will not accept this with equanimity, at least if history is any guide.

The creation of a battle-ready democracy designed to preclude a populist uprising is the script for a tragedy in the classic sense, as it would be written around a central premise of a self-fulfilling prophecy. As familiarity with the

2 Canadian Charter of Rights and Freedoms, Part 1 of the *Constitution Act, 1982*, being schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].

3 *R v Oakes*, [1986] 1 SCR 103 [Oakes].

4 *Doré v Barreau du Québec*, 2012 SCC 12 [Doré]; *Loyola High School v. Quebec*, 2015 SCC 12 [Loyola].

Weimar Republic instructs us, the repression of speech hollows out the political centre and leads to violence, instability, and ultimately to calls for an authoritarian response. Before the war of position between the PMC and the reactionary opposition that its speech restrictions catalyze becomes a war of manoeuvre, we should consider at length whether the cure for the expression of opinions we deem intolerable is inevitably worse than the disease.

II. From the Past, Through the Present, to the Future

The fourth and final section of this article has the narrowest and most specifically legal focus. It is also the longest by a considerable margin, as it addresses the jurisprudential developments that are required for the creation of a Canadian version of a *streitbare Demokratie* in considerable detail. The three sections that precede it set the stage for that constitutional analysis, by demonstrating that there is considerable impetus in Canada at the time of writing for the creation of a battle-ready democracy of a particular type, and with a specific enemy in mind.

In contrast to the legal analysis that follows, these first sections will draw heavily on history, sociology, and economic theory. Their explication of the contemporary importance of Pierre Bourdieu, Barbara Ehrenreich, and Thomas Piketty's work provide the keys to unlocking the intolerance that is hidden within the PMC's false universality.

The first section deconstructs the terribly *au courant* parallel between the present political crisis in the United States and the final phase of the Weimar Republic. It will also establish the importance of understanding the key role that the tensions between socio-economic classes play in the creation of threats to constitutionalism and the rule of law.

Building upon the parallels drawn in the first section to the earlier crises of the Weimar Republic, the second section will posit the central importance in post-Fordist societies of the role and associated values of a hitherto under-examined class formation: the PMC. It will also discuss its drive to universalize these values as essential to the social position and reproduction of this class,

especially for the members of its most precarious elements: the *lumpenmanageriate*.

These dynamics will explain the appeal of a new form of battle-ready democracy after the populist reversal of 2016. After highlighting the ideological biases inherent to the paradox of intolerance, the third section will outline the dangers of the political exclusion and infringement of the right to free expression of those whose views the hegemonic bloc deems incompatible with the values undergirding the constitutional order. It will also demonstrate that despite these dangers, both the rationale for the battle-ready democracy and the techniques that implement it are being normalized within the institutions that now function as the most important ideological state apparatuses.

The fourth section will, in parallel to its jurisprudential analysis, elucidate how these rationales and techniques for the elimination of dissidence are migrating from the margins to some of the most important centres of power, most notably the legal system. The author's experiences opposing the imposition of a values test by the regulator of Ontario's legal system will be one of the central examples of this drive and its dangerous implications.

The conclusion will recapitulate these arguments in support of its central thesis: if the constitutional order becomes the host for an illiberal, partisan, and unstable form of battle-ready democracy, this parasitism will have consequences. The normalization of repression and centralization of societal power into the state — whether in the past, present, or future — creates a tinderbox.

While we cannot imagine what sparks might set ablaze by a twenty-first century *Reichstagbrand*, it will be clear by the conclusion that a state monopoly for the delineation of respectable opinion is the most direct means of redirecting conflict from the realm of ideas and politics onto the streets. The lesson of history that we must learn is that the transmutation of one class's values into official state values that cannot be criticized is precisely what catalyzes a counter-hegemonic populism — or something worse.

A. Weimar America? The Use and Abuse of Historical Parallels

Concerns about the rise of populism as a threat to constitutionalism and the rule of law are endemic to the twenty-first century. At its outset, the inclusion of Jörg Haider's Freedom Party of Austria in a governing coalition in Austria in 2000 was considered cause for alarm by many political scientists, as was the sudden prominence of Pim Fortuyn in the Netherlands in 2002.⁵ However, these were transient crises: Fortuyn was murdered during the same year of his meteoric rise to fame, and the Freedom Party was defunct by 2005. It appeared that political scientists were as accurate as the economists who correctly predicted ten of the last five recessions. That said, a decade later the warnings of these theorists (like Cas Mudde)⁶ came true. In 2016, the broken clock was right on time, as Donald Trump shocked the world by being elected President of the United States of America. A populist was in the Oval Office. The expression of nationalistic sentiments long thought outdated and *déclassé* would now come from behind the Resolute desk. Those who had prophesied that populism would rise within a G7 state and catalyze a new form of totalitarianism — or outright fascism — were vindicated.

The nature and extent of Trump's faults have been the subject of a number of perceptive scholarly treatments, some of which demonstrate nuanced appreciation of the intellectual history of the reactionary tradition in politics and Trump's place within it. One exemplary appraisal (among many others) is Corey Robin's *The Reactionary Mind: Conservatism from Edmund Burke to Donald Trump*.⁷ Robin's scholarship received widespread dissemination in the publications at the acme of American intellectual life, being excerpted, reviewed,

5 Wilhelm Heitmeyer & James Steakley, "Tolerance as Risk" (2003) 95:1 Monatshefe 14 at 16.

6 Cas Mudde, *Western Democracies and the New Extreme Right Challenge* (New York: Manchester University Press, 2002).

7 Corey Robin, *The Reactionary Mind: Conservatism from Edmund Burke to Donald Trump*, 2d ed (Oxford: Oxford University Press, 2017).

and discussed in the *New York Review of Books*, *The Atlantic*, and *n+1*.⁸ Unfortunately, it was a much less refined analysis of the Trump presidency (and populism worldwide) that would gain traction within the commentariat.⁹

It is this simplistic analysis that would assume a dominant position over the next four years and appears to have influenced Ontario's legal profession. A broad segment of public intellectuals, in the United States and elsewhere, chiefly located within the vanguard of journalism, political theory, and legal academia, fastened upon the idea that the United States of America is in the same position as Weimar Germany, with Donald Trump in the Adolf Hitler role.¹⁰ As of the summer of 2020, arguments to that end are ubiquitous, not merely in the pages of middlebrow publications but also in the newspapers of record and across many people's social media. This analysis, and the associated call to action, has reached more North Americans than any other alarm of incipient fascism.

At present, the hue and cry about Trump comes from a voice of authority. Bill Moyers may be the closest analogue to Walter Cronkite that there is in these times of proliferating and polarized news sources; his moral authority is unparalleled within mainstream American media at this time. In June of 2020, Moyers described how he saw the light and came to reject his earlier belief that Trump did not present a serious threat to the body politic by re-examining accounts of 1932, particularly Peter Fritzche's *Hitler's First Hundred Days*.¹¹

After this Damascene conversion, Moyers rebuked Cass Sunstein's optimistic view: that the checks and balances of the American republic would arrest any slide into authoritarianism. In a sentence printed in bold in the original, Moyers then made the case for *streitbare Demokratie* (battle-ready democracy): “[i]t may in fact be one of the chief weaknesses of democracy that democracy can lead to

⁸ See e.g. Corey Robin, “The Triumph of the Shill”, *n+1* 29 (Fall 2017), online: <www.nplusonemag.com/issue-29/politics/triumph-of-the-shill/>.

⁹ See e.g. Carlos Lozada, *What Were We Thinking: A Brief Intellectual History of the Trump Era* (New York: Simon & Schuster, 2020).

¹⁰ See e.g. Theo Horesh, *The Fascism this Time and the Global Future of Democracy* (New York: Cosmopolis Press, 2020).

¹¹ Peter Fritzche, *Hitler's First Hundred Days* (New York: Basic Books, 2020).

tyranny just as well or perhaps even more than other political systems".¹² The assertion that American democracy is fragile flies in the face of the extensive documentation of the Founding Fathers' efforts to create a republic expressly designed to arrest the Polybian anacyclosis; that was the reason for the checks and balances of the United States Constitution.

There may well be grounds for such a conclusion, but rather than defending his contentious premise, Moyers moves instead to a cascade of analogies between Hitler in 1932 and Trump in 2020, which purportedly demonstrate the truth of the historian Bernard Weisberger's assertion. We are, according to Weisberger, on the verge of an American *Reichstagbrand*: "[a]ll this open talk by Trump of dominance is pretty undisguised fascism. He's inciting chaos to set the stage for the strong man to rescue the nation".¹³ Moyers concludes his article by agreeing with Weisberger's alarmism and adding a justification for an immediate response:

[y]es, Bernie, you are right: the man in the White House has taken all the necessary steps toward achieving the despot's dream of dominance. Can it happen here? It is happening here. Democracy in America has been a series of narrow escapes. We may be running out of luck, and no one is coming to save us. For that, we have only ourselves.¹⁴

It is fortuitous for the appeal of his argument that the ground had been laid for Weisberger and Moyers by countless other public intellectuals, as the parallels that Moyers draws between 1932 Germany and 2016 America are by no means self-evident. A consideration of the years that led up to 1932 uncovers different parallels — and, accordingly, uncovers quite a different threat to democracy from which "we" must "save ... ourselves".

12 Bill Moyers, "We Hold This Truth to Be Self-Evident: It's Happening Before Our Very Eyes" (5 June 2020), online: *Moyers on Democracy* <www.billmoyers.com/story/we-hold-this-truth-to-be-self-evident-its-happening-before-our-very-eyes/>.

13 *Ibid.* quoting the historian Bernard Weisberger.

14 *Ibid.*

B. Trump: American *Führer*?

Before Moyers, Timothy Snyder noted in 2017 that “European history has seen major democratic moments”, yet “[m]any of the democracies founded at these junctures failed, in circumstances that in some important respects resemble our own”.¹⁵ Snyder argues that Germany’s slide into fascism was due in part to the conformity of its people during the early phases of transformation, which he dates to 1932, after the election of the “Black-White-Red” coalition that included the Nazi Party in government and led to the appointment of Adolf Hitler as Chancellor.

It is impossible to ignore the later catastrophic consequences of that election. Within a month, Hitler (with President Hindenburg’s feckless assent) issued the Reichstag Fire Decree that suspended civil liberties and excluded the Communist Party from the opposition. This allowed the passage of the Enabling Act that transformed the Weimar Republic into a dictatorship. The appointment of Hitler to the Chancellorship undoubtedly warranted decisive opposition: it was Hindenburg’s failure to sanction a military coup in 1933 that made the Third Reich inevitable. Accordingly, Snyder argues from history that America is now in great peril, and decisive action is required.

At the time of this writing, many — including a number of law professors — present the current political situation in the United States as having reached a similar juncture to the one Snyder identified. President Trump’s threat to invoke the *Insurrection Act of 1807*¹⁶ to send federal troops into multiple American cities to quell unrest, an action that has not been taken since the military occupations of the South during the Reconstruction era, was characterized as a crisis for American democracy.

15 Timothy Snyder, *On Tyranny: Twenty Lessons from the Twentieth Century* (New York: Random House, 2017) at 10–11.

16 See *An Act Authorizing the Employment of Land and Naval Forces of the United States in Cases of Insurrection*, c 39, 2 Stat. 443 (1807).

Intellectuals' heretofore scrupulous observance of Godwin's Law¹⁷ only served to accentuate its sudden repeal on the eve of the Trump Administration: American lawyer Mike Godwin, the American lawyer after whom the rule of discourse that barred the comparison to Hitler was named, issued a universal licence (via the *Washington Post*) to break that law during Trump's 2016 campaign, specifically to allow the comparison between Hitler and Trump.¹⁸ Among the most ardent of the licensees were a number of law professors, many of whom taught at elite institutions. From Harvard Law School, for instance, Laurence Tribe coyly denied the precision of the analogy, but tweeted that "no prior president even suggests the comparison".¹⁹ Similarly, David Dyzenhaus endorsed Moyers' description of the President of the United States as a "strongman", and chose to lend his considerable prestige to the Trump 2020-Hitler 1932 analogy, building upon it to compare Trump's legal advisers with Carl Schmitt.

Yet a more precise comparison could be drawn between Schmitt and such legal advisers to the President as David Barron and Martin Lederman, Tribe's colleagues at Harvard: they were the authors of a secret memorandum of the Department of Justice's Office of Legal Counsel, which concluded that the President of the United States had the power to authorize the extrajudicial killing

¹⁷ This name for the taboo against *reductio ad Hitleram* is attributed to Michael Goodwin, for whom it is eponymously named "Godwin's law of Hitler Analogies (and Corollaries)". See Mike Godwin, "Godwin's Law" (12 January 1995), online: <www.web.archive.org/web/20120829094739/http://w2.eff.org/Net_culture/Folklore/Humor/godwins.law>.

¹⁸ See Mike Godwin, "Sure, call Trump a Nazi. Just make sure you know what you're talking about", *The Washington Post* (14 December 2015), online: <www.washingtonpost.com/posteverything/wp/2015/12/14/sure-call-trump-a-nazi-just-make-sure-you-know-what-youre-talking-about/>.

¹⁹ Lawrence Tribe (deleted, screenshot on file with author). See also Victor Morton, "Harvard Law professor deletes tweet claiming Trump-Hitler 'physical and behavioral resemblances'", *Washington Times* (14 May 2019), online: <<https://www.washingtontimes.com/news/2019/may/14/laurence-tribe-harvard-law-professor-deletes-donal/>>.

of an American citizen; and they argued in court that no judge had the authority to review that decision.²⁰ That twenty-first century *Nacht und Nebel* directive was issued during the Obama Administration.

It is a central argument of this article that there are troubling consequences, both in America and in Canada, to what law professor Jonathan Turley terms the “superheated rhetoric of professors denouncing the Trump administration as a fascist regime” that is “now routine” among “academics”²¹ and to widespread acceptance of two of these overheated analogies in particular: that Trump is Hitler; that 2020 is 1932; and that without decisive action, we are on a straight path to an American *Reichstagbrand*. In the United States, for instance, a significant number of prominent political figures (including former Secretary of Defense, Director of the Central Intelligence Agency, and White House Chief of Staff Leon Panetta) suggested in June of 2020 that the sitting Secretary of Defense and the uniformed commanders of the United States Armed Forces should refuse to obey an order from the President to deploy the military in American cities.²²

More bluntly, a Congressman (who inserted a controversial premise into his compound question when addressing this issue) asked the Chairman of the Joint

20 See David Dyzenhaus, “Lawyer for the Strongman”, *Aeon* (12 July 2020), online: <www.aeon.co/amp/essays/carl-schmitts-legal-theory-legitimises-the-rule-of-the-strongman>.

21 Jonathan Turley, “Chicago Professor Brian Leiter Removed Controversial Post That Appeared to Call for a Military Coup” (9 June 2020), online (blog): *Jonathan Turley* <www.jonathanTurley.org/2020/06/09/chicago-professor-brian-leiter-removes-controversial-post-that-appeared-to-call-for-a-military-coup/>.

22 See e.g. Tristi Rodriguez, “Former White House Chief Of Staff Says Role of US Military Should Not be Abused by the President”, *KRON 4* (4 June 2020), online: <www.kron4.com/news/former-white-house-chief-of-staff-says-role-of-us-military-should-not-be-abused-by-the-president/>.

Chiefs of Staff: “[d]o you intend to obey illegal orders from the President?”²³ From a constitutionalist point of view, this is troubling. The President’s role as Commander-in-Chief of the armed forces is constitutionally indisputable, as is his statutory authority to send them into American cities. Removing the president from the role would be sedition, according to the plain text of the *Espionage Act of 1917*.²⁴ What is more: it would place the military under its own control, which is the essential precondition for a military coup. Some public intellectuals said the ‘quiet part loud’: one very prominent law professor (with a high profile in both law and philosophy) blogged and tweeted his support for the retired generals who opposed the invocation of the *Insurrection Act*:

[n]ow he [former Chairman of the Joint Chiefs James Mattis] needs to encourage his military colleagues who share his respect for American democracy and the rule of law to do what he should have done in office: Trump should be deposed and jailed, and VP Pence should conclude his term and stand for election, if he chooses, this fall.²⁵

A clearer threat to the rule of law than this can hardly be imagined.

This could only be justified (if indeed one can even accept this sort of pragmatic justification, the logic of which is in itself a threat to constitutionalism)²⁶ by an even more catastrophic threat. Only the threat of an impending fascist dictatorship might qualify; otherwise, this is simply another example of destroying a country in order to save it. At present, the justification would require accepting the premise that the invocation of the *Insurrection Act*

23 Helene Cooper, Eric Schmitt & Thomas Gibbons-Neff, “Milley, America’s Top General, Walks Into a Political Battle” *The New York Times* (5 June 2020), online: <www.nytimes.com/2020/06/05/us/politics/protests-milley-trump.html>.

24 *Espionage Act*, c 30, 40 Stat 217, §3 (1917).

25 Brian Leiter, “Leiter Law Reports”, posted on June 03, 2020 at 5:50 PM in *Authoritarianism and Fascism Alerts* (deleted; screenshot on file with author).

26 See Ryan Alford, “Is an Inviolable Constitution a Suicide Pact? Historical Perspective on Executive Power to Protect the Salus Populi” (2014) 58:2 Saint Louis University Law Journal 355.

would prefigure the suspension of the presidential election, and the crushing of the inevitable rebellions would create a genocidal white nationalist ethnostaate. This, of course, is consistent with the lesson of history — or at least the lesson that is pertinent if indeed the parallel to 1932 holds true: if the coup allegedly being planned by Kurt von Schleicher would have been the only possible final throw of the dice to prevent fascism after the Enabling Act, then it would follow that Mattis' inaction would lead to a Trumpian reprise.²⁷

That said, it is just as easy to construct a historical parallel to a different — slightly earlier — phase of the same trajectory, which would place Trump not in the starring role, but rather in a supporting role analogous to Alfred Hugenberg's. One might well ask who Hugenberg was: the answer is that he was merely one of many right-wing figures who helped to pave the way for the ultimate victory of the Nazi Party, namely the elections of 1932 and, in 1933, the appointment of Hitler as Chancellor, the Reichstag Fire Decree that outlawed the Communist Party of Germany (the “KPD”) and the Enabling Act that established Hitler's dictatorship. The significance of viewing history from this perspective is that, when we look at the role that Hugenberg played, it also becomes apparent that his counterparts on the left were equally culpable.

C. The Dangers of ‘Antifascist’ Hyperbole: Antifa and the SPD

Hugenberg does not necessarily present a much better parallel to Donald Trump than many other figures from 1930–1934. The point is that there are a near-infinite number of comparators that might produce more illumination than the one that is invariably drawn instead. As for Hugenberg, he was a media impresario and freewheeling press baron who drifted rightwards after the First World War, moving away from centrism to craft the platform of his German National People's Party (the “DNVP”). Initially, his party called for the restoration of the former grandeur of the German Empire, the re-installation of the Hohenzollern dynasty, the return of German colonial possessions, and state-

27 See e.g. Nicholas Rankin, *Churchill's Wizards* (New York: Faber & Faber, 2008) at 1–3.

sponsored antisemitism.²⁸ The DNVP attained none of its goals before 1930. It had been locked out of the grand coalitions that had previously defined Weimar governments. It was the collapse of the political centre that gave right-wing politicians greater prominence in the 1930–1933 period, during which many important figures on the right, in incremental stages, warmed to the idea of lining up behind the Nazi Party. Ultimately, Hugenberg supported all of the key decisions that resigned him to political oblivion.²⁹ Accordingly, when one broadens one's historical lens to include the two years that preceded 1932–1933, the central question is no longer why Germans demonstrated what Snyder blithely labels a reflexive deference to authority, but rather why established authority itself collapsed and the key pillars of the Weimar political order fell into the dust.

The answer is that both the right and the left focused their efforts on destroying the centre: the German Communist Party (the “KPD”) focused its efforts on destroying the Social Democratic Party, primarily by means of violence.³⁰ Following the ultra-left turn in the Soviet Union and the Communist International (the “Comintern”), the KPD pilloried the Social Democratic Party (the “SPD”) as social fascists: practitioners of a form of fascism so diabolical that it denied its fascist character. After an SPD-dominated government dissolved the paramilitary wing of the KPD, the Communists founded *Antifaschistische Aktion* in 1932, which was dedicated primarily to destroying the SPD before that year’s general election. These tactics were the mirror opposite of those adopted by the Harzburg Front of far-right parties, who did their part for political polarization by undermining Heinrich Brüning and

28 See e.g. Richard Evans, *The Coming of the Third Reich* (New York: Penguin Press, 2004) at 95.

29 See e.g. John Leopold, *Alfred Hugenberg: The Radical Nationalist Campaign Against the Weimar Republic* (New Haven: Yale University Press, 1977).

30 See e.g. Eric D Weitz, *Creating German Communism, 1890–1990: From Popular Protests to Socialist State* (New Jersey: Princeton University Press, 1997).

his Centre Party.³¹ The KPD's turn to ultra-leftism had disastrous consequences: as Leon Trotsky had predicted, when confronted with a stark choice between the dictatorship of a right-wing leader they despised and the triumph of communists who would seize their wealth, the ruling class would never hesitate to pull the “emergency brake” of revolution: fascism.³² They had waged half a revolution by disdaining the real threat in favour of easier targets; by doing so, they only dug themselves shallow graves. It was only a precipitous strategic reversal in the Comintern in 1935 that allowed the French Communist Party to support the *Front Populaire* under Léon Blum.³³ His victory prevented France from following the German trajectory into right-wing authoritarianism and ultimately fascism.

It would indeed be disastrous to ignore the Hitler-Trump analogy if this is indeed — as so many would have it — the last moment in which a general uprising might prevent the ushering in of a fascist dictatorship via the *Insurrection Act*, an orgy of racist violence, the suspension of elections, and the creation of a dictatorship. Unfortunately, it remains just as likely now as it was in 1931 that the very belief that this is so might catalyze the same ultimate result, by means of the destruction of the political centre, the normalization of political violence, and the concentration of extralegal power in the hands of those who command the loyalty of the military. This is a danger that is not confined within the borders of the United States, as this article will demonstrate.

Merely asking the question of whether Trump will assume the same role as Hitler in 1933 recalls the joke about the drunk looking for his keys under a lamppost, who when asked if he last saw his keys there, says no: he is looking under the lamppost because that's the only place that isn't in the dark. Similarly, when drawing historical comparisons, we frequently choose to make a historical

31 See e.g. Karina Urbach, *Go-Betweens for Hitler* (Oxford: Oxford University Press, 2015) at 1277–78.

32 See e.g. Leon Trotsky, *The Struggle Against Fascism in Germany* (New York: Pathfinder Press, 1971).

33 See e.g. Julian Jackson, *The Popular Front in France: Defending Democracy 1934–38* (Cambridge: Cambridge University Press, 1988).

comparison simply because the subject of that comparison reminds us in some fashion — however trivial — of a prominent figure from history whom we can see from our historical vantage point, and about whom we might have similar feelings. At present, it has become commonplace among the American commentariat to draw the tenuous link between Trump and Hitler on the basis of their shared nationalism, as if the drawing of this analogy were not inevitably predicated on a historically, socially, and class-based appraisal of hackney and jingoistic displays.³⁴

What is worse: if the only nationalistic figure present in Germany during the relevant period who is remembered is Hitler, one will grope towards that comparison just as the drunk lurches towards the streetlight: it is the only place where any historical comparison might be found. This article contends that the Trump-Hitler comparison says as much about those who promote it as it does about anything else. Given its prominence as a contemporary social phenomenon, the question it will present to the intellectual historians of the future is what its currency among certain segments of the American population in 2020 tells us about the composition and dynamics of that society. Those interested in deriving class-based explanations for social phenomena might well be among those who find this question particularly fruitful.

To prefigure that inquiry, this article will now turn to the question of why this historical analogy is intuitively convincing to a broad segment of the American public. The first step towards answering it is determining the common denominator that defines those who are inclined to accept it —and those who reject it out of hand. While acknowledging that other factors are also relevant to such an enquiry, this article identifies socioeconomic class as that common denominator.

34 Consider the comparisons between Donald Trump and Hitler drawn after his attempt to stage a bombastic military parade on Memorial Day, 2019. It is difficult to imagine that anyone drew a comparison between Charles de Gaulle and Hitler simply because they both enjoyed watching their troops marching through Paris.

Class differences are not immediately apparent, however, because of the opacity of class relations in post-Fordist America, at least when compared to interwar Germany. It is a foundational premise of this article that a consideration of the hidden factors that drive class conflict in twenty-first century America should start with a consideration of which socioeconomic class has attained new prominence since the Second World War. Such an approach invites one to emulate the Abbé Sieyès' famous rhetorical questions, and his answers: “[w]hat is the [Professional Managerial Class]? Everything. What has it been hitherto in the political order? Nothing. What does it desire to be? To become something”.³⁵

III. The PMC: The Class That Dares Not Speak its Name

Any adequate description of the destruction of the Weimar Republic and the rise of fascism proceeds from an examination of the class tensions that drove the ideological conflict that hollowed out the political centre and fuelled the escalating paramilitary violence. The first step is simple, as the KPD was the party of a German working class; and the Nazis' core constituencies were the most fragile sectors of the petty-bourgeoisie. Both of these classes had been devastated by the Great Depression, deflationary monetary policy, and austerity. The violence from both far left and right was a function of these classes' struggle for survival in this economic environment, whether misdirected or otherwise.

The willingness of the German lower-middle class to fight to defend an economic system that was crushing them was the subject of considerable intellectual inquiry in the decades following the Second World War. Building upon Trotsky's analysis, C. Wright Mills labelled the lower-middle class as the “rearguarders” of capitalism, who can be mobilized in a crisis against both the working class and another, more shadowy, class formation: the professional-

35 Abbé Sieyès, Political Pamphlet, “What is the Third Estate” (January 1789).

managerial class, against whom they also have significant animus.³⁶ Drawing on his insights into the increasing complexity of class relations, Mills went on to outline the impact of technological and managerial innovation on class conflict in *White Collar* (1951).³⁷ As Mills noted, the petty-bourgeoisie and the precarious manageriate occupy a particularly unstable rung of the socioeconomic ladder owing to their lack of control over their conditions of employment, being neither true professionals nor unionized employees. As Hans Enzenberger notes:

[the professional-managerial class] can be defined only in negative terms, so its self-understanding is also negative . . . this strange self-hatred acts as a cloak of invisibility. With its help the class as a whole has made itself almost invisible. Solidarity and collective are out of the question for it; it will never attain the self-consciousness of a distinct class.³⁸

It is this inability to explain its own nature, combined with the manageriate's insecure hold on their social position, that Barbara Ehrenreich explored to great effect in 1989, in *Fear of Falling*.³⁹

Since the fall of communism, the shift to neoliberal economics has only exacerbated the downward pressures on the PMC, especially in the all-important arena of class reproduction: “[u]nlike other classes, each generation had to earn its status through educational credentialing, qualifying employment,

36 Michael D. Yates & John Foster, “Trump, neo-fascism, and the COVID-19 Pandemic”, *Monthly Review* (11 Apr 2020), online: <www.mronline.org/2020/04/11/trump-neo-fascism-and-the-covid-19-pandemic/>.

37 C. Wright Mills, *White Collar: The American Middle Classes* (Oxford: Oxford University Press, 2002).

38 Hans Magnus Enzensberger, “Notes and Commentary on the Irresistibility of the Petty Bourgeoisie” (1976) 30 *Telos* 161.

39 Barbara Ehrenreich, *Fear of Falling: The Inner Life of the Middle Class* (New York: Harper Perennial, 1990).

and professional achievement".⁴⁰ Unfortunately for the members of this class, the post-Fordist proliferation of automation, scientific management, and the further routinization achieved by stultifying workflow control systems continues unabated.

This has led to widespread de-skilling of the traditional preserves of manageriate employment, particularly publishing, journalism, health care, and large-firm legal work. In 2020, the professional-managerial class remains a large class formation within post-Fordist relations of production, accounting for approximately a third of the workforce. However, its privileged social and economic status is increasingly precarious, due to the existence of a subclass of *lumpen* (following Marx's usage) members. Accordingly, it is increasingly likely to define itself by virtue of its beliefs and social attitudes, which more than ever delineate the boundary between it and the class that it is deathly afraid of falling down the social ladder into — the working class.

The PMC has been repeatedly decimated by recessions and the largely jobless recoveries that follow them.⁴¹ As a result, there is at present an ever-growing reserve army of professional-managerial labour, consisting of freelancers, adjuncts, and temps, which one might call the *lumpenmanageriate*. Without access to some of the key status markers of that class, the importance of its ideology has been magnified. Being able to employ the argot and jargon of their fully employed brethren continues to mark out even the unemployed members of this reserve army of labour as apart from — and purportedly superior to — the working classes.⁴² The PMC, which is increasingly of marginal and tenuous status, now has a radicalized and angry rearguard of its own, defined primarily by a group ideology and the antagonism towards its class

40 Amber A'Lee Frost, "The Characterless Opportunism of the Managerial Class" 2019) 3:4 American Affairs 126.

41 See e.g. Stanley Aronowitz, *Just Around the Corner: The Paradox of the Jobless Recovery* (Philadelphia: Temple University Press, 2005).

42 See e.g. Charles Derber, William A Schwartz & Yale Magrass, *Power in the Highest Degree: Professionals and the Rise of a New Mandarin Order* (Oxford: Oxford University Press, 1990) at 92–93.

enemies, rather than its role in the productive economy or in the struggle for its own reproduction. Insofar as it cannot recognize either its existence as a class or the contingency of its existence within the relations of production, members of this *lumpenmanageriate* are likely to believe that the social attitudes from which the class derive their sense of superiority are not class-based but universally applicable values, which only deplorable people would fail to profess.⁴³ However, before exploring how these class dynamics affect the ideological superstructure of American society in ways that contribute to neoliberals' perception that their democracy is in crisis, the analysis must briefly turn from sociological theory to political science — by way of economics.

A. The Class Basis of Contested Values Within Woke Neoliberalism

In 2020, Thomas Piketty published his second book exploring the dynamics of late modern capitalism. While his first title — *Capital in the Twenty-First Century* — focused on neoliberal acceleration of the concentration of wealth, *Capitalism and Ideology* focuses on the role that ideas play in the maintenance and stabilization of regimes of extreme inequality.⁴⁴ Its provocative thesis is that neoliberalism has transformed the political sphere for its own purposes, principally the marginalization of the demands of the working class.

Until the era roughly co-terminal with the fall of communism, the political spectrum of most developed countries ran the gamut from the parties on the right, who represented the interests of those who possess capital, to those on the left who stood up for those who sell their labour power. Within that order, social democratic, socialist, or labour parties connected to the union movement were powerful political actors. However, in the last decade of the twentieth century, centre-left parties began to cater to the economic concerns of neoliberalism and

43 See e.g. Michael Lind et al, *The New Class War: Saving Democracy from the Managerial Elite* (New York: Portfolio, 2020).

44 Thomas Piketty, *Capitalism and Ideology* (Cambridge, MA: Harvard University Press, 2020).

the social concerns of the PMC; later, their more radical offshoots began to focus on the preoccupations of the *lumpenmanageriate*.

This transformation of the left-wing parties would over time be perceived by their traditional working-class base, increasingly marginalized by the relentless de-industrialization, offshoring, and union-busting endemic to neoliberalism, as abandonment.

In particular, the incorporation of the concerns of the PMC into the core platforms of the left-wing parties (which Piketty labels the “Brahmin Left”) left their former base entirely cold: as they “gradually turned to, and came to reflect the worldview of, the new urbanite, highly mobile, highly skilled ‘progressive’ elites, [they became] geographically, and ideologically detached from the lower-skilled and less-educated peripheral working classes”.⁴⁵ The revamped agendas of the parties of the Brahmin Left offer no meaningful opposition to globalism or income inequality, focusing instead on issues such as environmentalism and combating the social ills that obtained the most attention within college campuses and corporate human resources departments: sexism, racism, homophobia, transphobia, and ableism. In short, they became parties of progressive neoliberalism.

This article does not argue against the premise that sexism, racism, and other forms of discrimination are genuine social ills or deny that their causes are complex and varied. It does argue that there are significant economic causes of inequality located in the structures of capitalism that the Brahmin Left has become, by and large, incapable of identifying or acknowledging; accordingly, they have turned their focus on locating evils within the working class, which, as Ehrenreich noted, the manageriate views with contempt and paternalism.⁴⁶ In the United States, this came into sharp focus when the failures of progressive neoliberalism in one of America’s poorest regions could no longer be denied.

⁴⁵ Thomas Fazi, “Overcoming Capitalism without Overcoming Globalism?” (2020) 4:2 American Affairs 145.

⁴⁶ See Ehrenreich, *supra* note 39.

The desolation of Appalachia is plainly apparent. Opiate and methamphetamine addiction ravage its population; life expectancy has plummeted as unemployment has rocketed. The response of the mouthpieces of the Brahmin Left have not been what one would expect based on its *soi-disant* values of empathy, compassion, and hatred of oppression. Opinion pieces have been published by columnists for the newspapers of record that make the astonishing claim that feeling empathy for the white working class would be immoral;⁴⁷ the obverse of this are the feel-good news stories that wax Panglossian when describing government-subsidized efforts to retrain elderly coal miners as computer programmers. These two narrative strands of the Brahmin Left's media response to the human catastrophe visited on Appalachia tracked Ehrenreich's description of the PMC's ambivalent attitudes to the working class: contempt and paternalism. That these are the only available options is a function of fact that the manageriate became the backbone of the left parties after 1980: as Stuart Hall noted, both those parties and the classes that support them were those who had been tasked with "manag[ing] the capitalist crisis" that had destroyed Keynesian capitalism, and with doing so "on behalf of the capitalists".⁴⁸ After the working class was abandoned by the Brahmin Left, it was inevitable that various strands of populism filled the void. The leaders of these new populist political parties and movements voiced the traditional response to the "contempt and paternalism" directed towards the working class: hostility.⁴⁹

Ironically, the manageriate's reaction to populism misrecognizes the reasons for this new working-class hostility towards the PMC, its values, and its political leadership, characterizing it instead as hostility towards democracy, as evidence of an appetite for totalitarianism, or even as a fascist backlash. The contemporary

47 See e.g. Frank Rich, "No Sympathy for the Hillbilly", *New York Magazine* (20 March 2017), online: <www.nymag.com/intelligencer/2017/03/frank-rich-no-sympathy-for-the-hillbilly.html>.

48 Stuart Hall, "The Great Moving Right Show", *Marxism Today* 23:1 (January 1979) 14 at 18.

49 See Barbara and John Ehrenreich, "The Professional-Managerial Class", *Radical America* 11:2 (March–April 1977) 7.

misdiagnosis of populist reaction as anti-democratic animus is in no small part a function of the professional-managerial class's inability to understand that values are not universal. Rather, its own values are largely a function of an ideology determined by its class position.

In particular, the PMC fails to recognize that the purportedly neutral value of "being educated" conceals yet depends upon the indoctrinating function of neoliberal society's leading Ideological State Apparatus — the educational system — which inculcates judgment about who is worthy and unworthy within society in order to facilitate the maintenance of exploitative relations of production.⁵⁰ Owing to this characteristic inability, the PMC came to believe that the values it adopted in order to ward off a fall into the working class were integral to democracy.

As Roger Scruton noted, xenophilia and progressivism (the values of which would later come to define the PMC in the twenty-first century) have no intrinsic connection to democracy, especially to the republican form that the Framers developed to arrest the cycle of revolutions.⁵¹ Republics were designed to provide a durable vessel to contain clashes between factions with incompatible values, including the conflicts between classes.⁵² There is nothing inherently antithetical to that system within most strands of populism: the limitation of immigration have nothing intrinsically to do with authoritarianism or fascism. However, the fragility of the PMC's status within twenty-first century relations of production was bound to produce an explosive reaction whenever the values that justify its superiority might encounter pressure from below. This is

50 See e.g. Louis Althusser, *On the Reproduction of Capitalism: Ideology and Ideological State Apparatuses* (London: Verso, 2014) at 244–53.

51 See Roger Scruton, "Oikophobia and Xenophilia", in Teresa Walas, *Stereotypes and Nations* (London: International Cultural Centre, 1995).

52 See e.g. Eran Shalev, "Thomas Jefferson's Classical Silence, 1774–1776: Historical Consciousness and Roman History in the Revolutionary South", in Peter S. Onuf & Nicholas P. Cole, *Thomas Jefferson, the Classical World, and Early America* (Charlottesville: University of Virginia Press, 2011).

especially true after the creation of a radicalized element within its ranks. The catalyst came in the form of Donald Trump.

B. Trumpian Aesthetics as the Antithesis of the PMC's *Habitus*

From Trump's entry onto the political stage, criticism of his showmanship and persona was considerably more prominent than detailed critiques of his policies, at least in the national consciousness. On social media, which is the clearest window into the *id* of the commentariat's psyche, it is rare to find links to policy papers containing detailed refutations of his aggressive anti-China trade policy or the decision not to put "boots on the ground" in Syria. Neoliberals today are far more likely to find the *Twitterati* (or, at least, that segment of it that they find congenial and have chosen to follow) enraged by Trump's aesthetic choices.

The visceral appeal and virality within the media outlets of the Brahmin Left of comments about Trump's aesthetic — viz, his hairstyle and spray tan (along with similar critiques of his lowbrow taste for fast food and preference for eating well-done steaks with ketchup, or his inability to fasten his necktie at the correct length)⁵³ is undeniable. Trump is caricatured as a buffoon whose appearance and speech are viscerally revolting. While Richard Nixon's countenance was satirized so as to reveal the evil deep within his soul, Trump's aesthetic is lampooned in a manner that merely highlights what many consider his worst quality: vulgarity. This aesthetic dimension of the manageriate's animus is a function of the importance of the power to define good taste to the maintenance and generational transference of class position. After the publication of Pierre Bourdieu's seminal *Distinction: A Social Critique of the Judgment of Taste*,⁵⁴ it is impossible to dismiss aesthetic judgments as mere subjective criticism: they are essential to social positioning and reproduction. As Bourdieu noted in that

53 See Alyx Gorman, "You Can Understand How Trump Sees the World by Looking at the Way He Wears His Ties" (22 April 2017), online: *Quartz* <www.qz.com/958764/why-donald-trump-tapes-his-ties-together/>.

54 Pierre Bourdieu, *Distinction: A Social Critique of the Judgment of Taste* (Cambridge, MA: Harvard University Press, 1984).

volume, in a post-Fordist society, investment capital becomes of secondary importance to the social reproduction of the members of the middle classes. Its primary replacements are social and cultural capital. One's connection to interpersonal networks is essential to success and to the ability to set the next generation on the path to a favourable outcome. Belonging — and by extension, social exclusion of others — is crucial.

Another of Bourdieu's key insights was that cultural capital is embodied not only in social mores, etiquette, and *savoir-faire*, but crucially within *habitus*: attitudes, schemes of perception, and bases for moral judgment, which are formed both consciously and unconsciously.⁵⁵ Because *habitus* is acquired unconsciously (at least in part), the claims of each class to superiority over the lower orders comes from the unexamined and therefore unshakable belief that these ways of being are innately superior, and that those who lack them are unworthy of upward mobility or of power. While the *haute-bourgeoisie* might have traditionally employed shibboleths such as the use of U and non-U English (and sneered at fish knives and the inability to eat artichokes in the correct manner),⁵⁶ for the PMC, the judgment that a person is simply 'not our kind' turns on different criteria. This is evident from the fact that refined manners and appreciation of high culture are no longer the key product of socialization at universities.

Notably, a set of attitudes that include deference to expertise and cultural broad-mindedness are the signals with which credentialed members of the PMC distinguish themselves from the cretinous lower-middle class booboisie. At the same time, the routinization of the manageriate's occupations means that the academic content of the education they obtained has little relation to the tasks they perform. When work is scarce, members of their personal networks are more likely to be competitors than assets to obtaining employment. Accordingly, the importance of *habitus* increases in direct proportion to the

55 See Pierre Bourdieu, *Outline of a Theory of Action* (Cambridge: Cambridge University Press, 1977).

56 See Nancy Mitford, *Noblesse Oblige* (Oxford: Oxford University Press, 2002).

fragility of one's class position, and is therefore particularly important to for its *lumpen* elements, owing to their precarity.

For the graduate with a humanities degree from a selective liberal arts college working as an intern at a small press, what makes him or her feel deserving of their tenuous footing on the professional ladder has increasingly less to do with what they can do, and more to do with who they are. Virtually anyone can fill out spreadsheets and compose PowerPoint presentations, but it takes a sensitive soul who is constantly mindful of inequality to demonstrate that all-important 'fit' with corporate culture. Accordingly, it is this new *noblesse oblige*, respect for administrative or bureaucratic "expertise", and xenophilia that make one a deserving member of the organizations that hope to make change (and set the tone) in the twenty-first century.⁵⁷

According to Bourdieu's erstwhile student Loïc Wacquant,⁵⁸ a key element of the reproduction of the social hierarchy is the imposition of categories of perception onto lower classes who, owing to that symbolic violence, accept that the social order which oppresses them is just. One may clearly see the symbolic violence of such an imposition of narrative in the legacy media's refrain that the devastation of Appalachia was no tragedy, owing to the retrograde social attitudes of its white working class.⁵⁹ The epidemic of deaths of despair may be seen as the result of the implicit acquiescence of society's judgment of uselessness and irredeemability.⁶⁰ However, the acceptance Wacquant describes is not perfect; the rise of Trump to prominence can be characterized as a symbolic reaction in opposition to the PMC's symbolic violence.

To his base, one of Trump's most attractive characteristics is his shamelessness. He flouts his rejection of all of the cardinal virtues of the

57 See Frost, *supra* note 40.

58 See Loïc Wacquant, *Urban Outcasts: A Comparative Sociology of Advanced Marginality* (Cambridge: Polity Press, 2008).

59 See Rich, *supra* note 47.

60 See generally J D Vance, *Hillbilly Elegy: A Memoir of Family and Culture in Crisis* (New York: Harper, 2016).

manageriate. His nationalism is brash, and his preference for the homely and parochial is unabashed. Crucially, he ignores the claim to authority of managers and bureaucrats, insisting — rhetorically — that allegiance to traditional values is what entitles his supporters to social esteem. To elaborate on Wacquant's model, Trump engages in symbolic counter-violence on behalf of his key constituency: the classes below the PMC.

This is intolerable to the manageriate, as it is a direct threat to their claims to authority, and thus to their social position and reproduction. Hilary Clinton struck back for the Brahmin Left when she placed half of Trump's supporters into the "basket of deplorables".⁶¹ Unfortunately for Clinton, this was soon cited as a classic example of the blunder of saying the quiet part loudly. The spell of that assessment, which was implicitly shared by so many of its targets, was broken when it was articulated, as now it was associated with a particular speaker — and class position. The re-appropriation of the epithet "deplorables" by Trump's base was a clear sign that the PMC's ability to rely on its *habitus* to maintain its class position was now in doubt. Additionally, political positions that were impossible to advocate when the PMC's power as an arbiter of social acceptability was at its height would now emerge into the nation's political discourse.

That the political positions being asserted with new vehemence called for the Trump administration (as well as for local and state governments) to implement policies that directly affected millions of Americans is not in question here. Yet it may also be stated that these positions represented a class conflict: they were the working-class's open expression of the desire to roll back the agenda for a number of issues the manageriate considered the first fruits of their cultural hegemony.⁶² Accordingly, as populist views on a number of positions began to be voiced openly across every Western democracy, the Brahmin Left

61 Hillary Clinton, "Presidential Election Campaign Speech" (9 September 2016).

62 One weather vane issue—among many—was Trump's decision to ban most transgender persons from military service. See US, Presidential Memorandum for the Secretary of Defense and the Secretary of Homeland Security, *Military Service by Transgender Individuals* (FR Doc 2017-18544, 2017).

and the manageriate needed to formulate a strategy to maintain their superiority. This included asserting the notion that the tenets of the populist movements that are inimical to the PMC are inimical to democracy itself.

Thus, while Clinton's "basket of deplorables" speech may have prompted a backlash, it also contained the outline of a counter-offensive: in it, Clinton implied that those who possess racist, sexist and homophobic views are "not America".⁶³ In other words, those espousing "outrageous, offensive [or] inappropriate" attitudes could not be considered members of the American *polis*. Whereas observers like the journalist Rich Lowry argued that the term "deplorable" had been used to label "people who believe reasonable but politically incorrect things (immigration should be restricted, NFL players should stand during the national anthem, All Lives Matter, etc.)",⁶⁴ others would follow Clinton's lead to argue that the expression of these views was equivalent to violence, and certain to pave the way to fascism. Ultimately, it would be this adaptation of *streitbare Demokratie* that would prepare the ground for the Brahmin Left's counterattack on the new populism, fought on behalf of its new constituents.

As befits the PMC, this strategy was developed in a semi-conscious manner, and it would not be known by its historical name — or indeed by any designation to date. Not surprisingly, it was also developed outside of the formal channels of politics, within the institutions now dominated by the manageriate — including the legal profession. Within these enclaves, it would quickly demonstrate its utility as a means of silencing the expression of views that purportedly threatened democracy, but which in reality focused on preserving the hegemony of the particular class-based attitudes that protect the manageriate's status and facilitate its social reproduction.

63 Clinton, *supra* note 61.

64 Rich Lowry, "The Garbage Case for Roy Moore", *Politico* (7 December 2017), online: <www.politico.com/magazine/story/2017/12/06/lowry-roy-moore-garbage-216051>.

IV. Preparing for Battle with Populism: *Streitbare Demokratie*

It became clear by 2020 that Trump's populism had generated an unprecedented response. In keeping with the manageriate's inability to recognize itself as a class with particular interests, denigration of their values was mischaracterized and relocated into a challenge to the constitutional order; it is this response that characterizes a far more fundamental threat to the rule of law than that presented by populism, as it portends the transformation of the rule of law into a post-liberal shell.

The notion that the rule of law must be battle-hardened in order to be able to protect itself has historically been associated with the political right. The typical right-wing tropes used to justify this position include the assertion that the constitution is not a suicide pact, or that respecting the rights of those who would destroy it would only preserve one law, while all the laws but one would be made meaningless.⁶⁵ These arguments are usually advanced by the right to justify states of emergency, although these are increasingly likely to be so indeterminate in length as to be effectively permanent.⁶⁶ Yet as the next section *infra* will demonstrate, in the twenty-first century, these arguments' left-wing analogues are now most often deployed to rationalize speech restrictions, which are similarly open-ended. Before describing this practice, however, this section must lay out the theory that justifies it, and which explains the attraction and utility of that theoretical framework. As this section will demonstrate, the concept of the battle-ready democracy has a pedigree that makes it appear to be a theoretically defensible and politically appropriate means of preventing a slide into fascism.

Owing to its origins in post-war Germany and its adoption by the European Court of Human Rights, the concept of *streitbare Demokratie* is increasingly cited with approval as a basis for the restriction of rights wherever populism has

65 Alford, *supra* note 26.

66 See Ryan Alford, *Permanent State of Emergency* (Kingston: McGill-Queen's University Press, 2017).

resurfaced, even in nations that never experienced fascism or a serious threat of democratic decay into totalitarianism. Tragically, the growth and mutation of this concept may prove to be a far greater threat to the rule of law than what it suppresses. Should it narrow the Overton window of political discourse such that this precludes opinions that had been freely expressible until recently, the collapse of the political centre that this precipitates could provide the catalyst for the very forms of totalitarianism that it purports to prevent.

A. The Theory and Practice of Fortifying Democracy

The broad intuitive appeal of “a democracy capable of defending itself” is well-demonstrated by the inclusion of its rationale in the works of a thinker best known for his advocacy for an open society, defined by permissiveness. Karl Popper’s description of the “paradox of tolerance” provided an exception for the intolerance of “intolerant philosophies”: “we should claim the *right* to suppress them if necessary even by force”.⁶⁷ The concept of the battle-ready democracy was first elaborated by Karl Loewenstein in 1937, a mere four years after the Enabling Act was used —legally— to transform Weimar democracy into fascist dictatorship.⁶⁸ His argument, which the jurist wrote during his exile in the United States, established a rationale for legal restrictions on the freedom of expression: fascist speech was not designed to convince. Rather, Loewenstein argued, it was merely a technique to arouse emotions, particularly hatred. After the War, the creation of the Federal Republic of Germany allowed for the integration of the principles of the battle-ready democracy into the nation’s constitutional order. Kevin Williamson outlined the concept:

[S]treitbare Demokratie is today an important German constitutional principle, an idea deeply embedded into the architecture of German government and law.

It provides the theoretical basis for . . . criminalizing the communication of certain kinds of political thought . . . and treating as criminal offences that

67 Karl Popper, *The Open Society and its Enemies: The Spell of Plato* (New Jersey: Princeton University Press, 1971), 235 and n 6.

68 See Karl Loewenstein, “Militant Democracy and Fundamental Rights”, (1937) 31:3 American Political Science Review 417.

[which] would . . . in most parts of the free world, be considered ordinary and unremarkable parts of politics.⁶⁹

These principles are embodied in several sections of the German constitution that grant special powers to the Constitutional Court and the Federal Office for the Protection of the Constitution to authorize and engage in a range of repressive techniques and restrictions of civil liberties, which are predicated on a determination that the targets are engaged in a struggle against the constitutional order, which explicitly bars a transition to totalitarianism, even one achieved by legal means.⁷⁰ It is obvious how the experience of the Enabling Act and the rise of fascism motivates and explains such restrictions, but it soon became obvious that these measures were open to abuse — at the very least, to concept creep.

While these provisions were first used to disband parties composed of unrepentant Nazis, the Act was soon also invoked to ban the Communist Party of Germany (“KPD”). This was controversial, not least because certain officers of the Federal Office for the Protection of the Constitution involved in investigations had served in the Gestapo during the Third Reich.⁷¹ Even if the decision to ban the Communist Party had not been facilitated by personnel who considered them an inveterate ideological enemy, it is unclear whether anyone in the Bonn Republic could ever view communist political activity objectively, as it owed its existence to the Cold War. The KPD disputed the premises of the Office for the Protection of the Constitution. It argued that the party had distinguished itself during the war against fascism: it had continued its underground struggle against the Third Reich throughout the war, which cost approximately 150,000 German communists their lives. Despite this, vague references to “Marxist-Leninist party struggles” and “the dictatorship of the proletariat” in the party’s platform and literature were used to justify the

⁶⁹ Kevin Williamson, *The Smallest Minority* (Washington: Regnery Gateway, 2019) at 63.

⁷⁰ See Basic Law for the Federal Republic of Germany, Article 79.

⁷¹ See e.g. Jefferson Adams, *Historical Dictionary of German Intelligence* (Toronto: Scarecrow Press, 2009) at xxxii.

conclusion that communism was an ideology incompatible with the fundamental liberal order of the Federal Republic, and therefore undeserving of constitutional protection.⁷² The decision to suppress the KPD (taken shortly after the Soviet invasion of Hungary) was more a function of Cold War *realpolitik* than a reasoned conclusion about the likelihood of the communists' return to violent methods: across Europe, communist parties were an uncontroversial part of the electoral landscape, which in 1968 (and beyond) had served as a damper on extra-legal political violence. However, the political reality is immaterial to the conceptual framework of the battle-ready democracy. What matters is whether the words and legal actions of a party are deemed to be in service of violent ends or deemed to do violence to democracy itself. Thus, hypothetical violence is used as a justification for actual use of suppression and state violence.

Despite the dangers of this doctrine, the suppression of the KPD set a precedent. The European Court of Human Rights (the ECHR) dismissed the party's application, relying on logic similar to that of the Federal Constitutional Court to conclude that because the party — in theory — would have restricted people's rights had it succeeded, this justified the suppression of the fundamental rights of KPD members — in practice.⁷³ This implicitly discounted the possibility that the ideology of the KPD was interpreted by its members in a different manner, or that it might change of its own accord in the future, as was the case for other Western European communist parties during the Eurocommunist revision of the 1970s and 1980s. (It should be noted that Giorgio Napolitano, a leading communist modernizer, served as Italy's president for a decade without taking any action to install himself as a proletarian dictator.) The decision to restrict the KPD's speech may have had a paradoxical effect in the decades that followed: after the events of May 1968, the protests in France

72 See BVerfGE [Federal Constitutional Court], 17 August 1956, *KPD-Verbot*, 5, 85, 1414.

73 See *Kommunistische Partei Deutschland v Federal Republic of Germany, Admissibility, App No 250/57, (1955–57) I YB Eur Conv HR 222, 20th July 1957, European Commission on Human Rights (historical)* [ECHR].

led to concrete political changes and significant concessions to workers (*e.g.* the Grenelle Accords), in part because the student revolt was subsumed into protests led by trade unions connected to the French Communist Party. Conversely, the German student movement had no analogous and mature ideological ally; instead, numerous students joined radical left-wing splinter groups, some of which engaged in considerable violence, terrorism and, by 1977, assassinations.

The ECHR's decision to uphold a ban on a political party reverberated across Europe, and across the decades of the twentieth century into the twenty-first. At its outset, the ECHR, relying on the *ratio* of its judgment in *Communist Party of Germany v Federal Republic of Germany*, failed to intervene after Turkey banned numerous parties that allegedly challenged the *laïcité* of the Kemalist constitutional order. (It is worth noting that the same rationale was invoked earlier by the leaders of numerous military coups against various Turkish governments.)

In 2003, the very same year that the ECHR upheld the ban on the Turkish Welfare Party, one of that party's leaders — Recep Erdoan — won a general election under a different party banner. However, the earlier failure to incorporate moderate Islamism into the Turkish constitutional order had already produced considerable political polarization. This increased the chance of a lapse into totalitarianism considerably — a probability that redoubled after a failed coup d'état in 2016, which led to widespread political purges.

Despite these cautionary examples, the appeal of the battle-ready democracy as a response to the perception of a paradox of tolerance continues to appeal to many political observers around the world. But it has not appealed to all, even as it was articulated during the time of greatest peril. Writing contemporaneously with Loewenstein, Erich Fromm argued that political extremism had created a crisis of democracy that confronted every modern state. As noted in this article's epigraph, Fromm rejected *streitbare Demokratie*: “[n]or does it matter which symbols the enemies of human freedoms choose: freedom is not less endangered if attacked in the name of anti-Fascism or in that of

outright Fascism".⁷⁴ In Europe, the mobilization of battle-ready democracy against communism and Islamism produced decidedly mixed results. In certain cases it appears that rather than protecting democracy, it created the same dynamics as seen in Germany from 1930–1932, and made the constitutional order considerably more vulnerable to coups and totalitarianism. Owing to this, it is impossible to rule out any negative effects on the rule of law of a heavy-handed application of its techniques to twenty-first century populism. It may be the case that Fromm, and not Loewenstein, will be proven prescient when selective intolerance is deployed by the state — especially if this is done in defence of a noticeably partisan conception of tolerance.

B. (Post)modern Rationales for Intolerance of Intolerance

The greatest danger of a broad definition of the intolerance that should not be tolerated is that this breadth can disguise the partiality of the definition, or can be camouflage for its selective application for partisan ends.⁷⁵ Fortunately, the clear constitutional limits on the restriction of political speech in the United States (and, increasingly, the Westminster democracies) tied the dominant classes and factions to the mast long before the siren song of the battle-ready democracy was first sung. Even so, it is clear that twenty-first century populism has led to some straining against the ropes.

To date, the highest degree of friction has not generated calls to mobilize the state to employ coercive methods to restrict civil rights — that is to say, there have been very few calls for the implementation of legal and constitutional changes that would formally instantiate the basis of a battle-ready democracy (although the first harbingers of this will be described in the next section, *infra*). Instead, what has proliferated to date is pressure on private actors, beginning

74 Fromm, *supra* note 1 at 5.

75 See Williamson, *supra* note 69.

with social media and tech companies, but increasingly corporations in general — to accept the rationale of *streitbare Demokratie* as a basis for “cancellation”.⁷⁶

Owing to the close proximity between the PMC, social media, and the tech sector, this dynamic has accelerated, and it has become evident that the definition of intolerant speech that is too dangerous to tolerate is both manifestly overbroad and partisan. Furthermore, it is also becoming clear that this is more likely to drive the development and radicalization of populism than it is to curb it effectively, even as its advocates approach the threshold of governmental action.⁷⁷ By 2020, it became evident that the manageriate has turned to “cancel culture” and de-platforming to punish what it cannot tolerate.⁷⁸ The acrimonious dispute that arose when J.K. Rowling expressed her views on certain controversial topics associated with transgender rights (including the implications of the recognition of a legal right to self-identify one’s sex) may stand as an example.

The comments by the world’s best-selling author — long considered a progressive icon — ignited a firestorm. Despite the empathy, tolerance, and reasoned approach to the topic that Rowling espoused, a number of comments instantly labelled her words violence. This conclusion depended on the rationale that any questioning or challenging of the perspective of transgender activists empowers those who seek to take away their rights, and therefore promotes and validates violence against vulnerable transgender people, even — according to some — to the point of precipitating suicides.⁷⁹ Within *l'affaire Rowling*, one can observe the roiling confluence of two developments: the hyperbolic

76 See e.g. Marjorie Heins, “The Brave New World of Social Media Censorship” (2014) 127 Harvard Law Review Forum 325.

77 See e.g. Nadine Strossen, *Hate: Why We Should Resist it with Free Speech, Not Censorship* (Oxford: Oxford University Press, 2018).

78 See generally Michael Bérubé, “The Way We Review Now” (2018) 133:1 Proceedings of the Modern Language Association 132.

79 See Vic Parsons, “Teen News Site Apologizes to JK Rowling for ‘Suggesting She’s Transphobic’ and Urging Readers to Boycott Her Work”, *PinkNews* (23 July 2020), online: <www.pinknews.co.uk/2020/07/23/jk-rowling-the-day-apology-transphobia-free-speech-harry-potter-anti-trans/>.

conceptual inflation of the paradox of tolerance and the collapse of the distinction between symbolic violence and actual injury.

First, the ‘intolerant’ are increasingly defined not by the stated aims of the speaker, or even what can be reasonably imputed to them by virtue of their past speech and conduct. Rather than disputing the speaker’s position, their critics castigate them for failing to accept certain premises uncritically. With such critics as these, disagreement is mislabelled as intolerance; a wish to present one’s position is equated with the obliteration or erasure of one’s aggrieved interlocutor.⁸⁰ The second element of this dynamic is a product of a major component of the *habitus* of the *lumpenmanageriate*, named “safetyism” by Greg Lukianoff and Jonathan Haidt.⁸¹ Social psychologists like Haidt identified the elevation of emotional safety to the status of the highest virtue as the unintended consequence of equating threats to self-esteem with actual violence.

The two components of the argument for not tolerating intolerance dovetail perfectly into a seamless rationale for the suppression of Rowling’s speech: neither her stated aims nor her reasonable prose have any bearing on the fact that she can be labelled as ‘objectively’ pro-hate (in the same sense that the SPD was ‘objectively pro-fascist’ *per* the KPD, following the ultra-left turn) and her words can be unequivocally considered to constitute violence. One might well argue that a spat on social media cannot be considered a harbinger of the incorporation of the principles of the battle-ready democracy and its rationale for restrictions on political speech into the constitutional order. However, such arguments are not limited to Facebook and Twitter.

As the next section will detail, there is an intensifying clamour for something to be done about intolerable speech within the legal profession in Canada. Politicians and regulators are now confronted with powerful incentives, both

⁸⁰ See Ross Douthat, “10 Theses About Cancel Culture”, *New York Times* (14 July 2020), online: <www.startribune.com/10-theses-about-cancel-culture/571761652/>.

⁸¹ Greg Lukianoff & Jonathan Haidt, *The Coddling of the American Mind: How Good Intentions and Bad Ideas are Setting Up a Generation for Failure* (New York: Penguin Press, 2018).

negative and positive, to use state power to placate calls from the PMC, which is now the key political constituency of the Brahmin Left.

The essential barrier to the transition from “cancel culture” to the mobilization of official state censorship against those who oppose the PMC’s symbolic counter-violence in support of its cultural hegemony is the constitutional protection of the right to free speech. As the next section will demonstrate, this bulwark is not as impregnable as it might seem. Recent events in Canada demonstrate that it is possible to weaken these protections before challenging them directly, principally by smuggling a hyperbolic iteration of the concept of ‘harm’ into the jurisprudence addressing the reasonable limitation of rights. This is being done in tandem with the insertion of a right not to be offended into the constitution itself, principally by means of the manipulation of the doctrine of *Charter* values, particularly in the case law supporting the position that administrative agencies have a mandate to protect vulnerable groups from what is now considered dignitary harm.

V. Constitution Ready to Battle Populism — & Free Speech

In twenty-first century North America, one of the most salient ideological divides is between those who accept the epistemology created by the PMC’s *habitus* and those who do not: that is what divides the saved from the damned. The latter includes reactionaries, traditionalists, and sections of the working classes, whose political views will be subsumed through marginalization into a heterogeneous populism, which risks being labelled as a modern form of ‘social fascism’ by its enemies.

The primary element imported from the *lumpenmanageriate’s* worldview into (newly intersectional) neoliberalism is the promotion and celebration of diversity, which is so important that it is necessary to be on the right side of history, as it is defined teleologically by the devotees of political messianism.⁸²

82 See generally J L Talmon, *The Origins of Totalitarian Democracy*, vol 1 (London: Secker & Warburg, 1952).

Conversely, the wrong side of history is populated by those deemed insufficiently enthusiastic about addressing social wrongs.

This category will include those who merely insist on fighting for their economic interests rather than focusing on addressing gender, racial, or sexuality-defined deficits within the classes that rule them. That is why, as this paper argues, the definition of populism has become so catholic as to be effectively meaningless, except as the catch-all term for the hated enemies of woke neoliberalism. Any political label that covers all reactionaries — from the *Gilets Jaunes* on the left to the *Aliança pelo Brasil* on the right — is necessarily incoherent, and requires the help of a false dichotomy. This serves only to reinforce a worldview that progress is both inevitable and benevolent, and holds that anyone who opposes the process of ‘creative’ destruction in both the economic and cultural spheres is wrong at best and evil at worst.

One implication of this ideological divide is that the radicalized Brahmin Left has become, as a general rule, phlegmatic about the massive economic dislocations effected by unfettered neoliberal policies. De-industrialization and the dislocation of whole sectors of the economy (whether due to offshoring, technological ‘disruption’, or the fourth industrial revolution) is viewed as the price of progress. Accordingly, the left is now all too often content to be the handmaid of capitalism, as long as it performs wokeness; modern oligarchs such as Jeff Bezos return the favour by engaging in corporate genuflection (most notably by signalling support for the Black Lives Matter movement).

Blue collar workers and small business owners will remain political vagrants until populist movements rehouse them. As in most countries, their new houses are still under construction (while the decrepit centre-right collapses). For this reason it is unlikely that the most extreme techniques of *streitbare Demokratie* will be deployed in the near future: these parties must be founded before they can be banned for their purported hostility to the constitutional order.

However, the rationale for the integration of the battle-ready democracy into the Canadian constitutional order is being formulated, as diverse groups of reactionaries and traditionalists are now being defined alike as anti-social elements. This process requires weakening the constitutional limitations on the

restriction of political speech found in Section 2(b) of the *Charter*. Motivated by a desire to suppress what they consider dangerous symbolic violence from the *deplorables*, *lumpenmanageriate* activists in the legal profession are preparing the battle-ready democracy needed for a confrontation with populism.

If they succeed, the Constitution of Canada will be transformed from a shield into a sword — and a key resource for restricting political speech instead of its defender. Canada is already poised to become what the political scientist Eric Kaufmann has noted would be the first post-national state;⁸³ it remains to be seen if it will need to become a battle-ready democracy and crush populism en route to that goal, and whether its rule of law will survive the journey.

A. Coercing Lawyers to Promote Values: Rage at Resistance

In 2009, the Law Society of England and Wales adopted a Diversity and Inclusion Charter, which serves as a vision statement for the Society that expresses its commitment to promote greater diversity and inclusion of under-represented groups. The Society encouraged law firms to post a personalized statement addressing the issues the Charter addressed on their own websites, which would serve as a personal adoption and endorsement of its goals and a commitment to addressing these issues.⁸⁴ As of 2020, participation remains voluntary.

Inspired in part by these and similar measures, a Report of the Law Society of Upper Canada's Equity and Indigenous Affairs Committee presented to its Board ("Convocation") in 2016 a recommendation that thirteen measures be

⁸³ Eric Kaufmann, *Whiteshift: Populism, Immigration and the Future of White Majorities* (New York: Abrams Press, 2019) at 275–89.

⁸⁴ "Diversity and Inclusion Charter", online: *Law Society of England and Wales* <www.lawsociety.org.uk/campaigns/diversity-and-inclusion-charter/>.

adopted to address issues related to systemic discrimination.⁸⁵ The only measure that proved controversial was the requirement, very similar to that of the Law Society of England and Wales, about a statement of principles. The critical difference was that in Ontario, this would be mandatory.

1. The Statement of Principles: First Skirmish of Legal Culture Wars

In 2017, Ontario's legal professionals were informed by email of a new obligation: "[y]ou will need to create and abide by an individual Statement of Principles that acknowledges your obligation to promote equality, diversity and inclusion generally, and in your behaviour towards colleagues, employees, clients and the public".⁸⁶ Those who refused to do so were threatened with progressively more serious disciplinary action, although this was waived for the first year of noncompliance, just as serious concerns were raised about the constitutionality of this requirement.

These constitutional infirmities were plainly evident, at least to some; the only case in which the Supreme Court of Canada addressed government-compelled speech (albeit in *obiter*) was damning. In his *National Bank of Canada* concurring opinion, Justice Beetz wrote that compelled speech:

... is totalitarian and as such alien to the tradition of free nations like Canada
 ... [where] the *Canadian Charter of Rights and Freedoms* ... guarantees freedom
 of thought, belief, opinion, and expression. These freedoms guarantee to every

⁸⁵ Equity and Aboriginal Issues Committee, "Report to Convocation" (22 September 2016) at 11, online (pdf): *The Law Society of Upper Canada* <www.lawsocietyontario.azureedge.net/media/lso/media/legacy/pdf/c/convocation-dec-2016-equity-and-aboriginal-issues-committee.pdf>.

⁸⁶ Arthur Cockfield, "Why I'm Ignoring the Law Society's Orwellian Dictate", *The Globe and Mail* (17 October 2017), online: <www.theglobeandmail.com/opinion/why-im-ignoring-the-law-societys-orwellian-dictate/article36599997/>.

person the right to express the opinions he may have: *a fortiori* they must prohibit compelling anyone to utter opinions that are not his own.⁸⁷

This was only one of the numerous vexing constitutional issues the Statement of Principles presented. It was (and remains) unclear what the duty to “promote” particular values had required, or what it would mean to promote them “generally” in addition to doing so in one’s professional dealings. The lawyers retained by the Law Society to address the constitutionality question noted that the vagueness “gave us pause” and “recommend[ed] that the Law Society clear up this ambiguity”.⁸⁸ It did not. Instead, it communicated to lawyers that the failure to affirm that they would promote these values in general would be grounds for professional discipline.⁸⁹

The opinion letter which concluded that the Statement of Principles was constitutional had conceded that it implicated freedom of conscience, freedom of thought, belief, opinion, expression, freedom of association, the right to liberty and the right to equality.⁹⁰ Despite this, and regardless of the “difficulties” the opinion letter identified with the vagueness of the requirement to promote the Law Society’s chosen values “generally”, it concluded, in its final paragraph, with the truism that “perfection can be the enemy of the good”.⁹¹ In other words, the regulator of the legal profession should not let fundamental rights get in the way of pursuing what is most good, namely the elimination of systemic

⁸⁷ *National Bank of Canada v. Retail Clerks International Union*, [1984] 1 SCR 269 at 296, Beetz J concurring [*National Bank*].

⁸⁸ Andrew Pinto, “RE: Opinion on Working Group’s Recommendations re Challenges Facing Racialized Licensees” (16 November 2016) (on file with author).

⁸⁹ See Jacques Gallant, “Part of Law Society’s Plan to Address Racism Challenged in Court”, *Toronto Star* (7 November 2017), online: <www.thestar.com/news/gta/2017/11/07/part-of-law-societys-plan-to-address-racism-being-challenged-in-court.html>.

⁹⁰ See Pinto, *supra* note 88 at 357.

⁹¹ *Ibid* at 371.

racism. (This, as of 2017, is what passed for constitutional analysis in an opinion letter for Ontario's legal regulator.)

As the next subsection *infra* will demonstrate, this opinion letter implicitly relies upon the manageriate's particular hierarchy of values. It will also detail how the counteroffensive launched against those who contested this worldview followed a process parallel to that observed among neoliberals in the United States after the populist resurgence of 2016.

A constitutional challenge to the Statement of Principles requirement (the "SoP") was soon filed by a law professor; he did so because at that stage no other Ontario lawyer was willing to serve as the test plaintiff.⁹² Explaining why he had taken this action, Ryan Alford noted that he made the decision to "become Canada's most notorious law professor" because, while he would "happily take action voluntarily to promote the goals" of "equality, diversity, and inclusion", he was not willing to concede that "as an arm of the State [owing to its statutory powers to discipline its members], the Law Society can[] coerce me or any lawyer to say what my values are".⁹³ This would generate a dangerous precedent, especially for religious and ideological minorities.⁹⁴

Despite Alford's repeated reiterations in the media that his concerns with the Statement of Principles related to the preservation of state neutrality, the ultimate limits of governmental power over the regulation of the content of speech⁹⁵ and the precedent that it would set for compelled speech in other

92 Private correspondence between Ryan Alford and a civil liberties organization, on file with author.

93 Ryan Alford, "An Arm of the State Should Not Be Forcing Lawyers to Declare Their Values", *CBC News* (25 November 2017), online: <www.cbc.ca/news/opinion/law-society-statement-1.4418125>.

94 *Ibid.*

95 Gallant, *supra* note 89.

areas,⁹⁶ he was subjected to blistering criticism. Prominent diversity advocates in the legal profession labelled his arguments “disingenuous”⁹⁷ and identified the real reason for his objections as “white rage”.⁹⁸ (It is unclear how this could explain Ann Vespry’s earlier objections,⁹⁹ or those of Jorge Pineda and Chi Kun Shi’s that followed;¹⁰⁰ one particularly notable feature of the media coverage was the erasure of people of colour from the opposition to the Statement of Principles.)

2. The Law Society of Ontario as a Site of Symbolic Counterviolence

Owing to the slow movement of the millstones grinding out a resolution to the constitutional challenge, a heterogeneous set of lawyers decided to seek election to Convocation of the Law Society, with the goal of effecting a legislative repeal of the Statement of Principles requirement. While few wagered that this group had any chance of success in the election, every single member of the group succeeded in a landslide: each of these candidates received more votes than any other candidate in the history of the Law Society.¹⁰¹ The silent majority of

96 See Day 6, “Ontario’s Law Society is Tying Itself in Knots Over Diversity and Compelled Speech”, *CBC Radio* (6 September 2019), online: <www.cbc.ca/radio/day6/democracy-divided-the-handmaid-s-tale-measuring-hurricanes-diversity-vs-free-speech-and-more-1.5272042/ontario-s-law-society-is-tying-itself-in-knots-over-diversity-and-compelled-speech-1.5272070>.

97 Atrisha Lewis, quoted in Day 6, *ibid.*

98 Anthony Morgan, quoted in Day 6, *ibid.*

99 Joseph Brean, “Ontario Lawyers Must Say They Promote Equality, or Else After Law Society Rejects Exemption for Conscientious Objectors”, *National Post* (1 December 2017), online: <www.nationalpost.com/news/canada/ontario-lawyers-must-say-they-promote-equality-or-else>.

100 See Max Binks-Collier, “Bencher Warfare”, *CBA/ABC National* (16 October 2019), online: <www.nationalmagazine.ca/en-ca/articles/law/in-depth/2019/bencher-warfare>.

101 See “2019 Election Results and Voter Turnout Statistics for Lawyers 1999-2019” (2019), online (pdf): *Law Society of Ontario*

lawyers concerned with imposition of a new regime of compelled speech had spoken.

The response to this electoral vindication of opinions deemed by supporters of the SoP to be outside of the range of the acceptable came very quickly. One prominent former bencher identified the organizers of the group that won the election as “right-wing fundamentalist zealots”, while another called them “people who have right-wing religious views”. (In support of this evaluation, the author of the article in the *Toronto Sun* in which these former benchers were quoted identified one of the twenty-two electees as an “ordained Roman Catholic permanent deacon” and another as “president of the Catholic Civil Rights League”).¹⁰²

No information on the other twenty was included, although they include an immigrant from Hong Kong, another from Guatemala, a Buddhist, a Jew, a former NDP candidate for Parliament, and a prominent practitioner of Aboriginal law who has litigated for decades on behalf of a number of Band Councils.¹⁰³ The reduction of these lawyers’ views to no more than “regressive ideology” on the basis of thought-terminating clichés frequently approached the level of absurdity. This became evident when one of the members of the newly elected group of directors ran for the position of Treasurer of the Law Society.

Had she been elected, Chi-Kun Shi would have been the first woman of colour to lead it in its three-century history. Instead, Shi received only the votes of the twenty-two opponents of the Statement of Principles. Every other bencher voted for the sitting Treasurer, a cis het white man who had previously been the managing partner of McCarthy Tétrault. The Treasurer had retained his seat at Convocation by the skin of his teeth, after coming in twentieth of all

<lawsocietyontario.azureedge.net/media/lso/media/about/voting-results-for-2019-lawyer-bencher-election.pdf>.

102 Michele Mandel, “Law Society of Ontario Taken Over by ‘Right Wing Fundamentalist Religious Zealots?’”, *Toronto Sun* (3 May 2019), online: <www.torontosun.com/news/local-news/mandel-law-society-of-ontario-taken-over-by-right-wing-fundamentalist-religious-zealots>.

103 See Personal correspondence of Ryan Alford, on file with author.

the lawyers in Toronto running for the Board. He thus received the twentieth and last seat for lawyers from the Toronto region, while Murray Klippenstein, Alford's co-applicant on the constitutional challenge to the Statement of Principles, came in first, receiving approximately three times as many votes as the Treasurer.¹⁰⁴ The absurdity of some of the opposition to Shi demonstrated the consequences of the epistemic closure wrought by the suppression of opposing viewpoints within the precincts of the neoliberal left. One prominent activist, who had earlier attributed Alford's opposition to "white rage", argued that: "electing [Chi-Kun Shi] to lead the lawyer's governing body would undermine our ability to show young people that we are an inclusive and equitable legal profession".¹⁰⁵ In the next year's election for Treasurer, Philip Horgan was criticized both in and by the legal media for having previously represented the Roman Catholic Archdiocese of Vancouver at the Supreme Court of Canada in *Trinity Western University v. Law Society of Upper Canada*.¹⁰⁶ The questions put to him as a candidate by the *Law Times* asked whether this representation indicated Horgan's disagreement with the proposition that "the public interest included . . . preventing harm to LGBTQ law students".¹⁰⁷

The first hidden premise of that question is that the legal standing of organizations that do not approve of one's identity can itself effect a dignitary harm. Notably, that proposition received a very significant approval from the

¹⁰⁴ See "2019 Lawyer Tabulation" (2019) online (pdf): *Law Society of Ontario* <lawsocietyontario.azureedge.net/media/lso/media/about/governance/2019-lawyer-tabulation.pdf>.

¹⁰⁵ Anthony Morgan, *quoted in* Michele Mandel, "A Showdown Consuming the Law Society of Ontario", *Toronto Sun* (26 June 2019), online: <www.torontosun.com/news/local-news/mandel-a-showdown-consuming-the-law-society-of-ontario>.

¹⁰⁶ 2018 SCC 33 [*Trinity Western*].

¹⁰⁷ Anita Balakrishnan, "Law Society Question and Answer, Philip Horgan", *Law Times* (17 June 2020), online: <www.lawtimesnews.com/resources/professional-regulation/law-society-of-ontario-treasurer-election-question-and-answer-philip-horgan/330621>.

Supreme Court of Canada in its 2018 decision of *Trinity Western*.¹⁰⁸ However, the second hidden premise appears to be that identity-based groups have the right to expect that state bodies operate under a duty to protect them from dignitary harm, as those groups define it.

That said, the *Law Times'* question appears to insinuate that the mere representation of a group that contests a particular conception of human rights could be a legitimate basis for the perception of harm. It further insinuates that such a willingness to cause harm — by representing a client — could disqualify someone from a leadership position within the legal profession. While these premises remain disputable, not least within the Convocation of the Law Society of Ontario, there is only one acceptable position according to the *habitus* of the manageriate, which does not admit neutrality.

The fact that the SoP advocates' worldview is a function of the manageriate's *habitus* is demonstrated by their elevation of the elimination of dignitary harms (including micro-aggressions) to the status of a constitutional meta-principle. Despite the obvious constitutional infirmities of the compelled speech requirement, and despite the fact that similar requirements were condemned at the Supreme Court as "totalitarian", similar objections were simply reframed as evidence of racism, or "white rage": no better example of the epistemic closure of the manageriate's worldview could be imagined than the fact that it was now seen in the legal profession, which was previously defined by excellence in rational disputation.

Further evidence of this epistemic closure within segments of the legal profession and its dangers came to light in 2020, with the appearance of erstwhile terminology of the Maoist struggle session and the logic of the call-out and the cancel culture of the North American *lumpenmanageriate* within Canadian legal discourse. An open letter signed by approximately five hundred law students called the Statement of Principles:

[a] mere first step toward combating racial discrimination within the profession
 . . . This is not just a moral imperative—it is a professional obligation . . . [that

108 *Trinity Western*, *supra* note 106.

stems from] the special responsibility to . . . protect the dignity of individuals . . . the LSO must do better. As students, and as lawyers, we will hold accountable those who do not.¹⁰⁹

There is nothing in this letter that recognizes the existence of good-faith disputes about the limits of the regulatory power of the Law Society, the proper scope of the enforceable duty to respect human dignity, or the constitutional issues that surround the totalitarian use of state power to compel speech. What is evident is the intolerance of an epistemically closed worldview.

The self-reinforcing outrage typical of *lumpenmanageriate* online activism is also apparent here. Note that the letter purports to be outraged at the issuance of a statement written *in support* of Black lawyers, which is “more harmful than helpful without substantive action”.¹¹⁰ This hurt was allegedly occasioned by a Twitter post of the LSO that read:

[t]oday during Blackout Tuesday, the Law Society supports and stands with our diversity partners and stakeholders to address the barriers faced by Black lawyers and paralegals in the fight to end discrimination.¹¹¹

Given the tenor of this statement (reproduced above in its entirety), there could be no better demonstration of the transmutation of purported offence into harm and the bootstrapping of that alleged injury into something that a regulator is duty bound to prevent than the assertion that the tweet was ‘harmful’. The all too typical *mauvaise foi* this displays is only accentuated by the allegation in the letter that the deplorable anti-SoP benchers (who include people of colour and who voted *en masse* for the first woman of colour to run

¹⁰⁹ Open Letter to the Law Society of Ontario, 15 June 2020, on file with author [*Open Letter*].

¹¹⁰ *Ibid.*

¹¹¹ Law Society of Ontario, “Today during Blackout Tuesday, the Law Society supports and stands with our diversity partners and stakeholders to address the barriers faced by Black lawyers and paralegals in the fight to end discrimination: “<https://lso.ca/about-lso/initiatives/edi>” (2 June 2020 at 9:58), online: *Twitter* <twitter.com/LawSocietyLSO/status/1267863070547890176>.

for Treasurer in its three-century history) were motivated by “a desire to exclude”.¹¹²

Would that it were only law students who demonstrated their facility in defending their worldview with such tactics. One bencher in favour of the SoP wrote an opinion piece for the *Globe and Mail*, entitled “[r]epealing Ontario lawyer’s statement of principles is not a principled stance”, that openly accused the deplorable benchers of racist sentiments,¹¹³ while a retired Justice of the Ontario Court of Appeal opined at a talk given at the Law Society in honour of Pride Month (later printed in the legal media) that those who opposed compelled speech were actually motivated by “principles from a darker [sic] place”.¹¹⁴

Finally, in what was virtually his last official act, the Treasurer wrote an open letter in response to the law students’ missive (discussed *supra*). This statement, written under the letterhead of the Law Society of Ontario, displayed the reflexive obeisance expected in a struggle session:

I accept that the Law Society has lost credibility on the issue of racism. Your critical response to our tweet on Blackout Tuesday is understandable . . . personally, I am saddened and ashamed that the Law Society has lost credibility in speaking out against racism. You help the Law Society to do better by holding us to account. I hope you will continue to speak up.¹¹⁵

112 *Open Letter*, *supra* note 109.

113 Atrisha Lewis, “Repealing Ontario Lawyer’s Statement of Principles is not a Principled Stance”, *The Globe and Mail* (12 June 2019), online: <www.theglobeandmail.com/opinion/article-repealing-ontario-lawyers-statement-of-principles-is-not-a-principled/>.

114 Harry LaForme, “Justice LaForme Stresses Importance of Vigilance in Rights”, *The Lawyer’s Daily* (17 June 2019), online: <www.thelawyersdaily.ca/articles/13239/former-justice-laforme-stresses-importance-of-vigilance-in-rights-protection-at-pride-month-event>.

115 Letter from Malcolm Mercer to Members of the Ontario Law Student and Alumni Community (25 June 2020).

Traditionally, benchers of the Law Society have been considered as a reserve pool of sorts for appointments to the benches of the courts. This is doubly true of treasurers. One former treasurer, a key supporter of the Statement of Principles, now presides on the Superior Court of Justice. The number of judicial appointments (to say nothing of positions such as those on Judicial Appointment Committees) of those who supported a compelled speech requirement of dubious constitutionality (whether from within Convocation, while on the staff of the Law Society, or within its Equity Advisory Group and equity partners [read: advocacy groups]) would likely surprise most observers.

3. The PMC's Wedge in the Legal System: *Doré* and Charter Values

A complete enumeration of all the lawyers who reflexively defended compelled speech and minimized its effect on others' fundamental rights would likely give pause to those concerned with the preservation of an independent bar, particularly those who see it as essential to ensuring due process for disfavoured individuals and causes. The number of these appointed to judicial or quasi-judicial positions would likely be similarly troubling to those who are concerned with the preservation of a meaningful right to freedom of political expression for those whose values are in tension with those of the manageriate.

That said, the obvious rejoinder to this pessimistic institutional view would be that the Constitution of Canada remains the same, regardless of who interprets it. Unfortunately, this would be difficult to sustain given the recent jurisprudence interpreting the constitution in a novel manner. There have been three developments in the case law of the Supreme Court of Canada that provide a clear opening to those who would build a battle-ready democracy to limit the expression of the 'populists' who resist the PMC's hierarchy of values becoming the official ideology of the state.

Increasingly, members of the legal profession are joining the professional-managerial class. (More and more lawyers are essentially bureaucrats, and vice versa, as the social reproduction of the manageriate increasingly requires frustrated academics and journalists to become associates in law firms.) Given

the trends observed in the United States, discussed in Parts I and II, *supra*, there is a clear danger that Canada's newly-transformed constitutional order will be prepared for a battle with the ideas and speech of all those whose *habitus* and views are irreconcilable with those of the PMC.

There are three jurisprudential developments that might pave the way for a constitution for a battle-ready democracy. If first deployed against the populist reaction to the manageriate's hegemony, their erection and ultimate permanence could be justified. They are as follows: first, the recognition of offensive speech as a dignitary harm (even where it clearly fails to meet the legal criteria for being designated hate speech, slander, or libel), the prevention of which is a legitimate governmental objective. Second, the creation of an open-ended balancing test that does not require a consideration of whether the restrictions on the offensive speech (especially purportedly offensive political opposition) are minimally invasive. Third, the recognition of a constitutional source (*i.e.* one over and above legislation, including human rights codes) of protection from the dignitary harms occasioned by what was traditionally considered legitimate political opposition.

The first precondition has already been discussed *supra*. The second has been secured by the creation of the *Doré/Loyola* balancing test. The third, namely the recognition of an identity-based concept of dignity as a *Charter* value that must be balanced against the right to free speech within that test, must be elucidated in detail here. The simplest way of doing so is to consider how the constitutional challenge to the Statement of Principles would likely have been decided, had it not been made moot by its repeal at Convocation.

*Alford v. The Law Society of Upper Canada*¹¹⁶ asserted that the Statement of Principles implicated the Applicant's freedom of speech, infringing the right established by Section 2(b) in a manner that could not be justified as a reasonable limitation. This challenge was brought in the Superior Court of Justice pursuant to the constitutional jurisdiction of that court created by Section 52(2) of the *Constitution Act, 1982*.

116 2018 ONSC 4269 [*Alford v LSUC*].

The Law Society's very first response to the lawsuit was to move to transfer the Application to Divisional Court. It argued that the Applicant's challenge was improperly brought in Superior Court, as it was merely a disguised challenge to the exercise of a statutory power.¹¹⁷ The consequence of a transfer of the Application as the Law Society sought would have been the application of far more deferential test applied to whether the limitation of the Applicant's rights could be justified as reasonable.

In Superior Court, the *Oakes* test would have placed the burden on the Law Society to demonstrate that the objective of promoting equality, diversity, and inclusion within its membership was compelling. This would have been straightforward, as it would only have required a demonstration of a rational connection between requiring the creation of a statement to that end and achieving that goal. What would have been considerably more difficult is the showing that it would achieve these goals in a proportional manner. This would have entailed demonstrating that the SoP is minimally impairing of the right to free speech, despite the existence of numerous other means to achieve these goals, including the other twelve measures adopted to that end by the Law Society, none of which were challenged by the Applicant. More pointedly, it would have been difficult in the face of the characterization of compelled speech as "totalitarian" by Beetz J in *National Bank of Canada* to say that the use of this measure was proportional to what it would achieve, particularly as many of its proponents had derided the Statement of Principles as likely to be ineffective, or purely symbolic.¹¹⁸ Fortunately for the Law Society, The *Doré* test — which applies in Divisional Court when it reviews the exercise of statutory powers — is considerably more deferential to the administrative agency when deciding whether the limitation of one's constitutional rights is justifiable. For this reason,

117 See *Ibid.*

118 See *National Bank*, *supra* note 87 at 296.

it has been the subject of blistering academic critique, notably from Leonid Sirota¹¹⁹ and Mark Mancini.¹²⁰ As Audrey Macklin noted:

[t]he Supreme Court's 2012 decision in *Doré* signalled the apparent victory of Team Administrative Law over Team *Charter*: discretionary decisions engaging *Charter* rights . . . would henceforth be decided according to principles of administrative law . . . judges called upon to review exercises of discretion that impaired Charter rights . . . would defer . . . and only set it aside if it was 'unreasonable'.¹²¹

Accordingly, in *Alford v. LSUC*, the Divisional Court would only have been able to vindicate the right to free speech if it determined that Convocation had been unreasonable when it balanced that right against the objective of promoting equality, diversity, and inclusion within the legal profession. This ignores what Macklin labels the "normative priority" of rights in "a mere balancing of the *Charter* as one factor among others".¹²² And this, combined with the fact that reasonableness is a notoriously low standard of review, would likely doom the constitutional challenge to failure, despite the importance of the right to free expression and the totalitarian implications of compelled speech.

As noted by Justices Brown and Côté in their dissent in *Trinity Western*, under *Doré* "Charter rights are guaranteed only so far as they are consistent with the objectives of the enabling statute", in this case the *Law Society Act*, in line with its interpretation by the Supreme Court of Canada in *Trinity Western*. This approach to evaluating constitutional challenges virtually mandated a result in *Alford v. LSUC* that would have eviscerated all the rights implicated by the Statement of Principles requirement: rights that, according to the opinion letter

¹¹⁹ See Leonid Sirota, "It's Happening Here Too" (13 June 2019), online (blog): *Double Aspect* <www.doubleaspect.blog/2019/06/13/its-happening-here-too/>.

¹²⁰ See Mark Mancini, "The Conceptual Gap between *Doré* and *Vavilov*" (2020) 43:2 Dalhousie Law Journal 793.

¹²¹ Audrey Macklin, "Charter Rights and Charter-Lite" (22 February 2018), online (blog): *Double Aspect* <www.doubleaspect.blog/tag/dore/>.

¹²² *Ibid.*

obtained by the Law Society, included the right not only to free speech but also to freedom of conscience and freedom of religion.

Additionally, as the *Doré/Loyola* framework focuses judicial attention on the objectives enumerated in the administrative agency's enabling statute, it provides a road map for the construction of a battle-ready democracy. All legislatures need to do to limit the fundamental freedoms of those who oppose the new 'official' governmental values (those of the PMC-dominated Brahmin left, whenever they achieve electoral victory) is to enact statutes that enshrine these values.

As Lauwers JA has noted (when writing extrajudicially), "the language that she [Abella J, in *Doré*] used seems to suggest that the statutory objectives have indefeasible priority over *Charter* rights, which would be contrary to the *Oakes* methodology".¹²³ For those who will continue to seek to express their political opposition to the *habitus* of the manageriate after its worldview has been translated into official state values, this presents a vision of a bleak future. Any remaining optimism is likely to be dimmed even further when one considers how the balancing of the constitutional rights of dissenters is likely to be tilted even further in favour of the administrative agencies by the addition of *Charter* values to their side of the scale.

As seen in the reasons of *Trinity Western*, the identification of a statutory mandate to promote particular values can transform a regulator into a vehicle for social transformation in the image of those who control it. This is made even easier with the addition of the concept of *Charter* values.

Trinity Western presented the preliminary question of whether Canadian Law Societies were entitled, when exercising their powers over the licensing process, to consider the harm to identity-based groups that would allegedly ensue from admitting to legal practice the graduates of a faculty that discriminated against members of those groups. In short, the issue is whether the statutory mandate to operate in "the public interest" when licensing new

123 Peter Lauwers, "Reflections on Charter Values: A Call for Judicial Humility" (26 January 2018), online: *Advocates for the Rule of Law* <www.ruleoflaw.ca/reflections-on-charter-values-a-call-for-judicial-humility>.

lawyers would allow them to bar certain lawyers from practice, so as to protect members of certain groups from dignitary harm.

To resolve this issue, the majority turned to a versatile concept: *Charter* values. That majority (plus McLachlin CJ & Rowe J) interpreted the requirement that the Law Societies operate “in the public interest” so as to allow it to take into account how “inequitable barriers on entry to the school” (which receives no public funding) will cause “potential [dignitary] harm to the LGBTQ community”.¹²⁴ This is because the majority concluded that administrative bodies have a mandate when operating in the public interest to take heed of “fundamental shared values, such as equality, when making decisions within their sphere of authority — and may look to instruments such as the *Charter* or human rights legislation as a source of these values”.¹²⁵ As these reasons make clear, the problem with *Charter* values is that they are not enumerated or to be found the *Charter*, or in any other part of the Constitution: “There is no doctrinal definition of what a *Charter* value is”.¹²⁶ Rather, the simplest definition that can be derived from judicial use of the concept is that they are simply the means by which additional rights can be shoehorned into the Constitution, which runs directly counter to the decision of its framers to entrench only certain rights and not others.¹²⁷

The ambiguous role that *Charter* values play in adjudication is compounded by the fact that they are so vague as to resemble empty vessels for one’s own views, or indeed one’s *habitus*. As Lauwers and Miller JJA reasoned in *Gehl v Canada*:

Charter values lend themselves to subjective application . . . because of the irredeemably subjective — and value laden — nature of selecting some *Charter* values from among others, and of assigning relative priority among *Charter* values and competing constitutional and common law principles. The problem

¹²⁴ *Trinity Western*, *supra* note 106 at para 39.

¹²⁵ *Ibid* at para 46.

¹²⁶ Lauwers, *supra* note 123

¹²⁷ See *Ibid*.

of subjectivity is particularly acute when *Charter* values are understood as competing with *Charter rights*.¹²⁸

The subjective and ideologically-laden nature of value terms is becoming increasingly clear owing to the rise of the manageriate, whose *habitus* entails particular and even peculiar definitions of some of these concepts, including ‘harm’ and ‘equality’, both of which appeared to obtain significant traction in the decision of the majority in *Trinity Western*.

Owing to the ongoing conflict between the manageriate and the populist reaction, which has spread to the Canadian legal profession, it is no longer possible to dispute Lauwers’ observation that “the meaning of these concepts — and even their judicial application — is both contestable and contested”;¹²⁹ what remains to be seen is whether the ideological colonization of the legal profession by radicalized segments of the manageriate continues apace, and whether this could produce epistemic closure around these topics.

The first step towards that closure would have occurred if the Statement of Principles had been upheld on the same basis as the decision for the majority in *Trinity Western*. As noted above, because of the Law Society’s success in arguing that the constitutional challenge to the infringement of free speech rights was a dispute about the LSO’s statutory powers in disguise, the *Doré/Loyola* framework would have applied. The LSO could then have cited *Trinity Western* for the proposition that the power to regulate the legal profession in the public interest included a duty to promote equality within the legal profession, defined — in keeping with the manageriate’s preferences — not as formal, but as *substantive* equality. Again, citing *Trinity Western*, it could argue that the public interest requires the legal profession to protect racialized members or members of other identity-based groups from dignitary harm.

Finally, it would likely conclude that it had been reasonable for Convocation to determine that the only way to allow members of these vulnerable groups to feel safe within the legal profession was to curtail the free speech rights of every

¹²⁸ *Gehl v Canada (Attorney General)*, 2017 ONCA 319 at para 97.

¹²⁹ Lauwers, *supra* note 123.

member of the profession (including racialized lawyers themselves), by requiring them to assert that they did not merely accept the importance of equality, diversity and inclusion, but that they would “do the work” necessary to create substantive equality by pledging — under threat of expulsion — to promote these goals, both in their professional lives and generally, however that perplexingly vague imperative might be construed in the future.

At that point, the only question that would remain for the court to answer is whether the Law Society had balanced the free speech rights of its members against these paramount goals, which are now deemed to be mandated by the *Charter (ex silentio)* in a reasonable (that is, not necessarily in a correct, but merely defensible) manner. It is extremely unlikely that a Supreme Court of Canada (with substantially the same composition as the one that decided *Trinity Western*) would conclude that the LSO had not cleared the very low bar of reasonableness (at least before the redefinition of the reasonable standard in *Canada v Vavilov*).¹³⁰

4. Epistemic Closure of the Legal System: A Harbinger of Violence?

This catastrophic defeat for the right to freedom of political expression was only forestalled by the collective action of Ontario’s lawyers. It is notable that fewer than three percent of those called upon on pain of discipline to assert that they had made the required statement were willing to openly assert that they would not; but then under the cover of anonymity, the silent majority rose up to voice a stunning rebuke to the ideological reorientation of their regulator.

Despite this historic defeat of the manageriate’s ideological agenda within a particularly strategic node of social reproduction, the struggle over the meaning of the highly contested value terms of justice and equality within the Canadian legal profession — and society — has only just begun. As the letter signed by over 500 of Ontario’s law students indicated, the Statement of Principles was (and is) considered “only the first step” to the transformation of the legal

130 *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.

profession, which is characterized by an increasing number of activists as an engine of injustice.

One might argue that it is remarkable that the open expression of goals that recall the Cultural Revolution's aim of destroying the "Four Olds" received such a ringing endorsement from the outgoing Treasurer of the LSO, or that he would express his "personal . . . shame" that he had not been able to push this agenda further during his time in office, were it not the case that PMC *habitus* has been confronted with what might well be termed a populist reaction.

The steps that would have followed (and which may yet follow) upon a purge of those who would not agree to 'promote' the class-based values of the manageriate within the legal profession are now apparent. It was made clear in the last two elections for the position of Treasurer that certain beliefs, which were acceptable until the proverbial day before yesterday, can now disqualify one from a leadership position in the legal profession. These apparently include the belief that even the deplorable are entitled to legal representation. The obvious next step is the cancellation of those lawyers who continue to choose to represent those accused of hate crimes or human rights violations; in this case, the penalty may not merely be expulsion from the public sphere, but from the legal profession.

From there, it is only one step further to a legal profession that refuses representation to anyone whom the state accuses of transgressing official values, which it will read into the constitutional text as it sees fit. As Sirota noted:

[o]ne cannot help but think of the more unsavoury totalitarian regimes, where "bourgeois legality" was made to give way to "revolutionary class consciousness" or similar enormities . . . [but] [a]s the [*Trinity Western*] dissent rightly points out, on the majority's view law societies have a roving commission to weed out injustice.¹³¹

131 Leonid Sirota, "The Supreme Court v the Rule of Law", (18 June 2018), online (blog): *Double Aspect* <www.doubleaspect.blog/2018/06/18/the-supreme-court-v-the-rule-of-law/>.

Anyone who understands the implications of the transformation of the concept of justice into the remediation of everything the *manageriate* conceives of as oppression will understand how dangerous an ideologically-colonized legal profession might prove itself to be. The enumeration of a set of values that lawyers should promote generally within society and the identification of those who oppose particular conceptions of those values as deserving of expulsion would have been a serious escalation of the symbolic violence that the PMC has deployed in support of the counteroffensive against what it considers populism, or worse.

The legal profession serves as a repository within society for the wisdom of preserving a place for nonviolent political disputation; it is also the primary voice speaking in favour of the value of complex systems of neutral adjudication and due process — as opposed to partisan justice. Should this voice be silenced, a precedent would be created for imposing official sanctions on those who do not have values that align with the PMC's class-based aspirations. It would prevent others from opposing such persecution in the legal system.

The elimination of legal avenues for disputes about the scope of political rights is as dangerous a formula for the catalyzation and radicalization of populism as can be conceived by the mind of man. Those who have already been excluded from public life (or even gainful employment) by the effects of neoliberal globalization are unlikely to respond to being labelled and sanctioned as the official enemies of state values with equanimity. Rather, they would be very likely to understand the class-based impetus for their persecution, and to expose the hollowness of their class opponents' claims to authority.

Those exiled from political participation would quickly grasp the truth that the rhetorical function of substantive equality “is just a stalking horse for the particular form of treatment the advocating party wants to claim as worthy of equality protection”,¹³² in particular, the exclusive right to political speech. The new form of battle-ready democracy this requires would create its own justification after the fact, by radicalizing its enemies. This would lead to a state

132 Lauwers, *supra* note 123.

of affairs in which any constitutional order — even Canada’s constitutional order — might plausibly be compared to the Weimar Republic, as the political centre collapses and violence replaces speech.

VI. Conclusion

Restricting the ability of broad segments of the populace to advocate for themselves and in accordance with their own values and interests inevitably leads to a populist reaction; this remains as true in Canada in the present as it was elsewhere in the past. At present, anyone not in perfect alignment with the manageriate’s class-based hierarchy of values stands to be silenced and sidelined from mainstream political activity. What is worse, they can now be exiled outside of what is rapidly becoming the official moral order of society — and labelled an enemy of all that is right and proper. Yet history strongly suggests that the populist backlash to this unprecedented ideological repression may lead to violence in the future.

To address the analogies presented in the article’s title, the primary threat to constitutionalism and the rule of law, in Canada as elsewhere, comes not from populism — Trumpian or otherwise — but from responses to its successes. At present, the smouldering flames of class conflict have spread throughout this society’s ideological superstructure, including the apparatuses that comprise our legal system, beginning with legal education and the regulators. This prefigures a broader transformation of the legal system designed to suppress populist resistance: the creation of a battle-ready democracy.

As this article has demonstrated, the decision to restrict fundamental rights to protect the constitutional order will inevitably entail speech restrictions that are demonstrably partisan. The lesson that history provides is that this is a prelude to an escalation of class conflict into political violence, which then provides an additional rationale for an authoritarian crackdown on free speech. Having failed to learn that lesson, Canada may soon be entering a vicious circle of repression. We may soon risk destroying the rule of law in an attempt to save it; or rather, in attempting to save a vision of the Constitution imbued with the values and hierarchies of the prevailing hegemonic bloc, the constitutional order

that served to contain disputes about values within political and legal bounds may burst asunder.

Only better understanding of the forces that drive the calls for repression can bring us back from the brink. This begins with an understanding of the class-based nature of the conflict that appears in the guise of a culture war. Both sides of this struggle are defined by their position within post-Fordist relations of production. In the twenty-first century, the single greatest political threat to the professional-managerial class has been the increased unwillingness of its greatest rival — the working class — to accept the naturalness of its subordination, especially as this is reproduced within the realm of culture.

This resistance first became visible as symbolic counter-violence, which spread rapidly over the new social media platforms and culminated in the election of politicians — most notably Donald Trump, but others too, as ideologically diverse as Beppe Grillo and Jair Bolsonero — who ridiculed the manageriate's purported moral authority. It was this public and majoritarian rejection of the PMC's class-based values that catalyzed in the PMC a desire to regulate speech that it deemed offensive: a desire to eliminate dissent instantiated by promoting the equivalence between taking offence and having suffered real and irreparable harm.

Remarkable successes within the broader public sphere in the United States and elsewhere and the widespread uncritical acceptance of the view that present circumstances in the United States parallel the last days of the Weimar Republic prepared the ground in Canada for an assault on the most important citadel of open and reasoned debate: the legal profession. The constitutional bastions of free speech — in Canada, the fundamental right entrenched by Section 2(b) of the *Charter* — is now being undermined in a manner that might precipitate the total collapse of Canadians' only durable protection from the promotion of official state values and the regulation of speech in accordance with its dictates.

The rejection of this justification for driving dissidents out of the public square in addition to the public sphere cannot be considered a foregone conclusion. What is most troubling is that the decision of the majority in *Trinity Western* created a road map for the justification of these measures, one that relies

upon the infinitely malleable — yet increasingly partisan — application of *Charter* values such as equality and justice.

The consequences of the epistemic closure that subjects these values into thought-stopping clichés are far reaching in scope and terrifying in effect. It is also quite predictable that this will catalyze a more radical populist response. If these dynamics continue unabated, the broken calendar will be right once again: the invocation of 1933 as a rationale for intolerance of intolerance will summon its horrors.

At the time of this article's submission, President Trump has not conceded defeat, despite the projections that Joe Biden would win 306 electoral votes (where 270 are required, at a time when 99% of the ballots have been counted). Trump authorized the release of funds for Biden's transition to the presidency; if he concedes before December 13, 2020, he would do so sooner than Al Gore did in 2000.

In the unlikely event that Trump achieves victory by means of his lawsuits addressing states' certification of their results, this would follow the precedent set by George W. Bush (who was recently rehabilitated by the Brahmin Left owing to his rejection of populism). Were Trump's lawsuits to succeed only in delaying the certification of electoral votes and then achieve victory in a contingent election in Congress, he would achieve success in the same manner as John Quincy Adams (and in accordance with the terms of the Twelfth Amendment to the United States Constitution).

If, as is most likely, Trump loses the election, refuses to concede, and continues to campaign for the next four years while alleging that he was cheated by means of corruption, he would instead be following the example of Andrew Jackson. It should be noted that a comparison between Jackson and Trump is considerably more apt to any comparator drawn from the era of the Weimar Republic.

Whichever result comes to pass, the total failure of all the predictions that Donald Trump would fight for the Oval Office by mobilizing the military or paramilitary militias should put the allegation that he was a potential American *Führer* to rest once and for all. Unfortunately, a retraction of that charge from a

commentariat that cannot distinguish between fascism and disrespect for the PMC's values may be too much to expect.

That said, one hopes that it is not too late for Canadians to learn the right lesson from the lessons of history, both recent and further removed: a Constitution that is made battle-ready because of the inability of the ruling classes to tolerate populism will only accelerate democratic decay. Those who lose their liberties in the name of anti-fascism are among the least likely to adopt a state-sanctioned respect for democracy. Removal of even the right to disagree runs the risk of creating an unparalleled legitimization crisis, one with explosive pressures far beyond the ranges that can be dissipated through the safety-valve of reactionary populism.

What We Talk About When We Talk About the Rule of Law

Jeffrey B. Meyers*

This article considers the concept of the rule of law both as a commemoration of the past and as a frame of reference. In particular, it examines the rule of law at the intersection of law and politics, namely the point where politics becomes law-bound. The article presents case studies from Canada, the US and the UK to explore how legal and political rationalities intersect in the idea of the rule of law. The comparison reveals troubling questions as to the apparent normalization of significant and recent departures from the rule of law in all three jurisdictions.

* The author is an Associate Teaching Professor at the Thompson Rivers University, Faculty of Law and member of the Bar of the State of New York (2005) and the Law Society of British Columbia (2012). Thanks to my excellent research assistant, Alisha Dhanjal, and to the *Canadian Journal of Comparative and Contemporary Law*'s editors for accepting my submission. A special thanks also to Professor Lorne Neudorf for the rigorous editing and substantive feedback he offered on an earlier draft of this article which immeasurably improved it. The title of this article is adapted from the short story by Nathan Englander, "What We Talk About When We Talk About Anne Frank": Nathan Englander, *What We Talk About When We Talk About Anne Frank* (New York: Vintage, 2013).

- I. INTRODUCTION
 - II. THE RULE OF LAW: BETWEEN LAW AND POLITICS
 - III. CASE STUDIES
 - A. Canada
 - 1. The SNC-Lavalin Affair: The Problem of Conflict of Interest
 - 2. The Provincial Routinization of the Notwithstanding Clause
 - B. The United States
 - C. The United Kingdom
 - IV. RULE OF LAW CRISES IN COMPARATIVE PERSPECTIVE
 - V. CONCLUSION
-

I. Introduction

This article considers the concept of the rule of law both as a remembrance of the past and as a frame of reference for the present. In particular, it examines the rule of law at the intersection of law and politics. A more complete understanding of the rule of law is important as the public looks to lawyers to explain when, why and how political actors are bound by formal legal limits. Being able to know what is meant when a particular jurisdiction is claimed to be in compliance with the rule of law has become especially important because of a growing public awareness of questions relating to the legality of government action, along with continued challenges in applying the rule of law's basic requirement: that political action taken by the executive must be consistent with established legal standards.

In exploring these questions, this article presents case studies from Canada, the United States and the United Kingdom as common law jurisdictions with significant overlap in legal language, legal culture and legal history. For each jurisdiction, the article will consider how the rule of law might be placed at risk by unchecked executive power. The article begins by introducing the rule of law as a conceptual device which emerges on the margins of law and politics before examining the case studies and concluding with a refined understanding of the current state of the rule of law that draws on insights from the case studies.

II. The Rule of Law: Between Law and Politics

Most scholarship on the rule of law begins by simply providing a definition of the concept that is suitable to the scholar. This article instead begins by noting the intellectual history of the concept. The phrase is commonly attributed to AV Dicey and other nineteenth century English thinkers of public law and jurisprudence. According to Costas Douzinas, “A.V. Dicey and Walter Bagehot distinguished between political and legal sovereignty” by saying that “the former [political sovereignty] belongs to the electorate and has only ideological significance” while “legal sovereignty by contrast is perpetual, indivisible and illimitable”.¹ It is fair to say that a similar relationship can exist between the concepts of the democracy in political sovereignty and the rule of law in legal sovereignty. This is the basic distinction which this paper seeks to tease out in the contemporary Anglo-American context.

Underlying this article is a rich body of scholarship on the rule of law that speaks to questions of human rights, liberalism and equality as substantive inheritances of an imagined universal (or at least western) political and legal culture. An analysis of this scholarship reveals an unresolved divide between those who understand the rule of law as infused with a ‘thick’ or substantive substrate of content on the one hand, and those who understand it as ‘thin’ or procedural without substantive content on the other hand. In the thick version, the rule of law means more than guarantees that the law applies equally to all. It also means that the law includes principles of equality of access and basic human rights.² By contrast, in the thin version, the concept tends to be neutral or devoid of substantive content and avoids intruding on the autonomy of the legislature

1 Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Abingdon: Routledge-Cavendish, 2007) at 282.

2 See Jeremy Waldron, “Legislation and the Rule of Law” (2007) 1:1 Legisprudence 91. For an empirical analysis of the usage by scholars, see Jørgen Møller & Svend-Erik Skaaning, “Systematizing Thin and Thick Conceptions of the Rule of Law” (2013) 33:2 Justice System Journal 136.

to make policy decisions.³ Proponents of the thin view tend to resort to *laissez-faire* views to justify an ideologically neutral definition of the concept.⁴ This perspective reveals a critical divide between rules that govern political and legal rationality. Notably, both thin and thick conceptualizations of the rule of law contain a liberal ethos. The thin view sees the rule of law as “a technical construction limited to formal conditions without material content”.⁵ These conditions tend to focus on laws being clear, prospective and non-contradictory. The thick view insists on substantive equality of outcome and formal equality of opportunity. This perspective includes norms designed to provide respect for individual liberties and human rights among other commitments of liberalism.

In writing on the rule of law, Brian Tamanaha puts forward a series of assertions about the rule of law's relationship with the normative universe of liberalism. These assertions provide a useful starting point for further analysis. Among them is the axiomatic rule on the relationship between the rule of law and liberal ideology and moral philosophy to the effect that although the rule of law can exist outside liberal systems, no liberal system can exist without the rule of law. In premodern times in the ancient, classical and medieval iteration of the rule of law was about collective self-rule rather than individual rights, *e.g.* citizen self-rule in Greece and the containment of the rule of the many by the one in medieval iterations. But, Tamanaha emphasizes, modern imaginings of the rule of law emerge from Renaissance and Reformation and reach a high point in the individuation of the Enlightenment and the US and French Revolutions in particular. The modern rule of law is individualist insofar as it is motivated by a

³ The late Justice Scalia is well-known for this view. For a critique thereof see Erwin Chemerinsky, “The Jurisprudence of Justice Scalia: A Critical Appraisal” (2000) 22:2 University of Hawaii Law Review 385 at 385–401. For a principled defence of judicial activism see Sonja C Grover, *Judicial Activism and the Democratic Rule of Law* (London: Springer, 2020) at 232–69.

⁴ See Grover, *ibid* at 232.

⁵ Jesús Fernández-Villaverde, “Magna Carta, the Rule of Law, and the Limits on Government” (2016) 47:1 International Review of Law and Economics 22 at 22–28, citing Brian Z Tamanaha, *On the Rule of Law* (Cambridge: Cambridge University Press, 2004) at 33.

fear of imposition on personal liberty by the state (as is the social contractual model upon which liberal political theory is based).⁶

The late Lord Bingham laid out eight fundamental postulates of the rule of law in his popular title on the subject, as follows:

1. Law must be accessible and strive to be intelligible, clear and predictable.
2. Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion.
3. Law of the land should apply equally to all, save and to the extent objective differences justify differentiation.
4. Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly for the propose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably.
5. Law must afford adequate protection of fundamental human rights.
6. Means must be provided for resolving disputes without prohibitive cause or inordinate delay, bona fide civil disputes which the parties are unable to resolve.
7. Adjudicative processes provided by the state should be fair.
8. Compliance by the state with obligations in international law as in national law.⁷

It is clear that both Tamanaha and Bingham adopt a thick version of the rule of law. In other words, the basic characteristics attributed to the rule of law are not only procedural but also involve value judgments and normative commitments. A synthesis of the rule of law scholarship suggests that the concept is best seen as an ethical horizon toward which we might strive, alongside democracy but at times in tension with it. The tension arises from democracy privileging majoritarianism while a substantive view of the rule of law can override

⁶ See Tamanaha, *ibid*.

⁷ See Tom Bingham, *The Rule of Law* (London: Penguin Books, 2011).

majorities on the basis of a higher social contract, often reflected in a culture of constitutionalism.

This article focuses on the rule of law as applied in two scenarios: (a) a crisis situation where the executive government is called upon to take urgent action in response to a crisis; and (b) the potential for a conflict of interest between the personal interests of political leaders and the public interest. In these contexts, the rule of law is understood as making politics law-bound when an executive act can be seen to conflict with legal requirements. While this article favours Tamanaha and Bingham's thick version of the rule of law, the case studies do not turn on this question. Instead, each presents a clear example of a departure from the thinnest possible view of the rule of law, even one merely focused on maintaining fidelity to existing legal standards. In terms of defining 'law', for the purpose of this article, once the threshold that makes a normative standard a legal rule has been crossed it is considered a valid legal standard.

III. Case Studies

A. Canada

Through legislation, the Parliament of Canada has attempted to make political actors, including the executive government, accountable to basic principles of the rule of law. The main source of rules is found in the *Conflict of Interest Act*.⁸ Applications of the legislation are contained in the reports of the Conflict of Interest and Ethics Commissioner. A number of these reports relate to Justin Trudeau's Liberal government, two of which are notable. First, the 2017 investigation into Trudeau's relationship with the Aga Khan Foundation found multiple violations of the legislation publicly reported upon by the Commissioner in *The Trudeau Report*.⁹ Second, the 2019 investigation of the SNC-Lavalin affair disclosed breaches of the legislation publicly reported upon

8 SC 2006, c 9, s 2.

9 Canada, Office of the Conflict of Interest and Ethics Commissioner, *The Trudeau Report*, by Mary Dawson (Ottawa: CIEC, 20 December 2017).

by the Commissioner in the *Trudeau II Report*.¹⁰ At the time of writing, the Conflict of Interest and Ethics Commissioner has confirmed a new investigation into Trudeau in connection with a non-profit organization called WE Charities, which with Trudeau and his family were associated before and after the 2015 election.¹¹

1. The SNC-Lavalin Affair: The Problem of Conflict of Interest

The SNC-Lavalin affair is well known to Canadians and was reasonably widely reported on by English language media in the US and the UK.¹² The legal origins of the scandal lie in a 2015 RCMP investigation into the Canadian construction and engineering giant's business practices in Muammar Gaddafi's Libya. These events draw to a close in 2019 when the company pled guilty to fraud charges arising under the *Criminal Code*¹³ of Canada and to bribery charges arising under the *Corruption of Foreign Public Officials Act*.¹⁴ The case against the firm involved bribes to secure lucrative contracts with the Libyan government before Mr. Gaddafi was deposed. Ultimately, the company agreed

10 Canada, Office of the Conflict of Interest and Ethics Commissioner, *Trudeau II Report*, by Mario Dion (Ottawa: CIEC, 14 August 2019).

11 See Peter Zimonjic, "Ethics watchdog investigating Trudeau over choice of WE Charity to run \$900M student grant program", *CBC News* (3 July 2020), online: <www.cbc.ca/news/politics/wecharity-trudeau-mario-dion-probe-1.5637195>.

12 See e.g. Ian Austin, "The Strange Story Behind the SNC-Lavalin Affair", *The New York Times* (15 February 2019), online: <www.nytimes.com/2019/02/15/world/canada/snc-lavalin-justin-trudeau.html>; Leyland Cecco, "Explained: the case that could bring down Canada's Justin Trudeau", *The Guardian* (1 March 2019), online: <www.theguardian.com/world/2019/mar/01/explained-the-case-that-could-bring-down-canadas-justin-trudeau>.

13 RSC 1985, c C-46.

14 SC 1998, c 34.

to pay a CAD \$280,000,000 fine.¹⁵ SNC-Lavalin's legal exposure to serious criminal charges overseas, triggered a political crisis for the governing Liberal Party which ended with the high profile exit of two senior ministers from cabinet, including the first Indigenous woman to hold the twin portfolios of Attorney General and Minister of Justice, Jody Wilson-Raybould, and Federal Treasury Board President, Jane Philpott. Beyond its impact on the careers of two top ministers in his government, the scandal also triggered the resignation of Trudeau's longest serving and close political advisor, Principal Secretary, Gerald Butts and that of Canada's most senior unelected civil servant, the Clerk of the Privy Council, Michael Wernick, both of whom were implicated by the Conflict of Interest Commissioner in a pressure campaign against then Attorney General and Minister of Justice, Wilson-Raybould to intervene in the criminal prosecution of SNC-Lavalin.

Matters came to a head when Wilson-Raybould alleged and the media widely reported that the Prime Minister and the Office of the Prime Minister as well as other high ranking government officials, including Butts and Wernick, pressured her to intervene in the independent Director of Public Prosecutions ("DPP") branch of the Department of Justice, to grant a Deferred Prosecution Agreement ("DPA"). The DPP is an independent and arm's length body which makes discretionary decisions about public prosecutions in the public interest and insulated from political considerations.¹⁶ A DPA is sometimes called a remediation agreement and similar provisions exist also exist in the US and the

15 See Gail J Cohen, "RCMP lays corruption charges against SNC-Lavalin", *Canadian Lawyer Magazine* (19 February 2015), online: <www.canadianlawyermag.com/news/general/rcmp-lays-corruption-charges-against-snc-lavalin/273054>; Nicolas Van Praet et al, "SNC-Lavalin unit pleads guilty to fraud charge, to pay \$280-million fine", *The Globe and Mail* (19 December 2019), online: <www.theglobeandmail.com/business/article-snc-lavalin-reaches-agreement-to-plead-guilty-to-charges-of-corruption/>.

16 DPAs which also exist in the US and the UK, became a part of the law of Canada with amendments to the *Criminal Code* of Canada given royal assent on September 19, 2018 in the context of omnibus *Budget Implementation Act, 2018, No. 1*, SC 2018, c 12, s 403.

UK.¹⁷ Such an agreement permits a prosecutor and a corporation charged with corporate malfeasance in the form of fraud or corruption to agree to a deferred prosecution triggered only if the corporation does not reform itself, make restitution and implement new self-regulation measures. In Canada, such an agreement, can now occur by way of Part XXII.1, section 715.3(1) of the *Criminal Code* provides that remediation agreements entered into “between an organization accused of having committed an offence and a prosecutor, to stay any proceedings related to that offence if the organization complies with the terms of the agreement”.¹⁸ This provision in the *Criminal Code* was added as a result of intensive lobbying of the Trudeau Government for it by SNC-Lavalin.¹⁹

17 For a jurisdictional comparison from an academic perspective see Paetrick Sakowski, “A Bargain with Justice? A Perspective of Canada’s New Remediation Agreement” (2019) 42:3 Manitoba Law Journal 365; Eleanor Dennis, “Using N/DPAs to Achieve Global Settlements: Lessons for Canada and its Nascent Regime” (2020) 29:1 Dalhousie Journal of Legal Studies 45. For a guide to corporate commercial or white collar clients from one of Canada’s leading commercial law firms see Lawrence E Ritchie & Malcolm Aboud, “Deferred Prosecution Agreements (DPAs) come into force in Canada” (19 September 2018), online (blog): *Osler* <www.osler.com/en/blogs/risk/september-2018/deferred-prosecution-agreements-dpas-come-into-force-in-canada>; Patrick FD McCann, “Remediation Agreements: A Rational Process that is in the Public Interest” (19 September 2019), online: *Fasken Newsletter*, <fasken.com/en/knowledge/2019/09/ott-newsletter-remediation-agreements-a-rational-process-that-is-in-the-public-interest>.

18 *Criminal Code*, *supra* note 13, s 715.3(1).

19 See David Cochrane, “Inside SNC-Lavalin’s long lobbying campaign to change the sentencing rules”, *CBC News* (14 February 2019), online: <www.cbc.ca/news/politics/snc-lavalin-trudeau-bribery-fraud-wilson-raybould-1.5020498>; Bill Curry & Tom Cardoso, “SNC-Lavalin Lobbied PMO 19 times since start of 2017 records show”, *The Globe and Mail* (2 October 2019), online: <www.theglobeandmail.com/politics/article-snc-lavalin-had-access-to-governments-top-decision-makers-lobbying/>; Robert Fife & Daniel Leblanc, “Liberals, Conservatives reimburse illegal SNC-Lavalin donations”, *The Globe and Mail* (8 September 2016), online: <www.theglobeandmail.com/news/politics/snc-lavalin-violated-elections-act-with-contributions-to-liberals-tories/article31762290/>.

It meant that a corporate accused, much like a regular person who is charged with a criminal offence, could be offered a deferred prosecution.²⁰ In a deferred prosecution, an accused agrees to plead guilty in exchange for the Crown's agreement to divert them from the criminal justice system into an alternative non-penal remedy. SNC-Lavalin, a major employer in Canada and a donor to the Liberal Party, had successfully lobbied the Government earlier in its mandate for an amendment to the *Criminal Code* which would permit corporations to "reduce the negative consequences of the wrongdoing for persons – employees, customers, pensioners and others – who did not engage in the wrongdoing, while holding responsible those individuals who did engage in that wrongdoing". That language is now reflected in section 715.31(f) of the *Criminal Code* along with five other legislative objectives Parliament attributes to the amendment.²¹

SNC-Lavalin is not only Canada's largest construction company, it is a significant employer in Canada,²² it is also a significant donor to the Liberal

20 *Budget Implementation Act*, *supra* note 16.

21 *Criminal Code*, *supra* note 13, s 715.31(f) is the final of six objectives Parliament attributes to the revisions to provisions treating remediation agreements. Other legislative objectives include the denunciation of an organization's wrongdoing, proportionate accountability for wrongdoing, encouragement of respect for the law, encouragement of voluntary disclosure of wrongdoing and provision for reparations for harm caused.

22 In testimony before the House of Commons Justice Committee in 2019, Trudeau's former principal secretary, Gerald Butts, is reported to have testified that "9,000" Canadian workers employed by the firm in the country "could lose their jobs" in addition to more in the supply chain more broadly "if the company couldn't secure a DPA" as cited by Diana Swain, "An economic reality check on SNC-Lavalin: Are 9,000 jobs really at stake?", *CBC News* (8 March 2019), online: <www.cbc.ca/news/business/snc-lavalin-scandal-economics-jobs-risk-1.5047248>. These claims were uncertain and tough to verify. For a very critical view of the jobs-based argument for DPA see Ian Lee & Philip Cross, "Why Trudeau's excuse that he's protecting SNC-Lavalin 'jobs' is total baloney", *Financial Post* (15 March 2019), online: <financialpost.com/opinion/why-trudeaus-excuse-that-hes-protecting-snc-lavalin-jobs-is-total-baloney>.

Party.²³ Long before this scandal, it had a long established record of illegal donations and improper influence peddling with both of Canada's major political parties.²⁴ After Ms. Wilson-Raybould was sacked she was replaced by David Lametti; the decision by the DPP not to grant a DPA was not interfered with. However, the firm did strike a deal with prosecutors whereby a subsidiary pled guilty to fraud and agreed to pay a CAD \$280,000,000 fine over five years. Which, as Professor Errol Mends puts it, "got [SNC-Lavalin] a DPA by another means".²⁵ For his part, Mr. Trudeau would go on a year later to secure another majority government. Ms. Wilson-Raybould now sits as an independent in Parliament, Ms. Philpott narrowly lost her re-election bid as an independent Member of Parliament and Mr. Wernick is retired. Mr. Butts, a long-time and close personal friend of the Prime Minister, was quietly moved back into the Prime Minister's inner circle after a short period in the wilderness. The scandal and its aftermath speaks to a culture of impunity and lawlessness at the highest levels of the Canadian Government.

The Conflict of Interest and Ethics Commissioner's report into the SNC-Lavalin affair speaks about the rule of law as it applies to the Prime Minister's control of the federal cabinet, particularly in relation to the dual role of the Minister of Justice and Attorney General. The findings of the report strongly criticized Trudeau:

23 See Tim Naumetz, "Liberal raised nearly \$500,000 amid brewing SNC-Lavalin Affair", *iPolitics* (3 April 2019), online: <ipolitics.ca/2019/04/03/liberals-raise-nearly-1-million-amid-brewing-snc-lavalin-affair/>.

24 See Alex Boutilier, "SNC-Lavalin made illegal donations to Liberals, Conservatives from 2004 to 2011", *Toronto Star* (8 September 2016), online: <www.thestar.com/news/canada/2016/09/08/snc-lavalin-broke-laws-in-donations-to-liberals-conservatives.html?rf>.

25 Errol Mendes, "Was the public interest and Canada's legal and moral obligation served in the SNC-Lavalin conviction", *iPolitics* (2 January 2020), online: <ipolitics.ca/2020/01/02/was-the-public-interest-and-canadas-legal-and-moral-obligation-served-in-snc-lavalin-conviction/>. Mendes further notes that the fine is comparatively low to what similar offenders are ordered to pay in the UK and the US.

[t]he evidence showed that SNC-Lavalin had significant financial interests in deferring prosecution. These interests would likely have been furthered had Mr. Trudeau successfully influenced the Attorney General to intervene in the Director of Public Prosecutions' decision. The actions that sought to further these interests were improper since they were contrary to the Shawcross doctrine and the principles of prosecutorial independence and the rule of law. For these reasons, I found that Mr. Trudeau used his position of authority over Ms. Wilson-Raybould to seek to influence, both directly and indirectly, her decision on whether she should overrule the Director of Public Prosecutions' decision not to invite SNC-Lavalin to enter into negotiations towards a remediation agreement.²⁶

The Shawcross doctrine relates to the independence of the Attorney General from cabinet, politics and the decision-making apparatus of the executive, and by extension the administrative arm of the state.²⁷ The doctrine supports the impartial role of the Attorney General as the chief law enforcement officer. At the federal level in Canada, the potential for conflict is significant as the portfolios of Attorney General and Minister of Justice (the latter being a senior cabinet minister responsible for formulating policy) are held by the same individual. The doctrine, named after Sir Hartley Shawcross, was widely debated in the media at the time that the SNC-Lavalin affair unfolded.²⁸ In 1951 Shawcross described, in the British House of Commons, what he believed to be the proper relationship between the Attorney General and the cabinet as one in which he or she may consult with colleagues at their discretion.²⁹

26 *Trudeau II Report*, *supra* note 10 at 2.

27 For a basic definition of the doctrine see John Llewelyn Jones Edwards, *The Attorney General, Politics and the Public Interest* (London: Sweet & Maxwell, 1984) at 360.

28 For a comprehensive and authoritative summary of the media coverage and the underlying legal issues see Richard Devlin & Sarah Frame, "Economic Corruption, Political Machinations and Legal Ethics: Correspondents' Report from Canada" (2019) 22:1/2 Legal Ethics 94.

29 See Kent Roach, "Prosecutors and National Security" (2019) [forthcoming in Ronald Wright, Kay Levine & Russell Gold, eds, *Oxford Handbook on Prosecutors and Prosecutions*] on the definition and historical origins of the

However, the eventual decision to prosecute or not prosecute in a particular criminal case rests with the Attorney General alone. No undue pressure should be placed on him or her by the prime minister or any other member of cabinet.³⁰ In Canada, the independence of the public prosecution function within the Department of Justice is itself institutionally reinforced by its separate administration in the Department of Public Prosecutions.³¹

Canadian courts have previously considered the Shawcross doctrine. The leading cases are *Miazga v Kvello Estate*³² and *Krieger v Law Society of Alberta*.³³ In its 2002 judgment in *Krieger*, the Supreme Court of Canada held that “[i]t is a constitutional principle that the Attorneys General of this country must act independently of partisan concerns when exercising their delegated sovereign authority to initiate, continue or terminate prosecutions”.³⁴ The Court further held:

[t]he gravity of the power to bring, manage and terminate prosecutions which lies at the heart of the Attorney General’s role has given rise to an expectation that he or she will be in this respect fully independent from the political pressures of the government. In the U.K., this concern has resulted in the long tradition that the Attorney General not sit as a member of Cabinet. Unlike the

Shawcross Principle and of its particular iteration in Canada: “[t]he Shawcross Principle articulated in 1951 is a constitutional convention that while the Attorney General (AG) may consult Cabinet colleagues about the policy implications of prosecutorial decisions, he or she is not to be directed or pressured on such decisions by the Cabinet and that the decision should be made by the AG alone. ... The leading Canadian articulation of this principle remains federal Attorney General Ron Basford’s statement that prosecutorial decisions should not be made on the basis of ‘narrow, partisan views, or based upon the political consequences to me or to others; but that the AG is entitled ‘to seek information and advice from others’ while not being ‘directed by his colleagues in the government or by Parliament itself’” [citation omitted].

30 See *ibid.*

31 See *Director of Public Prosecutions Act*, RSC 2006, c 9, s 121.

32 2009 SCC 51 [*Miazga*].

33 2002 SCC 65 [*Krieger*].

34 *Ibid* at para 3.

U.K., cabinet membership prevails in this country. However, the concern remains the same, and is amplified by the fact that the Attorney General is not only a member of cabinet but also Minister of Justice, and in that the role holds a position with partisan political aspects. Membership in Cabinet makes the principle of independence in prosecutorial functions perhaps even more important in this country than in the U.K. ... It is a constitutional principle in this country that the Attorney General must act independently of partisan concerns when supervising prosecutorial decisions.³⁵

Several years later in *Miazga*, the court affirmed *Krieger* for the proposition that prosecutorial discretion was at the heart of Crown independence, which meant that “decisions taken by a Crown attorney pursuant to his or her prosecutorial discretion are generally immune from judicial review under principles of public law, subject only to the strict application of the doctrine of abuse of process”.³⁶ It also observed that “[t]he independence of the Attorney General is so fundamental to the integrity and efficiency of the criminal justice system that it is constitutionally entrenched. The principle of independence requires that the Attorney General act independently of political pressures from the government”.³⁷

It is important to contextualize these cases. Neither was about the dual role of Attorney General and Minister of Justice. *Miazga* was a civil case arising from a suit for malicious prosecution. *Krieger* involved questions relating to the role of a lawyer acting as a provincial Crown attorney, specifically as to the application of law society rules that required such lawyers to provide timely disclosure of evidence to the accused. The decision in *Krieger* turned on the question of whether the law society had interfered with prosecutorial discretion through its regulation of the legal profession. Despite their different contexts, these cases set the stage for prosecutorial independence and discretion in Canada.

35 *Ibid* at paras 29–30 [footnotes omitted].

36 *Miazga*, *supra* note 32 at para 6.

37 *Ibid* at para 46.

Aside from its role in supplying the Attorney General with independence to promote impartial decision-making, the Shawcross doctrine is also related to the interface of law and politics within the broader concept of the rule of law. The doctrine goes further than protecting prosecutorial independence at the level of Crown attorneys as it relates to the conduct of the Attorney General. While it permits an Attorney General to take the public interest into account in exercising prosecutorial discretion, it prohibits political interference in the exercise of this discretion.

In the SNC-Lavalin affair, the Conflict of Interest and Ethics Commissioner concluded that the Prime Minister's involvement in deferring the prosecution of SNC-Lavalin was contrary not only to the Shawcross doctrine, but also to the principles of prosecutorial independence and the rule of law.

Following this report, the government asked former Deputy Prime Minister and Minister of Justice Anne McLellan to review the roles of the Attorney General and Minister of Justice and Attorney General of Canada. Her review, released in June 2019, concluded that no separation of these roles were required or desirable from a rule of law perspective.³⁸ In her report, McLellan concluded that:

[t]he structure we have balances the independence of the Attorney General with political accountability. It safeguards against interference in prosecutorial decisions by placing prosecutions in the hands of an appointed, tenured public official. It requires that on the rare occasions when an Attorney General decides to exercise their authority to intervene, it will be transparent. ... As I heard repeatedly in our consultations and literature review, any structure can be vulnerable to improper interference and decision-making based on impermissible considerations. ... Upholding the rule of law cannot be the responsibility of only one person. It is the responsibility of the Prime Minister, Cabinet, all parliamentarians, appointed officials, the Clerk of the Privy Council, the public service, and the judiciary. No matter what structure is in place, a democracy can only thrive if there is a commitment on the part of all

³⁸ Perhaps this conclusion is unsurprising coming from a former Liberal Attorney General and Minister of Justice rather than an independent outsider.

who govern it to the rule of law. It is my hope that the recommendations I have made will reflect and support that commitment.³⁹

McLellan's unwillingness to upset the status quo in the face of what appears to be a fairly obvious case for reform was poorly received in the media.⁴⁰

It is also worth considering the conflict of interest question in relation to the SNC-Lavalin matter. Section 9 of the *Conflict of Interest Act*⁴¹ provides:

- 9 [n]o public office holder shall use his or her position as a public office holder to seek to influence a decision of another person so as to further the public office holder's private interests or those of the public office holder's relatives or friends or to improperly further another person's private interests.⁴²

In this case, the relevant public office holder is Trudeau in relation to the furtherance of a private interest, namely that of SNC-Lavalin. SNC-Lavalin is a major employer in Trudeau's home province and city and was also a donor to the governing Liberal Party. In this sense, the conflict of interest is between the public interest in prosecutorial independence and the perceived political and electoral interests of the Prime Minister, his political party and the government.⁴³ The scandal threatened to undermine Trudeau's "sunny ways"

39 Canada, Office of the Prime Minister of Canada, *Review of the Roles of the Minister of Justice and Attorney General of Canada* by The Honourable A Anne McLellan (28 June 2019) at 44–45.

40 See Anne Kingston, "Anne McLellan's appointment: one more bumbling bid to bury the SNC-Lavalin affair", *MacLean's* (22 March 2019), online: <www.macleans.ca/politics/ottawa/anne-mclellans-appointment-one-more-bumbling-bid-to-bury-snc-lavalin/>.

41 *Conflict of Interest Act*, *supra* note 8, s 9.

42 *Ibid.*

43 See Charlie Smith, "Where does Trudeau's SNC-Lavalin scandal go from here?", *The Georgia Straight* (28 February 2019), online: <www.straight.com/news/1207256/where-does-trudeaus-snc-lavalin-scandal-go-here>; *contra*, Jonathan Malloy, "Is the SNC-Lavalin controversy truly a scandal?" (24 February 2019), online: *The Conversation* <theconversation.com/is-the-snc-lavalin-controversy-truly-a-scandal-112208>.

anti-corruption and transparency image that initially brought him to power in 2015.⁴⁴

What is clear in even the thinnest conception of the rule of law is that the political interests of the governing party and its leader are not to take priority over the public or national interest. Even where there is no direct personal enrichment, a political advantage has value and can suffice as an interest leading to a conflict. Insofar as Trudeau, as both party leader and head of government, sought to intervene in the exercise of prosecutorial discretion by the Department of Public Prosecution under the auspices of the Attorney General, the Conflict of Interest and Ethics Commissioner observed: “I find that Mr. Trudeau used his position of authority over Ms. Wilson-Raybould to seek to influence her decision on whether she should overrule the DPP decision not to invite SNC-Lavalin to enter into negotiations towards a remediation agreement”.⁴⁵ Arguably, a country that takes the rule of law seriously might have required Trudeau to resign in these circumstances. However, it appears that Canadians may not have appreciated the significance of the Conflict of Interest and Ethics Commissioner’s findings, at least not sufficiently to stop them from returning the Prime Minister and his Liberal Party to power in 2019, albeit in a chastened minority. Although the party went from a large majority of 184 seats in 2015

44 David Moscrop, “Trudeau’s ‘sunny ways’ were doomed to meet their SNC-Lavalin. Because this is Canada” (5 March 2019), online: *MacLean’s* <www.macleans.ca/politics/trudeaus-sunny-ways-were-doomed-to-meet-their-snc-lavalin-because-this-is-canada/>; Kai Nagata, “The Disturbing Double Meaning of Trudeau’s ‘Sunny Ways’” (29 November 2017), online: *The Narwhal* <www.thenarwhal.ca/disturbing-double-meaning-trudeau-s-sunny-ways/>.

45 Martin Patriquin, “SNC-Lavalin affair evokes ‘humiliation’ of sponsorship scandal in Quebec” (8 February 2019), online: *iPolitics* <www.ipolitics.ca/2019/02/08/snc-lavalin-affair-evokes-humiliation-of-sponsorship-scandal-in-quebec/>; Charlie Pinkerton, “Trudeau tried to influence Wilson-Raybould on SNC-Lavalin, broke conflict-of-interest code: Ethics Commissioner” (14 August 2019), online: *iPolitics* <www.ipolitics.ca/2019/02/08/snc-lavalin-affair-evokes-humiliation-of-sponsorship-scandal-in-quebec/>.

down to minority of 157 seats in 2019, it is truly not clear to what extent the SNC-Lavalin affair can be said to have motivated voters. However, popular political polling suggested the scandal was a factor during the campaign.⁴⁶

Although the narrative expressed in the media understood the situation as relating to a conflict of interest, it was not always clear how the conflict related to the rule of law. For Liberal Party supporters who were either employees of SNC-Lavalin or sympathetic to the jobs-first message communicated by Trudeau in his defence, the conduct at issue may have seemed acceptable and even correct. For others who prioritized the rule of law, Trudeau's actions were disconcerting as it suggested that the Prime Minister was willing to cross ethical lines repeatedly.

The question of a conflict of interest is an ethical problem as much as it is a rule of law one. Indeed, it is hard to understand the rule of law in the absence of a corresponding ethos of public life. In this case, the Prime Minister acted in his public capacity to pursue his own electoral interests over the professional advice of independent prosecutors. This action crossed a crucial ethical boundary between a political act and the apolitical and impartial act of proceeding with a criminal prosecution. Is this significantly different from when US President Donald Trump intervened with federal Department of Justice prosecutors in the sentencing recommendations of his convicted associate Roger Stone?⁴⁷ This comparison may not be welcome for centrist Canadians who

46 See David Colletto & Bruce Anderson, "Has the SNC-Lavalin/Wilson-Raybould Controversy Impacted Public Opinion?" (6 March 2019), online: *Abacus Data* <abacustransdata.ca/has-the-snc-lavalin-wilson-raybould-controversy-impacted-public-opinion/>.

47 Article II, §2 of the US Constitution of course grants the President the legal power "to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment". However that does not end the matter, US courts have not yet been tested in the face of claim taken against someone who received a Presidential pardon given for a corrupt intent or colourable purpose designed to undermine the rule of law. On the Stone pardon specifically, see Harold Hongju Koh et al, "Is the Pardon Power Unlimited?" (28 February 2020), online: *Just Security* <www.justsecurity.org/68900/is-the-pardon-power-unlimited/>. Hongju Koh et al argue that if Trump was re-elected an abuse of

support Trudeau's government and imagine Canada to be everything that Trump's America is not. However, the tendencies for the rule of law to be flouted in the context of conflict of interest are shared by both countries. The rule of law is violated in the same way in both situations through interference with the prosecutorial independence of the Attorney General and the Department of Justice. In the US, this kind of interference has become an acute and continuing problem during the course of the Trump administration.⁴⁸ However, its features are not foreign to the Canadian government. When the executive intervenes in the criminal justice system for political purposes in the absence of a sound legal basis, the rule of law will be undermined unless the violation is recognized and remedied. This is particularly problematic in a country like Canada, the US and the UK where the office of the Attorney General and the Department of Justice is overseen by a member of the cabinet bound by party loyalty to the government and its leader. Structurally speaking, and as a question of institutional design, federal prosecutors in the US or Crown prosecutors in Canada and the UK are not appointed by courts, but rather by federal departments of justice. Federal prosecutors are ultimately answerable to the Attorney General. It is therefore hardly surprising that prosecutorial discretion can give rise to rule of law challenges.

the pardon power could become the basis for renewed obstruction of justice articles of impeachment in a second term and after his defeat a potential basis for criminal charges of obstruction of justice in both state and federal courts.

The authors cite Alexander Hamilton's *Federalist 74* for the proposition that the exercise of the pardon power would be guided by "humanity and good policy", "scrupulousness and caution", even "dread of being accused of weakness or contrivance".

48 See Center for Ethics and the Rule of Law, University of Pennsylvania, Ad Hoc Working Group in Participation with Citizens for Responsibility and Ethics in Washington (CREW), "Report on the Department of Justice and the Rule of Law Under the Tenure of the Attorney General William Barr" (12 October 2020), online (pdf): <www.law.upenn.edu/live/files/10900-report-on-the-doj-and-the-rule-of-law>. See e.g. at 9–10 where the Working Group "concluded that there had been extensive political and politically-motivated interference in individual prosecutions by the White House and Attorney General – particularly in the cases of Michael Flynn and Roger Stone".

2. The Provincial Routinization of the Notwithstanding Clause

Canada's *Charter of Rights and Freedoms*⁴⁹ (the "Charter") includes a derogation provision. Section 33 stipulates: "[p]arliament or legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7–15 of the *Charter*".⁵⁰ This provision provides a mechanism by which Parliament can override some of the most foundational civil and political liberties guaranteed by the Constitution of Canada. This provision represents the greatest weakness in the Canadian imagining of the rule of law. Professor Robert Leckey describes it as the "the nuclear weapon" of legislative options.⁵¹

For most of the *Charter's* history, governments tended to avoid invoking section 33 to take away rights.⁵² However, over the past two years populist premiers in Canada's two most populous provinces have sought to bring section 33 into play as a way of circumventing the *Charter* scrutiny of illiberal laws. This is an alarming development for routine politics in the provinces.

Quebec's controversial secularism law, championed by Premier François Legault, prohibits the wearing of religious symbols or outward signs of religious

49 Canadian *Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].

50 *Ibid*, s 33.

51 Daniel Leblanc & Ingrid Peritz, "Quebec to invoke notwithstanding clause to prevent Charter challenges of religious-symbols ban", *The Globe and Mail* (28 March 2019), online: <www.theglobeandmail.com/canada/article-quebec-to-invoke-notwithstanding-clause-to-prevent-charter-challenges/>.

52 See Richard Mailey, "The Notwithstanding Clause and the New Populism" (2019) 28:4 Constitutional Forum 9 discussing the end of the "notwithstanding taboo" and attributing the phrase to Richard McAdam at 13, n 41. Earlier, at 11, n 23, Mailey attributes the insight to Richard Albert along with McAdam that "the strength of the political convention that quickly developed against invocations of s. 33" were responsible for the growth of judicial review and increasingly powerful judiciary in post-*Charter* Canada.

observance by those working in public facing jobs for the provincial government.⁵³ The law has the effect of precluding police, lawyers, teachers and others working for the state from wearing the Muslim hijab, the Sikh turban, the Jewish kippah and other religious symbols. So brazen is the law's non-compliance with the *Charter* that the legislation invokes the notwithstanding clause to exempt it from compliance with the *Charter* protections of free expression, religious freedom and equality.

Quebec governments have invoked section 33 over the years, but the last time it created a storm of controversy was in 1988, when Premier Robert Bourassa used the measure to adopt a restrictive language law.⁵⁴ This was a part of Quebec's dissent from the process of constitutional patriation from the United Kingdom in 1982. The essence of Quebec's objection to patriation was that it did not have a veto in constitutional amendment and could not protect minority language education rights to its satisfaction.⁵⁵

In addition to Quebec, Ontario Premier Doug Ford threatened to use the notwithstanding clause following his election in 2018.⁵⁶ The threat was made in response to the Ontario Superior Court of Justice's ruling in the *City of Toronto v Ontario (Attorney General)*.⁵⁷ Ford's response triggered a political and

53 See Bill 21, *An Act Respecting the Laicity of the State*, 1st Sess, 42nd Leg, Quebec, 2019 (assented to 16 June 2019), SQ 2019, c 12.

54 See *Attorney General of Quebec v Quebec Association Protestant School Boards et al.*, (1984) 2 SCR 66 (province's restriction on admissions to English schools); *Ford v Quebec*, (1988) 2 SCR 712 (Bourassa Government's prohibition on English commercial signage).

55 See Roy Romanow, John Whyte & Howard Leeson, *Canada...Notwithstanding*, revised ed (Toronto: Carswell, 2007) at 264 ("In the last hours of the November conference everyone acknowledged that no proposal on minority language education rights and an amending formula would be acceptable to both to Ottawa and Quebec City").

56 See Jeffrey B Meyers, "First Ontario, now Quebec: The notwithstanding threat" (10 October 2018), online: *The Conversation* <www.theconversation.com/first-ontario-now-quebec-the-notwithstanding-threat-104379>.

57 2018 ONSC 5151 [*City of Toronto*].

legal crisis. The case involved *Charter* scrutiny of a hastily enacted law, the *Better Local Government Act*, referred to as Bill 5.⁵⁸ The Court held the law to be unconstitutional. Bill 5 sought to redraw the Toronto City Council by “reducing the number of City wards and councillors from 47 to 25 and *de facto* doubling the ward populations from an average of 61,000 to 111,000”.⁵⁹ Justice Belobaba found that key provisions of Bill 5 ran afoul of *Charter* section 2(b) that guarantees the rights of municipal voters and candidates to “freedom of thought, belief, opinion and expression”.⁶⁰ The court also held that these violations could not be justified under section 1 of the *Charter* that guarantees rights “subject to ‘such reasonable limits … as can be demonstrably justified in a free and democratic society’”.⁶¹

In refusing to accept the Court’s ruling, Ford threatened to invoke section 33 of the *Charter*.⁶² In rushing the new legislation through, the government did

58 Bill 5, *An Act to amend the City of Toronto Act, 2006, The Municipal Act, 2001 and the Municipal Elections Act, 1996*, 1st Sess, 42nd Leg, Ontario, 2018 (assented to 14 August 2018) SO 2018, c 11 [Bill 5].

59 *City of Toronto*, *supra* note 57 at para 4.

60 *Ibid* at para 22.

61 *Ibid* at para 62. The injury to section 2(b) rights would be to the capacity of council candidates to effectively get their message out and campaign a changed electorate and redrawn electoral map on eve of an election. Justice Belobaba expressed doubt on the likelihood of success of other constitutional grounds including section 2(d) freedom of association and section 15(1) equality rights but does not foreclose on the possibility at para 13. In my opinion, a strong case could be made, on the basic principle of the rule of law as articulated in the seminal pre-*Charter* case of *Roncarelli v Duplessis*, [1959] SCR 121, which contains certain factual parallels.

62 Although he failed to formally invoke the notwithstanding clause in the proposed legislation, his public comments suggest that was his next move. The backlash was swift. Professor Lorraine Weinrib argued that the notwithstanding clause is governed by basic principles of the rule of law and cannot be abused in this way, see Lorraine Weinrib “Doug Ford can’t apply the notwithstanding clause retroactively to impede democracy” (18 September 2018), online (blog): *The University of Toronto Faculty of Law*

not make clear its intent to override *Charter* rights in the text of the original legislation reviewed by Justice Belobaba. Although this error is not necessarily a fatal defect, it demonstrates the knee-jerk response of the government to the adverse ruling. Importantly, the purpose of Bill 5 was to change the boundaries of wards and effectively nullify the forthcoming municipal election.⁶³ This legislation was a far cry from the type of nationalist politics that characterized disputes between Quebec and the federal government around language rights and the constitutional division of power. By contrast, Ford's response appears to be a crude attempt at after-the-fact gerrymandering and payback for past political grievances.⁶⁴ Comparisons can again be made to the Trump administration in the US.

Perhaps the reason that section 33 has not been used in a routine way to undermine the *Charter* is related to the constitutional design. Section 1 of the *Charter* has provided an outlet for a nuanced balancing act between competing rights. The analysis is informed by the approach of the Supreme Court of Canada in *R v Oakes*.⁶⁵ Although reasonable people disagree on where to draw the line, including judges of the Supreme Court of Canada, the section 1 jurisprudence permits careful weighing of evidence and emphasizes proportionality of harms and benefits. Section 33, by contrast, circumvents this

<www.law.utoronto.ca/blog/faculty/doug-ford-can-t-apply-notwithstanding-clause-retroactively-impede-democracy>.

63 See Jeffrey B Meyers, “Ford’s fight with Toronto shows legal vulnerability for cities” (21 September 2018), online: *The Conversation*

<theconversation.com/fords-fight-with-toronto-shows-legal-vulnerability-of-cities-103134>.

64 See Samuel E Trosow, “Fighting Doug Ford’s threat to shrink Toronto city council” (30 July 2019), online: *The Conversation*

<theconversation.com/fighting-doug-fords-threat-to-shrink-toronto-city-council-100798> (citing the comments of Professor Roger Keil to the *Toronto Star* as “gerrymandering”); Edward Keenan, “Doug Ford’s attack on Toronto’s city council is a declaration of war” (27 July 2018), online: *Toronto Star* <www.thestar.com/opinion/star-columnists/2018/07/27/fords-move-to-slash-toronto-council-without-consultation-an-undemocratic-move.html>.

65 [1986] 1 SCR 103.

process. While the section was seen to be a form of preserving parliamentary sovereignty under a bill of rights, it offers legislatures a method to avoid judicial review and the rule of law in respect of some *Charter* rights.

Section 33 is a potentially fatal defect to many of the fundamental constitutional rights in Canada. With some notable exceptions, this defect has been latent.⁶⁶ But, recent events discussed above reveal that section 33 can become a quick, easy and unprincipled escape route for a provincial government (and conceivably a future federal government) that seeks to reject a court ruling before appealing the decision to a higher court.⁶⁷ Ford's message, not unlike President Trump's, is clear: the courts are not elected, I am. In this sense, the Ontario government shares parallels with the Trump administration.

The 2018 crisis in Ontario was ultimately averted when the Court of Appeal upheld the Ontario government's application for a stay of the original decision.⁶⁸ But this result should not provide us with false comfort. The fact remains that provincial premiers, including those in Canada's two largest provinces, have

66 See David Halton, "Constitutional shortcomings weaken the Charter" (5 November 1981), online (video): *CBC Archives* <[>](http://www.cbc.ca/player/play/1811846060).

67 Ford could have appealed the ruling to the Ontario Court of Appeal and Supreme Court of Canada, but he did not. He instead declared that the decision was illegitimate because he, unlike Justice Belobaba, is elected. The *Toronto Star*, which Ford is known to oppose quoted the Premier's reaction: "I was elected. The judge was appointed. He was appointed by one person, (former Liberal Premier) Dalton McGuinty". Jennifer Pagliaro & Robert Benzie, "Ford plans to invoke notwithstanding clause for first time in province's history and will call back the legislature on Bill 5", *Toronto Star* (12 September 2018), online: <www.thestar.com/news/toronto-election/2018/09/10/superior-court-judge-strikes-down-legislation-cutting-the-size-of-toronto-city-council.html>. As any first-year law student will know, this is impossible because superior court judges are federally appointed. In fact, as noted in the article, Justice Belobaba was appointed by former Prime Minister Paul Martin.

68 See Nick Westoll & David Shum, "Ontario's appeal court sides with Ford government, paves way for 25-ward Toronto election", *Global News* (19 September 2018), online: <www.globalnews.ca/news/4464728/appeal-court-stay-toronto-city-council/>.

shown a recent willingness to invoke the notwithstanding clause as a matter of routine politics. Similarly, Trudeau has been found to be in a conflict of interest on multiple occasions in which his own personal and political interests have influenced government decisions.

Ultimately, whether a provincial government backs down or follows through on threatened use of the notwithstanding clause, the effect on the political culture is to loosen the convention against its non-usage while threatening the substantive values associated with the rule of law. The same can be said of the federal government headed by a prime minister who repeatedly breaches the *Conflict of Interest Act* without lasting consequences.

The invocation of section 33 of the *Charter* cannot itself be interpreted as an attack on the rule of law as it is perfectly legal under the *Charter*. At the same time, however, its existence creates an invitation to go beyond the balancing and proportionality of section 1 to circumvent the rule of law: a deeply flawed structural aporia. Indeed, during the debate following Ford's threat to use the provision, former Prime Minister Stephen Harper's Director of Communications, Rachel Curran, stated on television: “[w]ho are we actually governed by? ... Are we governed by our elected representatives or a small cabal of largely left-leaning judges?”.⁶⁹ This comment might as easily have been heard on Fox News in the US debate over the latest circuit court ruling on Obamacare. The tension between the idea of a democratic mandate and the rule of law is obvious in both countries. Unsurprisingly, Legault described section 33 as a “legitimate [legislative] tool” and one that was necessary for respecting “what the vast majority of Quebecers want”.⁷⁰ Of particular note is the way in which the democratic majoritarian ethos is presented in opposition to the rule of law. This

69 Brennan MacDonald & Vassy Kapelos, “He did the right thing’: Former premiers back Doug Ford’s use of the notwithstanding clause”, *CBC News* (13 September 2018), online: <www.cbc.ca/news/politics/powerandpolitics/former-premiers-doug-ford-notwithstanding-clause-1.4823066>.

70 Morgan Lowrie, “Legault defends Quebec’s religious-symbols bill, calls notwithstanding clause ‘legitimate tool’”, *The Globe and Mail* (31 March 2019), online: <www.theglobeandmail.com/canada/article-legault-defends-quebecs-religious-symbols-bill-calls-notwithstanding/>.

is a key theme in conflict of interest situations like the SNC-Lavalin affair and the high-profile usage of the notwithstanding clause in provincial politics.

In Canada, as in the US and the UK, positive law does not always ensure an appropriate sanction to a breach of the rule of law. Conventions are even less reliable. In Canada, by virtue of section 33, the exception to the rule of law is provided by the Constitution itself. That said, the problem of conflict of interest, particularly as it relates to the exercise of power by the executive is usually at the core of any crisis.

B. The United States

The US President's continued capacity to hold power is framed in terms of the rule of law. This point was not lost on Adam Schiff, Chairman of the House Permanent Select Committee on Intelligence. The Committee's *Trump-Ukraine Impeachment Inquiry Report* not only invoked the language of American exceptionalism but also the language of an imagined global striving toward the rule of law which America had, at least in an aspirational sense, come to represent. According to the report:

[f]rom their homes and their jail cells, from their public squares and their refugee camps, from their waking hours until their last breath, individuals fighting human rights abuses, journalists uncovering and exposing corruption, persecuted minorities struggling to survive and preserve their faith, and countless others around the globe just hoping for a better life look to America. What we do will determine what they see, and whether America remains a nation committed to the rule of law ... As Benjamin Franklin departed the Constitutional Convention, he was asked, 'what have we got? A Republic or a Monarchy?' He responded simply: 'A Republic, if you can keep it'.⁷¹

This quote attributed to Benjamin Franklin resonated in the moment of Schiff's address to the Senate, the American people and the world because it spoke to the idea that the rule of law lies in the hands of every generation to safeguard

71 US, House of Representatives Permanent Selection Committee on Intelligence, *The Trump-Ukraine Impeachment Inquiry Report* (HR 660) (December 2019).

anew and to the importance of the Trump impeachment trial in America's 240-year experiment with republican democracy. Although the Senate ultimately acquitted President Trump, the evidence was overwhelmingly against him and, much of it, free for the entire world to see. In a sense Schiff's opening statement can now be read as an epitaph to the rule of law in contemporary America.

Several months earlier, Robert Mueller had begun digging the grave.⁷² In its cryptic conclusion, the *Mueller Report* punted the decision on whether Trump obstructed justice to the congressional impeachment mechanism, and refused to weigh in decisively:

[b]ecause we determined not to make a traditional prosecutorial judgment, we did not draw ultimate conclusions about the President's conduct. The evidence we obtained about the President's actions and intent presents difficult issues that would need to be resolved if we were making a traditional prosecutorial judgment. At the same time, if we had confidence after a thorough investigation of the facts that the President clearly did not commit obstruction of justice, we would so state. Based on the facts and the applicable legal standards, we are unable to reach that judgment. Accordingly, while this report does not conclude that the President committed a crime, it also does not exonerate him.⁷³

Mueller, a career prosecutor and consummate lawyer, painfully constrained his language, seeking to avoid falling afoul of Justice Department policy prohibiting the indictment of a sitting President.⁷⁴ At the same time, Mueller signalled to Congress that the President's conduct raised a fundamental question of the rule of law insofar as it related to the law-bound character of executive power.

When Schiff recounts the story of Benjamin Franklin at the opening of America's national mythology, however, he signals just how deep the crisis has

⁷² See US, Department of Justice, *Report On The Investigation Into Russian Interference In The 2016 Presidential Election* (Washington, 2019) [*Mueller Report*].

⁷³ *Ibid* at 182.

⁷⁴ See US, Office of Legal Counsel, *A Siting President's Amenability to Indictment and Criminal Prosecution* (Department of Justice, 2000).

gone. Well before Trump fired James Comey, triggering the Mueller investigation, or requested what obviously appeared to be a quid pro quo from the President of the Ukraine, he was already flouting the rule of law. A series of lawsuits beginning early in his presidency by a group called Citizens for Responsibility and Ethics in Washington (“CREW”) identified the enormity of the new administration’s violation of the plain language of the Constitution on the very first day of Trump’s presidency. Trump had refused, unlike any modern President before him, to divest himself of his considerable business interests prior to taking the oath of office.

The CREW lawsuits made the novel argument that Trump was in violation of both the Foreign and Domestic Emoluments Clauses. Article 1, section 9, clause 8 of the *US Constitution*, the Foreign Emoluments Clause, prohibits a President taking payments, gifts or favors from a foreign power.⁷⁵ Article 2, section 1, clause 7, the Domestic Emoluments Clause of the *US Constitution*, stipulates the President’s remuneration while in office and states that it shall not be varied during his term. The President “shall not receive within that Period any other Emolument from the United States, or any of them”.⁷⁶ The understanding which CREW reasonably urged upon the courts was that the President could not receive any payments, gifts or favors, directly or indirectly, beyond the terms of compensation set by the *Constitution*. This would include his own government, a state government or their booking of accommodations or a convention at a Trump owned hotel rather than at another business. The Foreign Emoluments Clause is aimed at preventing foreign governments from influencing a sitting president with gifts, payments or bribes directly or indirectly. This would include a foreign government purchasing Trump owned products or services in lieu of a competitor for the purpose of ingratiating themselves to the President.

The Founding Fathers included the Foreign Emoluments Clause to guarantee that any “[p]erson holding any Office of Profit or Trust” could not be

75 US Const, art I, § 9, cl 8 [the Foreign Emoluments Clause].

76 *Ibid*, art II, § 1, cl 7 [the Domestic Emoluments Clause].

corrupted by accepting “any present, Emolument, Office or Title, of any kind whatever, from any King, Prince, or foreign State”.⁷⁷ This principle was implanted in US legal and constitutional culture from the time of the revolution. It constituted a sharp break with the still feudal practices that prevailed in England at the time. Frank Bowman contrasts what he describes as the “constitutional compensation” model for officials from a practice that was “long prevalent in Great Britain in which officials were paid, not with regular salaries, but by grants of land, commercial monopolies, or right to streams of revenue from taxes, fees, or the Church”.⁷⁸ Instead in the US:

the obvious point of the foreign emolument clause [w]as to insulate all American officeholders from the temptation to betray their country to another nation. The dual purpose of the special bar on domestic presidential emoluments was first, to prevent congressional factions or executive departments from buying the president’s special affection, and, second, to ensure that the president was not bribed by states into favoring one state or region over the interests of the nation.⁷⁹

The question of emoluments illustrates that a departure from the rule of law started on the first day of Trump’s presidency. Based on the established practice of all modern presidents, it was clear that President-elect Trump had an obligation to disclose his assets, tax returns and divest himself of his ongoing financial interests in a blind trust. When the litigation was advanced against Trump, Bowman described the emoluments clauses as having “been excavated from desuetude by the presidency of Donald Trump”.⁸⁰ The idea that the Foreign Emoluments Clause might have fallen into desuetude but for Trump’s presidency suggests that convention or established practice was not sufficient to safeguard the rule of law. It also highlights a tendency in American legal and

⁷⁷ Foreign Emoluments Clause, *supra* note 75.

⁷⁸ Frank O Bowman III, *High Crimes and Misdemeanors: A History of Impeachment for the Age of Trump* (Cambridge: Cambridge University Press, 2019) at 279.

⁷⁹ *Ibid.*

⁸⁰ *Ibid* at 280.

constitutional culture to rely on terms like emoluments that are no longer in contemporary usage or relevance.

The Federalist Papers remain a key authority in American constitutional jurisprudence, especially at moments of constitutional crisis or a breakdown in the rule of law (which may overlap).⁸¹ They discuss several meanings for the term “emoluments”. It is clear that both Hamilton and Madison had a strong sense of what constituted a conflict of interest and self-dealing. They also expressed views on which emoluments properly flowed to a public office holder and which did not. In “Federalist No. 1”, Hamilton writes that the term is “among the most formidable of the obstacles which the new Constitution will have to encounter may readily be distinguished the obvious interest of a certain class of men of every State to resist all changes which may hazard a diminution of the power, emolument, and consequence of the offices they hold ...”.⁸² In this usage, an emolument is a benefit conferred on the basis of the public office held or an enrichment arrived at by virtue of holding that office. Similarly, in “Federalist No. 36”, Hamilton writes about the state power of taxation, which he fears will allow states to gain influence as against the federal government “by an accumulation of their [citizens] emoluments”.⁸³ Emoluments would therefore include payment, monies or salaries flowing from an office, and possibly tax revenues flowing to the government.

In “Federalist No. 51”, which focuses on checks and balances among the different branches of government, Madison writes that the “... member of each department should be as little dependent as possible on those of others for the

81 See *Reference re Secession of Quebec*, [1998] 2 SCR 217 in which the Supreme Court of Canada treats the rule of law and constitutionalism interchangeably alongside federalism, democracy and multiculturalism as unwritten norms which underpin the Canadian legal system and are inherent to the constitutionalism itself.

82 Alexander Hamilton, “Federalist No. 1” in Clinton Rossiter, ed, *The Federalist Papers* (New York: New American Library, 1961) at 28.

83 Alexander Hamilton, “Federalist No. 36” in Clinton Rossiter, ed, *The Federalist Papers* (New York: New American Library, 1961) at 218.

emoluments annexed to their offices”.⁸⁴ Similarly, in “Federalist No. 55” he writes: “[t]heir [Congressmen] emoluments of office, is to be presumed, will not, and without a previous corruption of the House of Representatives cannot, more than suffice for very different purposes; their private fortunes, as they must all be American citizens, cannot possibly be sources of danger”.⁸⁵ He further writes that “members of the Congress are rendered ineligible to any civil offices that may be created, or of which the emoluments may be increased, during the term of their election”.⁸⁶ Here again, Madison uses the term emolument to mean benefits arising from public office.

In “Federalist No. 59”, Hamilton writes how Congress might regulate the election of its own members: “[t]he scheme of separate confederacies, which will always multiply the chances of ambition, will be a never failing bait to all such influential characters in the State administrations as are capable of preferring their own emolument and advancement to the public weal”.⁸⁷ The idea of an emolument flowing to a public official cuts against the grain of the preference for the common weal rather than the personal, political or economic gain of the officeholder. Enrichment need not be understood purely in terms of private financial or pecuniary interests as the emoluments of office might include indirect benefits relating to political status and influence.

In “Federalist No. 65”, Hamilton writes of a President who has been impeached by the House of Representatives and convicted by the Senate: “[a]fter having been sentenced to perpetual ostracism from the esteem and confidence, and honors and emoluments of his country, he will still be liable to prosecution

⁸⁴ James Madison, “Federalist No. 51” in Clinton Rossiter, ed, *The Federalist Papers* (New York: New American Library, 1961) at 318.

⁸⁵ James Madison, “Federalist No. 55” in Clinton Rossiter, ed, *The Federalist Papers* (New York: New American Library, 1961) at 342.

⁸⁶ *Ibid* at 343.

⁸⁷ Alexander Hamilton, “Federalist No. 59” in Clinton Rossiter, ed, *The Federalist Papers*, (New York: New American Library, 1961) at 364.

and punishment in the ordinary course of law".⁸⁸ In other words, once convicted by the legislative branch of a political crime, it will be up to the judicial branch to determine guilt if the president is criminally charged. Hamilton speaks of "perpetual ostracism from the esteem and confidence and honors and emoluments of his country".⁸⁹ Thus, it is understood that emoluments in this context are awards that come properly from holding a public office. The idea is that a president cannot receive foreign emoluments while he is president or cannot be similarly induced into real or apparent conflicts of interest. The link between a conflict of interest and emoluments is central to the Hamiltonian conception of American democracy.

"Federalist No. 72" speaks to the risk that would ensue if "every new President" were to "promote a change of men to fill the subordinate stations; and these causes together could not fail to occasion a disgraces and ruinous mutability in the administration of the government".⁹⁰ Speaking of the remuneration of the chief magistrate in "Federalist No. 73", Hamilton warns against having his remuneration based on the partisan preferences of Congress: "[t]he legislature, with a discretionary power over the salary and emoluments of the Chief Magistrate, could render him as obsequious to their will as they might think proper to make him".⁹¹ Again, the term emolument is used alongside salary to signal the conferral of benefits, honours and other forms of benefit which properly flow to the office rather than the specific person occupying it.

"Federalist No. 72" further speaks to the context of corruption by state officials including presidents and chief magistrates alike. The point for Hamilton is that prohibitions on the taking of emoluments are designed to prevent "an avaricious man, who might happen to fill the office, looking forward

88 Alexander Hamilton, "Federalist No. 65" in Clinton Rossiter, ed, *The Federalist Papers* (New York: New American Library, 1961) at 397.

89 *Ibid.*

90 Alexander Hamilton, "Federalist No. 72" in Clinton Rossiter, ed, *The Federalist Papers* (New York: New American Library, 1961) at 435.

91 Alexander Hamilton, "Federalist No. 73" in Clinton Rossiter, ed, *The Federalist Papers* (New York: New American Library, 1961) at 439.

to a time when he must at all events yield up the emoluments he enjoyed".⁹² Such a man, Hamilton opined, "would feel a propensity, not easy to be resisted ... to make the best use of the opportunity he enjoyed while it lasted, and might not scruple to have the recourse to the most corrupt expedients to make the harvest as abundant as it was transitory ... ".⁹³ Self-dealing is the essence of the conflict, in this context turning the public office into private gain which is antithetical to the rule of law. The form of good could be personal and pecuniary or perhaps also more generally political or factional in the language of Hamilton.

"Federalist No. 73" addresses the wide scope of executive power inclusive of the veto, and Hamilton makes the point that "power over a man's support is a power over his will".⁹⁴ This statement reiterates the requirement that the President should receive no salary, gift or other benefit outside of his annual remuneration as set out in the *Constitution*:

[i]t is not easy, therefore, to comment to highly the judicial attention which has been paid to this subject in the proposed Constitution. It is there provided that '[t]he President of the US shall, at stated times, receive for his services a compensation which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them'.⁹⁵

Article 2, section 1 of the *US Constitution* reflects the language proposed by Hamilton, which also appears in the Presidential Oath of Office. The *US Constitution* requires the President to "solemnly swear (or affirm) that I will faithfully execute the Office of the President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States".⁹⁶ This language, and the commitment to legal formalism to which it corresponds is so important that when Chief Justice Roberts stumbled over the

92 Hamilton, "Federalist No. 72", *supra* note 90 at 436.

93 *Ibid.*

94 Hamilton, "Federalist No. 73", *supra* note 91 at 440.

95 *Ibid.*

96 US Const, *supra* note 75, art II, § 1.

words administering President Obama's first oath of office, the Chief Justice re-issued the oath the next day in the Oval Office to make sure the President had stated the formula exactly as required by the Constitution.⁹⁷ It is clear that the constitutional text matters and is taken seriously.

In the case of Trump, there are two questions about emoluments. First, whether payments by foreign governments and dignitaries to Trump-related hotels and other businesses constitute prohibited foreign emoluments. Second, whether payments by state governments or the federal government itself to Trump-owned enterprises constitute prohibit domestic emoluments.

Federalists No. 76, 77 and 84 reinforce Hamilton's use of emoluments. "Federalist No. 76" prevents the executive from having undue influence over the legislature by prohibiting the appointment of members of Congress from appointment "to any civil office under the US which shall have been created, or the emoluments whereof shall have been increased, during such time".⁹⁸ Here again, the idea is that the creation of emoluments from sources other than the one to which one's public office is derived from creates a situation ripe for conflict of interest. In "Federalist No. 77", Hamilton's usage is again evident: "[t]he power which can original the disposition of honours and emoluments, is more likely to attract that be attracted by the power which can merely obstruct their course".⁹⁹ Finally, "Federalist No. 84" reflects the language of the Foreign Emoluments Clause itself.¹⁰⁰ Notably, because both the Foreign and Domestic

97 See Samuel P Jacobs, "After fumbled oath, Roberts and Obama leave little to chance", *Reuters* (18 January 2013), online: <www.reuters.com/article/us-usa-inauguration-roberts/after-fumbled-oath-roberts-and-obama-leave-little-to-chance-idUSBRE90H16L20130118>.

98 Alexander Hamilton, "Federalist No. 76" in Clinton Rossiter, ed, *The Federalist Papers* (New York: New American Library, 1961) at 457.

99 Alexander Hamilton, "Federalist No. 77" in Clinton Rossiter, ed, *The Federalist Papers* (New York: New American Library, 1961) at 459.

100 See Alexander Hamilton, "Federalist No. 84" in Clinton Rossiter, ed, *The Federalist Papers* (New York: New American Library, 1961) at 510 citing to the following proposed Constitutional language for the proposed Article 1, Section 9 Clause 7: "No title of nobility shall be granted by the United States; and no

Emoluments Clauses had seemingly fallen into desuetude prior to the Trump administration, their contemporary meaning and application will only become ascertained through ongoing litigation.¹⁰¹

In addition to CREW, a private business sued President Trump on the basis that the restaurant at the Trump hotel in Washington DC benefited from unfair advantages as a result of its link to the President.¹⁰² A group of Democratic members of Congress also filed emoluments lawsuits on behalf of their constituents.¹⁰³ Such lawsuits face hurdles which are nevertheless by no means insurmountable on the question of standing.¹⁰⁴ There are conflicting rulings. Some courts found that CREW lacked standing to proceed,¹⁰⁵ while other courts found that CREW had the necessary standing to proceed.¹⁰⁶ The Democrats in Congress were also found to have standing.¹⁰⁷ In addition to standing, there are also questions about whether payments to the President's

person holding any office of profit or trust under them shall, without the consent of the Congress, accept of any present, emolument, office, or title of any kind whatever, from an king, prince, or foreign state". Compare to the actual Foreign Emoluments Clause at Article I, Section 9, Clause 8 *supra* note 75: "[n]o Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State".

101 Bowman, *supra* note 78 at 279–80.

102 Citizens for Responsibility and Ethics in Washington, "Legal Actions", (last visited 27 February 2021) online: *CREW* <www.citizensforethics.org/legal/lawsuits/>.

103 Heather Caygle, "Democrats to sue Trump over conflicts of interest", *Politico* (7 June 2017), online: <www.politico.com/story/2017/06/07/democrats-donald-trump-sue-conflict-of-interest-239262>.

104 See Bowman, *supra* note 78 at 440, n 25.

105 See *Citizens for Responsibility and Ethics in Washington v Trump*, 276 F Supp (3d) 174 at 174 (SD NY 2017).

106 See *District of Columbia v Trump*, 291 F Supp (3d) 725 at 725, 737 (D Md 2018).

107 See *Blumenthal v Trump*, 949 F Supp (3d) 14 (US App DC 2020).

businesses paid in the ordinary course of business would be considered emoluments or whether something else would be required to characterize them in this way. There is also a question of the appropriate remedy for a constitutional breach in such a case. As Bowman points out, the availability of remedies against a defendant president or other high office holder is through Congress' power to impeach. On the precipice of President Trump's impeachment, Bowman wrote, “[i]n sum, the very presidential attacks on the justice system and the press that form a part of the indictment against Mr. Trump raise exponentially the difficulty of convincing the public at large — but more particularly his increasingly tribalized electoral base — that there exists a body of verifiable truth upon which a fair impeachment judgment could be made”.¹⁰⁸ Just as impeachment would be too much of a lift for the Grand Old Party Senate in the present political and media milieu, the post-Trump United States Supreme Court cannot be counted upon to recognize that a payment made by a foreign official, lobbyist, another branch of government or state government is an emolument simply because the President or other state official has an interest in the business.

Nevertheless, the political reality is clear. There is an apparent and likely real conflict of interest arising from the President's initial refusal to divest himself of his businesses or place them in a blind trust during his presidency. As noted, there is no legal requirement for the President to do so, only an established practice. The same is true about the disclosure of tax returns by presidential candidates. Democratic lawmakers are quite appropriately considering legislation to address both.¹⁰⁹

108 Bowman, *supra* note 78 at 314.

109 In the context of conflict of interest and divestiture from business interests see Jacob Pramuk, “Elizabeth Warren and Democrats introduce bill to push Trump to divest businesses”, *CNBC* (9 January 2017), online: <www.cnbc.com/2017/01/09/elizabeth-warren-and-democrats-introduce-bill-to-push-trump-to-divest-businesses.html>. In context of the disclosure of tax returns of some states, see Kayla Epstein, “Trump could be left off some states’ ballots in 2020 if these bills become law”, *Washington Post* (20 March 2019),

C. The United Kingdom

Martin Loughlin describes the rule of law as a part of a western legal cultural inheritance with both an ancient and a modern face.¹¹⁰ The ancient one can be traced back to Aristotle for whom the rule of law was conceptually distinct from democracy. The rule of law was seen by Aristotle, according to Loughlin as an elitist ethos, directed at the governing class and to the nascent class of jurists tasked with interpreting the laws rather than to the people generally who were as yet not imagined.¹¹¹ The ancient idea of the rule of law, according to Loughlin, insisted on the reason-based quality of legal thought and the need for those with power, influence or high office to be of high character and fair-minded, inclined towards benefiting the citizens and the republic rather than themselves.¹¹² The essence of the rule of law in this ancient iteration was a form of ‘practical wisdom’ or reason. Loughlin refers to this using the Greek term *phronesis*:

[t]he Aristotelian account suggests that the single most important condition on which the rule of law rests is that of the worthiness of character of those engaged in legislative and judicial decision-making. Although this worthiness is a

online: <www.washingtonpost.com/politics/2019/03/20/trump-could-be-left-off-some-states-ballots-if-these-bills-become-law/>.

110 See Martin Loughlin, *Swords and Scales* (Bloomsbury: Hart Publishing, 2000).

111 See *ibid* at 69 describing Aristotle as the quintessential example of the ancient idea of the rule of law which elevated reason above democratic or egalitarian impulses in the modern sense but instead addressed itself to a privileged governing class comprised of “a small group of human beings—the adult male heads of holds” of a particular caste etc.

112 *Ibid* at 71 speaking to the origins of the England’s ancient or unwritten constitution as descending from Aristotelian imaginings of the rule of law transmitted the English constitutional culture into the present as a preference for “aristocratic government” in which political experience is passed down “within the governing class from generation to generation”. Here again, the contrast with more modern or egalitarian liberal and republican impulses on continental and American constitutional history, is apparent.

precondition fall all within the governing class, it impinges most on the judges, since it is through their work that justice is activated into reality.¹¹³

This ancient Aristotelian understanding of the rule of law is absorbed in British constitutional culture. Britain, unlike the US which has a comparatively modern written constitution, is the inheritor of an unwritten and ancient constitution. Canada inherited the British Constitution but adopted a written constitutional framework and a bill of rights. These characteristics make Canada a hybrid of both its colonial history and its closest neighbour.

The War of Independence fought between republicans and loyalists in North America was partly a contestation of the need of a written constitution guaranteeing enumerated individual rights, particularly around the power to tax.¹¹⁴ The Federalist Papers reveal that its authors were sufficiently worried that the new republic would collapse into tyranny. They therefore could not rely on the ancient idea of the rule of law as prudence, wisdom and good governance. Instead, they designed a complex constitutional architecture to ensure that public officials acted in accordance with law or suffered the consequences, including removal from office. This led to a culture of judicial review over matters of high politics developing much earlier in the US than it would in the UK. In fact, it is specifically the culture of judicial review and constitutionalism in the modern sense which drives some of the partisan intensity around Brexit. Interestingly, those critical of Canada's adoption of the *Charter* frequently

113 *Ibid* at 70.

114 See Bruce Ackerman, "Constitutional Politics/Constitutional Law" (1989) 99:3 The Yale Law Journal 453 at 475 describing America's founding fathers as "children of the Enlightenment, eager to use the best political science of their time to prove to a doubting world that republic self-government was not utopian dream. ... Otherwise they would never have tried to write a Constitution whose few thousand words contained a host of untried ideas and institutions" [citation omitted]. See also Bruce Ackerman, *We The People: Foundations* (Cambridge Mass: Harvard Beknap Press, 1991) at 188, writing of Publius "Whatever modern America may think, he speaks for a People of white male merchants and planters, farmers and mechanics who fought a Revolution for life, liberty, and property – but not for the end of slavery or the triumph of the welfare state".

channeled parliamentary sovereignty to suggest that elected members of parliament, and not unelected judges, should make policy decisions of national importance.¹¹⁵

Speaking of the influence of the ancient idea of the rule of law on the historical emergence of the British constitutional culture, Loughlin writes:

[t]he unwritten British constitution is rooted in a set of traditional practices concerning the business of governing and reflects the deep-seated belief that government is a form of practical knowledge. These characteristics of the British constitution were consolidated during an era of aristocratic government in which political experience was passed down with the governing class from generation to generation ... This quite clearly reflects an idea of the rule of law which is rooted in character, the need for a balanced disposition and the maintenance of self-restraint.¹¹⁶

Loughlin explains how the ancient conception of the rule of law as prudential governance embedded itself in the jurisprudence of Sir Edward Coke who famously observed that “[r]eason is the life of the law”.¹¹⁷ This idea is not unique to the British understanding of the rule of law as it can also be found in the thought of Tocqueville.¹¹⁸ Loughlin writes that the ancient concept of the rule of law lived on in England into the twentieth century insofar as judicial review could always be understood as wise or prudential adjudication. This is now also the case in the UK where judges are increasingly understood, in the

¹¹⁵ See e.g. Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Thompson, 1994); Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997); Andrew Petter, “Twenty Years of *Charter* Justification: from Liberal Legalism to Dubious Dialogue” (2003) 52:1 University of New Brunswick Law Journal 187.

¹¹⁶ Loughlin, *supra* note 110 at 71.

¹¹⁷ John Marshall Gest, “The Writings of Sir Edward Coke” (1909) 18:7 The Yale Law Journal 504 at 524.

¹¹⁸ See Loughlin, *supra* note 110 at 74 attributing to Tocqueville the idea that “democratic institutions can only survive when combined with ‘lawyer-like sobriety’”.

words of Lord Evershed in a 1945 letter to then Lord Chancellor, Viscount Simon, at the core of the rule of law in modern England. The common law requires the figure of the judge and the act of judicial review. Loughlin explains that this as “largely bound up with the immense prestige and person position accorded to the judges” who derived their authority according to Lord Evershed, from still more ancient virtues corresponding to a “cloistered” and “aristocratic” profession in which the judge is “both the complete master of the trial” and subject to “solemn (if not Olympian)” requirements of “real impartiality”.¹¹⁹ In other words, judges who understand their role as neutrally applying laws enacted by the legislature. Loughlin notes that “[a]s a result of these developments, the rule of law has acquired a rather different meaning. Once the emphasis on judging changes from deliberation to rule-application, the ancient idea of the rule of law as the rule of reason is superseded by a modern idea of the rule of law as the rule of rules”.¹²⁰ That said, the ancient idea of the rule of law as *phronesis* remains but has been transplanted into the judiciary in its role as interpreter and applicator of the law. Loughlin refers to the rites and rituals of the judiciary as reflected in the icon of justicia as reflections of the ancient idea of the rule of law as a virtue: “[t]he public must have confidence in the virtuous character of the judiciary. The judiciary must be seen to be both independent of government and placed and some remove from the people”.¹²¹

Brexit provides an illustration of the crisis of the rule of law in Britain. Voters favouring Brexit framed their objective as escaping the imagined constraints of European Union law and EU sovereignty that competed with their own. However misleading and inaccurate this narrative may be, the palpably racist idea that Britain needed to regain control of its borders from Europe in order to keep out foreign workers, immigrants and refugees was a powerful nativist undercurrent for Brexit driven by lower-income voters, particularly those who

119 *Ibid.*

120 *Ibid* at 78.

121 *Ibid* at 75.

were older, whiter and living outside London.¹²² A comparison with these voters can be made with those who supported Trump in 2016.¹²³

Before Boris Johnson's government was re-elected in 2019 with a majority and given a mandate for Brexit, he was rebuked by the UK Supreme Court. The ruling addressed important questions of legal and constitutional culture. In *Miller v The Prime Minister*¹²⁴ and its companion case *Cherry v Advocate General for Scotland*,¹²⁵ the UK Supreme Court reviewed the legality of the government's advice tendered to the Queen to prorogue Parliament. The judgment considered the critical issue of the justiciability of political questions, the same question visited by the US Supreme Court in *Marbury*.¹²⁶ The UK Supreme Court found that the government's actions were unconstitutional. Part of what made the prorogation unconstitutional was that the government advised the Queen not in the best interests of the British people but in his and his government's electoral and political interests. Although the judgment was celebrated as a rebuke to Johnson's callous disregard for parliamentary rules, it did not trigger his resignation.¹²⁷ Like Trudeau and Trump, Johnson went on to survive, and even thrive, politically.

122 See Simon Winlow, Steve Hall & James Treadwell, *The Rise of the Right* (Bristol: Policy Press, 2017) at 199–208.

123 See Rachel Bitecofer, *The Unprecedented 2016 Presidential Election* (London: Palgrave Macmillan, 2018).

124 *R (on application of Miller) v The Prime Minister*, [2019] UKSC 41 [*Miller v The Prime Minister*].

125 *Cherry and others v Advocate General for Scotland*, [2019] UKSC 41 [*Cherry v Advocate General for Scotland*].

126 *Marbury v Madison*, 5 US (1 Cranch) 137 (1803).

127 On his blog Conor Gearty declared it is “the finest moment in the annals of UK’s judicial history”: Conor Gearty, “Supreme Court judgment: in law, reason still matters, facts are relevant, and nonsense doesn’t work” (25 September 2019), online (blog): *London School of Economics British Politics and Policy* <www.blogs.lse.ac.uk/politicsandpolicy/supreme-court-judgment-prorogation/>.

The UK Supreme Court's decision points to the complex intersection of law and politics at the core of the rule of law. By the time of Brexit, there was pressure for the UK Supreme Court to stop the Prime Minister from abusing discretionary prerogative powers to advise the monarch to dissolve Parliament and call an election. To do so, the UK Supreme Court waded into foundational questions of the rule of law. The UK Supreme Court unanimously held that the government had violated the rule of law by using its powers for political purposes. The judgment curtailed the scope of executive power at a moment of major political significance. Delivering the ruling, Lady Hale spoke for the unanimous court on the question of justiciability of political issues and whether, how and to what extent a court can rule on matters of having to do with politics *qua* politics. The judgment demonstrates that the rule of law is about the meeting place of law and politics and the insistent autonomy of both. It is also about stopping the executive from exceeding the bounds of its power, particularly where there is a conflict between the political or self-interest of a politician and the proper functioning of the constitutional order.

In considering such a case, the court must ascertain what is a legal question as opposed to a political question. It must also impose legal oversight of the political, which requires decisive line-drawing:

[a]lthough the courts cannot decide political questions, the fact that a legal dispute concerns the conduct of politicians, or arises from a matter of political controversy, has never been sufficient reason for the courts to refuse to consider it. ... almost all important decisions made by the executive have a political hue to them. Nevertheless, the courts have exercised a supervisory jurisdiction over the decisions of the executive for centuries. Many if not most of the constitutional cases in our legal history have been concerned with politics in that sense.¹²⁸

This important passage reveals the limits of prerogative powers that operate at the margins of law and politics. When governments in parliamentary democracies rely on prerogative powers, it is usually a sign of the executive

128 *Miller v The Prime Minister*, *supra* note 124 at para 31.

attempting to act at the zenith of its power.¹²⁹ Crucially, for the UK Supreme Court, the exercise of prerogative powers by a Prime Minister, even in a matter as sensitive as providing advice to the Queen, can be subject to judicial review:

[r]eturning, then, to the justiciability of the question of whether the Prime Minister's advice to the Queen was lawful, we are firmly of the opinion that it is justiciable. As we have explained, it is well established, and is accepted by counsel for the Prime Minister, that the courts can rule on the extent of prerogative powers. That is what the court will be doing in this case by applying the legal standard which we have described. That standard is not concerned with the mode of exercise of the prerogative power within its lawful limits. *On the contrary, it is a standard which determines the limits of the power, marking the boundary between the prerogative on the one hand and the operation of the constitutional principles of the sovereignty of Parliament and responsible government*

129 In the UK, the exercise of prerogative powers gave legal cover to then UK Prime Minister Tony Blair's Government to short circuit Parliament in the decision to deploy the military alongside the US in the Iraq War. For an examination of the problem of having war powers exercised as prerogative powers by the executive in the absence of a written constitutional safeguard see Peter Hennessey, "From Blair to Brown: The Condition of British Government" (2007) 78:3 The Political Quarterly 344, see also Teemu Häkkinen, "Challenging the Royal Prerogative: The Decision on War against Iraq in Parliamentary Debates in 2002-3" (2016) 35:1 Parliamentary History 54. On the development of the prerogative power in subsequent conflicts and under subsequent governments see James Strong, "Why Parliament Now Decides on War: Tracing the Growth of Parliamentary Prerogative through Syria, Libya and Iraq" (2014) 17:4 The British Journal of Politics and International Relations 604. Canada did not enter into the Iraq War in a combat role, by way of comparison with the UK, in the Australian context of the commitment of combat troops to Iraq see Charles Sampford & Margaret Palmer, "The Constitutional Power to Make War: Domestic Legal Issues Raised by Australia's Action in Iraq" 18:2 Griffith Law Review 350. In a domestic electoral context in Canada see e.g. former Prime Minister Harper's 2008 request to the Governor General to prorogue parliament "GG agrees to suspend Parliament until January", *CBC News* (4 December 2008), online: <www.cbc.ca/news/canada/story/2008/12/04/harper-jean.html>. For powerful critiques of Harper and his government see Lawrence Martin, *Harperland: The Politics of Control* (Toronto: Viking Canada, 2010); Christian Nadeau, *Rogue in Power* (Montreal: Lorimer Publishing, 2011).

on the other hand. An issue which can be resolved by the application of that standard is by definition one which concerns the extent of the power to prorogue, and is therefore justiciable.¹³⁰

In ruling that the government acted unlawfully in advising the Queen to prorogue Parliament, Lady Hale made clear that the rule of law will not permit Parliament to be prorogued for purposes that are purely political. In other words, the rule of law does not sanction a conflict between a prime minister's personal or political ambitions, wishes or agenda and the prime minister's law-bound and constitutionalized role:

[t]he Prime Minister, in giving advice to Her Majesty, is more than simply the leader of the Government seeking to promote its own policies; he has a constitutional responsibility ... It is impossible for us to conclude, on the evidence which has been put before us, that there was any reason – let alone a good reason – to advise Her Majesty to prorogue Parliament for five weeks, from 9th or 12th September until 14th October. We cannot speculate, in the absence of further evidence, upon what such reasons might have been. It follows that the decision was unlawful¹³¹

The conclusion that “[i]t was outside the powers of the Prime Minister to give it [the advice to her Majesty]. This means that it was null and of no effect”, reasserted the rule of law.¹³² The government, however, transformed this historic rebuke into political success and secured a clear mandate in the following election to effectuate Brexit.

IV. Rule of Law Crises in Comparative Perspective

On both sides of the Atlantic, the Anglo-American political and legal inheritance is being tested. The televised judgment of the UK Supreme Court made clear that Johnson's government had acted unconstitutionally. The ruling had the trappings of a key moment for the evolution of the rule of law in the

130 *Miller v The Prime Minister*, *supra* note 124 at para 52 [emphasis added].

131 *Ibid* at paras 60–61.

132 *Ibid* at para 69.

UK. It appeared to have averted a constitutional crisis. However, it created a fresh political crisis related to the legitimacy of the prime minister's power. It is also created a rule of law problem relating to the legal control of a political question that lies at the heart of constitutional monarchy. It was followed by a general election in which Johnson consolidated his mandate and formed a majority government on the promise to deliver Brexit once and for all.

In the US, Congress is a co-equal branch of government under the Constitution. It has, however, abdicated robust executive oversight in recent decades. The ground that will need to be made up to restore the balance after the Trump administration is formidable. Congressional oversight of the executive also faces ongoing opposition from Republican lawmakers. It also appears that in the US and UK, political leadership characterized by celebrity egos and degradations of the office have become the norm.

In parliamentary democracies, the role of the prime minister has become increasingly presidential in its day-to-day operations.¹³³ This trend presents a rule of law problem as it means that the person of the leader and the government they lead can raise a conflict of interest. Notably, Johnson survived a political defeat after UK Supreme Court ruling and Trudeau remained as prime minister although with a government reduced to a minority. Both clashes with the rule of law were survivable for leaders in political terms. It thus appears that political accountability is wanting.

In the US, the Constitution permits a president to be tried by the Senate and removed from power if convicted of impeachment. The constitutional framers carefully crafted provisions around oversight and the removal of a president, reflecting that at its limit presidential power and oversight is more of a political than a legal question. Leading US constitutional scholars have written

¹³³ On the concentration of power in the Office of the Prime Minister ("PMO") during the Harper years (2006-2015), and on the Americanization of Canadian legal, political and constitutional culture see David Schneiderman, *Red, White, and Kind of Blue?* (Toronto: University of Toronto Press, 2015), especially on the phenomena of 'presidentialization' of the PMO at 79–80, 90–92, and nn 85–87 describing similar phenomena in the UK context.

about the impeachment process, weighing in on what constitutes a high crime and misdemeanor that is needed for conviction by a two-thirds majority of the Senate. Bowman captures the present moment and the relevance of the rule of law to impeachment. Having compared the case against Trump with earlier impeachment trials against Johnson, Nixon and Clinton, he concludes:

[t]he list of Trump's offences against constitutional propriety and reasonable expectations of presidential behaviour is dishearteningly diverse and includes conduct in virtually the categories of conducts historically identified as 'high Crimes and Misdemeanors' [to White] obstruction of justice both narrowly and broadly defined; abusing (or at least thoughtlessly misusing) the pardon power; ceaseless prevarication; and using his office to enrich himself and his family while violating the emoluments clauses in the process. They run on to include varying forms of electoral misconduct; culpable maladministration of various kinds, most notably deconstruction of America's trade, diplomatic, and security architecture; persistent attack on the legitimacy of the other branches of government and the free press; regular abuse of the norms of civil discourse; and perhaps, bizarre though it seems even to consider it, being in thrall to a hostile foreign power.¹³⁴

This view can be compared with the *Mueller Report*, which stated:

[b]ecause we determined not to make a traditional prosecutorial judgment, we did not draw ultimate conclusions about the President's conduct. The evidence we obtained about the President's actions and intent presents difficult issues that would need to be resolved if we were making a traditional prosecutorial judgment. At the same time, if we had confidence after a thorough investigation of the facts that the President clearly did not commit obstruction of justice, we would so state. Based on the facts and the applicable legal standards, we are unable to reach that judgment. Accordingly, while this report does not conclude that the President committed a crime, it also does not exonerate him.¹³⁵

134 Bowman, *supra* note 78 at 297.

135 *Mueller Report*, *supra* note 72 at 296–97.

The result of Trump's presidency, in the context of the internet age, is to introduce a form of politics characterized by the manipulation of effect, propaganda and chaos unlike any previous administration. The effects on the government and the institution of the presidency are yet to be fully understood. But it would seem that the US has a long way to go in rebuilding its international authority on the rule of law.

In Canada, things are not as they used to be. Violations of the rule of law and statements by officials that the rule of law has been infringed no longer have obvious political consequences, nor do political scandals that would have once shocked and upended the status quo. It would seem that Trudeau should have been ousted by his own party after the Conflict of Interest and Ethics Commissioner's report twice found him guilty of significant conflicts of interest. As noted earlier, even after being chastened by the electorate and reduced to a minority government, Trudeau is in the midst of a similar case related to a charity that he and his family were associated with and which received a large government contract.

It is clear that recent events of global importance demonstrate the seriousness of the current crisis of the rule of law in two of the world's leading countries: the UK and the US. Recent events in Canada, led by Trudeau, a more centrist and conventional leader than Trump or Johnson, prove that my home country is not immune to the crosscurrents and an erosion of the rule of law. What is taking place in political and legal cultures should be a warning sign against normalizing lapses of the rule of law. Wherever a head of government or head of state circumvents legal rules for political ends, great damage is inflicted upon the rule of law.

For the ancients, the rule of law depended on the prudence, wisdom and character of the law-maker. This approach could not be enforced by constitutional language or court jurisprudence. The rule of law now aims to constrain arbitrary power through a more permanent structural means that does not rely on the personality, training or 'aristocratic wisdom' of the decider. No longer is the law about the exercise of innate wisdom or what the Greeks called *phronesis*. While the more primordial idea of the rule of law still courses through

the ancient unwritten English Constitution, it appears anemic in the face of populist nationalism and majoritarian politics.

V. Conclusion

Despite including a bill of rights, the US Constitution reflects a deeper commitment to ancient political wisdom, judgement and ethics than what it makes explicit. Until recently, it has not been necessary for the US to consider legislating a requirement for presidential candidates to disclose their tax returns, or to divest themselves of business interests prior to taking office. In Canada, Trudeau is again at the centre of a conflict of interest investigation. Similarly, until Johnson, a British prime minister had not pushed the limits of existing constitutional conventions to merit a rebuke from the UK Supreme Court. Despite the unfortunate milestones, these governments have shown themselves to be largely impervious to conventional mores of right conduct in public office. Until addressed, the disconnect between violations of the rule of law and political accountability will continue to raise troubling new challenges.

VOLUME 7 | NUMBER 1 | 2021

DEMOCRATIC DECAY: CHALLENGES FOR
CONSTITUTIONALISM AND THE RULE OF LAW
SYMPOSIUM

Review of Dixon and Landau's *Abusive Constitutional Borrowing*
Tom Ginsburg

Abusive Constitutional Borrowing as a Form Politics by Other Means
Ran Hirschl

Assessing "Abusive Constitutionalism" in a Complex Political Universe
Sanford Levinson

Review of Dixon and Landau's *Abusive Constitutional Borrowing*
Mark Tushnet

Abusive Constitutional Borrowing: A Reply to Commentators
Rosalind Dixon & David Landau

ARTICLES

Balancing Accountability and Effectiveness: A Case for Moderated Parliamentarism
Tarunabh Khaitan

Knowledge Institutions in Constitutional Democracies: Preliminary Reflections
Vicki C. Jackson

Press Freedom in Australia's Constitutional System
Keiran Hardy & George Williams

A Critical Analysis of the Case of Prorogations
Paul Daly

"Constitutional Risk", Disrespect for the Rule of Law and Democratic Decay
Anne Twomey

Populism and Democratic Decay: Will Canada's Cure be Worse than the Disease?
Ryan Alford

What We Talk About When We Talk About the Rule of Law
Jeffrey B. Meyers